

**UNIVERSITY OF CAPE TOWN**

**FACULTY OF LAW**



**Towards the legal protection of married women:  
Combating and criminalising marital rape in Kenya**

By

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**GNTLIZ002**

Research Dissertation submitted for the approval of Senate in fulfillment of part of the requirements for the Master of Laws in approved courses and a minor dissertation.

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### **Abstract**

This dissertation addresses the most neglected form of sexual violence in Kenya – marital rape. Drawing from prevailing statistics and testimonies by survivors, it confirms the existence of marital rape in Kenya and delves deeper into the prevailing social and legal dynamics that condone it. On examining the existing legal framework governing sexual violence in Kenya, the finding is that there is no law that explicitly criminalises marital rape. Marital rape is a human rights issue as it curtails women’s enjoyment of their right to equality and dignity. This dissertation argues that Kenya has a duty to honour her State obligations under international human rights law to respect, protect and fulfill human rights. The dissertation concludes that by not criminalising marital rape, Kenya has failed to satisfy her treaty obligations under International Human Rights Law. The dissertation further draws insights from other jurisdictions’ legal responses to marital rape through a comparative study of South Africa, India and Australia. The main recommendation of this dissertation is that Kenya should explicitly criminalise marital rape in order to respect, protect and fulfill her human rights obligations pertinent to women. Moreover, it is recommended that a comprehensive response to marital rape requires the State to embrace both legal and extra-legal reforms that will not only criminalise but ultimately combat marital rape in the long term.

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**LIST OF ACRONYMS AND ABBREVIATIONS**

CEDAW	Convention on The Elimination of all Forms of Discrimination Against Women
DEVAW	Declaration on the Elimination of Violence Against Women
GBV	Gender Based Violence
HIV	Human immunodeficiency virus
HRBA	Human Rights Based Approaches
IPV	Intimate Partner Violence
KDHS	Kenya Demographic and Health Survey
STI	Sexually Transmitted Disease
UDHR	Universal Declaration of Human Rights
UNAIDS	United Nations Programme on HIV/AIDS
UNFPA	United Nations Population Fund
UNICEF	United Nations Children Fund
VAW	Violence Against Women
WHO	World Health Organisation
WRAP	Women Rights Awareness Programme

## CHAPTER ONE

### 1.0. UNDERSTANDING MARITAL RAPE

#### 1.1.Introduction

Controversy has trailed the discussion of marital rape in many jurisdictions. This dissertation is an attempt to break the silence and legal negligence surrounding marital rape, generally a taboo topic in Kenya. It is a form of violence against women in the most unexpected setting, the confines of marriage. Amnesty International published a report in March 2002 on rape in Kenya, revealing that violence against women is widespread in Kenya. ‘Every day women are physically and sexually abused. Rape occurs in all social and ethnic groups. It is a crime that shocks and traumatizes the victim, and undermines the status of women in society; [Y]et is largely suffered in silence.’<sup>1</sup> Sexual violence occurring in spousal relationships, also referred to as marital rape, forms the basis of discussion in this paper. It is a form of Gender Based Violence (GBV) that is perpetrated by spouses within the institution of marriage. This form of GBV is highly neglected. It challenges the general expectations of marriage that sexual consent is automatically granted in a marital relationship where two people of marriageable age come together in matrimony. Due to the taboos surrounding marital rape, it is insufficiently reported and its impact under-estimated. Nevertheless, reports by health surveys and testimonies by survivors prove that marital rape exists and is seldom addressed. In their South African analysis of marital rape, Oyebanke and Balogun suggest that discussions around marital rape should revolve around two dimensions, that is, the criminal and social dimensions.<sup>2</sup> The criminal aspect deals with the laws governing unlawful sexual conduct, while the social aspect analyses the health, gender and society responses to marital rape.<sup>3</sup> There are considerable variations among countries with regards to their approach on marital rape. Some countries have developed proper laws defining marital rape and further criminalising it<sup>4</sup>, while other countries are yet to address or even recognize marital rape. Kenya falls in the latter category of countries which have a much weaker approach towards

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<sup>1</sup> Lucinda O’Hanlon ‘Violence against women in Kenya; Discrimination against women’ (2003) The World Organization Against Torture OMCT at 28.

<sup>2</sup> Oyebanke Yebisi & Victoria Balogun ‘Marital Rape: A Tale of Two Legal Systems’ (2017) 38 *Obiter* at 542.

<sup>3</sup> *Ibid.*

<sup>4</sup> Examples of Countries that have explicitly criminalised marital rape include South Africa and Australia, as discussed in chapter four of this dissertation. See, ‘Marital rape by country’, *Wikipedia*, available at [https://en.wikipedia.org/wiki/Marital\\_rape\\_laws\\_by\\_country](https://en.wikipedia.org/wiki/Marital_rape_laws_by_country), accessed on 12 September 2019.

the legislation of marital rape. As shall be discussed in this dissertation, there is no law in Kenya that *explicitly* criminalises marital rape. The current status continues to jeopardize survivors who do not have any recourse to justify a legal charge. This continues to encourage perpetrators and distorts the fight against violence against women. In this dissertation I will analyse the existence of marital rape within the Kenyan context and scrutinize the criminal and social dimensions surrounding marital rape. I will examine the legal framework governing sexual violence in Kenya, the role of international human rights informing the need for criminalisation and thereafter invoke a comparative study with three other jurisdictions. In conclusion, I will propose solutions for both extra-legal and legal recommendations that should form the basis for recognising, combating and criminalising marital rape in Kenya.

## 1.2. Defining sexual violence

Sexual violence forms one of the key forms of violence against women, commonly referred to as ‘gender based violence’. The World Health Organisation (WHO) defines sexual violence as:<sup>5</sup>

any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.’

Sexual Violence is one of the most common forms of Gender based violence (GBV) in Kenya. GBV is defined as any act or practice that results in physical, sexual, psychological or economic harm or suffering because of a person’s gender or socially defined role.<sup>6</sup> It is the manifestation of control and power, mostly by men over women, resulting from unequal power relations<sup>7</sup> between the sexes. GBV can include physical, sexual, psychological, or other forms of violence. Although it affects boys, men, and sexual and gender minorities, GBV is often synonymous with violence against women due to its disproportionate impact on women and girls

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<sup>5</sup> WHO ‘World Report on Violence and Health’ (2002) 149. Available at [https://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/full\\_en.pdf?ua=1](https://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf?ua=1), accessed on 5 May 2019.

<sup>6</sup> WHO ‘Violence Against Women, Definition and Scope of the Problem’ (1997) 1. Available at <https://www.who.int/gender/violence/v4.pdf>, accessed on 5 May 2019.

<sup>7</sup> Namati ‘Reporting Gender Based Violence: A Handbook for Journalists’ (2009) 10. Available at <https://namati.org/wp-content/uploads/2014/04/Reporting-Gender-based-Violence-a-handbook-for-journalists-IPS.pdf>, accessed on 19 January 2019.

that may be based on actual or perceived power differences between the sexes.<sup>8</sup> GBV not only violates basic human rights<sup>9</sup> but also undermines women's sexual and reproductive autonomy and jeopardizes their physical and mental health.<sup>10</sup>

Sexual Violence is manifested in many ways, including through forced or coerced penetration of the vagina, vulva or anus, using a penis, objects or other body parts, usually without the victim's consent or where consent is obtained by force or fraud.<sup>11</sup> WHO has produced a list of actions that fall under the definition of 'sexual violence', as follows:<sup>12</sup>

- rape within marriage or dating relationships;
- rape by strangers;
- systematic rape during armed conflict;
- unwanted sexual advances or sexual harassment, including demanding sex in return for favours;
- sexual abuse of mentally or physically disabled people;
- sexual abuse of children;
- forced marriage or cohabitation, including the marriage of children;
- denial of the right to use contraception or to adopt other measures to protect against sexually transmitted diseases;
- forced abortion;
- violent acts against the sexual integrity of women, including female genital mutilation and obligatory inspections for virginity;
- forced prostitution and trafficking of people for the purpose of sexual exploitation.

With women constituting a significant majority of victims<sup>13</sup>, sexual violence can be attributed to gender inequality and unequal power relations between men and women. This has

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<sup>8</sup> Reproductive Health Response in Crises Consortium (RHRC) et al., 'GBV Training: Multisectoral and Interagency Prevention and Response to Gender-based Violence' (2004) Washington, DC: RHRC Consortium/JSI Research and Training Institute §.

<sup>9</sup> Violence against women is a violation of the right to dignity and equality, and freedom from cruel and inhuman treatment, as provided by national, regional and international human rights instruments applicable in Kenya. This shall be discussed extensively in chapter three of this paper.

<sup>10</sup> UNFPA 'Addressing violence against women and girls in sexual and reproductive health services: A review of knowledge assets' (1998)9-13. Available at [https://www.unfpa.org/sites/default/files/pub-pdf/addressing\\_violence.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/addressing_violence.pdf), accessed on 25 February 2019.

<sup>11</sup> WHO 'World Report on Violence and Health' (2002) 149.

<sup>12</sup> Ibid.

<sup>13</sup> WHO 'Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence' (2013) 2. Available at

been described as a concept that acknowledges the differences between men and women and how these differences affect an individual's way of life.<sup>14</sup> Chimamanda Adichie, in her TED Talk 'We Should All be Feminists' suggests that despite the fact that men and women are physically and biologically different, gender is a social construction attributed to socialization.<sup>15</sup>

Difference Feminism often associated with the works of Carol Gilligan propounds that there are genuine differences between the sexes, but the distinctively female contribution is at worst unrecognized, and at best under-valued, by a male-dominated world, rather than being accepted and valued.<sup>16</sup> GBV is one of those harmful acts or practices that tend to subjugate women as a result of gender differences.<sup>17</sup> It is the manifestation of control and power, mostly by men over women, resulting from unequal power relations<sup>18</sup> between the sexes. In addition to legislation, one of the non-legal interventions towards ending sexual violence, and GBV in general would be to address cultural and patriarchal norms that tend to subjugate women and normalize acts of violence.<sup>19</sup>

### 1.3. Background and scope of the problem

Sexual violence has been a neglected area of research, with data being drawn from police, clinical settings, non-governmental organisations and survey research.<sup>20</sup> At least one in five of the world's female population has been physically or sexually abused by a man or men at some point in their life.<sup>21</sup> The Kenya Demographic and Health Survey (KDHS) released periodically by the Kenya Bureau of Statistics in partnership with the Ministry of Health, is among the few

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<https://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>, accessed on 7 February 2019.

<sup>14</sup> The difference between sex and gender is that sex is a biological concept based on biological characteristics such as difference in genitalia which defines male and female. Gender on the other hand is considered a social construction that primarily deals with personal, societal and cultural perceptions of sexuality. See [www.sciencebc.com](http://www.sciencebc.com), accessed 7 May 2019.

<sup>15</sup> Chimamanda Ngozi Adichie 'We Should All Be Feminists' (2013). Available at [https://www.youtube.com/watch?v=hg3umXU\\_qWc](https://www.youtube.com/watch?v=hg3umXU_qWc), accessed 16 May 2019.

<sup>16</sup> Muuss, R. E. 'Carol Gilligan's theory of sex differences in the development of moral reasoning during adolescence' (1988) 229-243.

<sup>17</sup> Ibid.

<sup>18</sup> Namati 'Reporting Gender Based Violence: A Handbook for Journalists' (2009) 10.

<sup>19</sup> WHO 'Changing Cultural and Social Norms that Support Violence' (2009) 6. Available at <http://www.who.int/violenceprevention/publications/en/index.html>, assessed on 23 February 2019.

<sup>20</sup> WHO 'World Report on Violence and Health' (2002) 175.

<sup>21</sup> WHO 'Violence Against Women, Definition and Scope of the Problem' (1997) 2.

sources of health and gender related data in Kenya. The reports provide extensive data on GBV prevalence in Kenya.

The 2008-09 KDHS indicates that 37 percent of ever-married women have experienced physical violence by a husband, 17 percent have experienced sexual violence, and 30 percent have experienced emotional violence.<sup>22</sup> Overall, almost one-half of ever-married women (47 percent) have experienced some kind of violence (physical, sexual, or emotional) by a husband or live-in partner.<sup>23</sup> Much of the violence was current; within the last 12 months preceding the survey, 31 percent of women experienced physical violence, 14 percent experienced forced sex from their partners without their consent, and 28 percent experienced emotional violence.<sup>24</sup>

According to the 2008-09 KDHS Survey, the majority victims of GBV occurring in domestic relationships (domestic violence), did not seek any help to stop the violence or legal redress to obtain justice, and 45 percent kept silent about their experiences.<sup>25</sup> Another finding was that 64 percent of the help sought came from family members of the victims and less than nine percent of the victims sought help from legal and social referral facilities such as reporting to the police or seeking medical services.<sup>26</sup> The report acknowledges difficulty in collection of data on GBV and attributes this challenge to a culture of silence that causes women to fear talking about their experiences due to feelings of fear and shame.<sup>27</sup> In 2010, The Police Annual Crime Report<sup>28</sup> indicated an increase in Gender Based Violence by 3% in rape cases, 2% in defilement cases and 1 % in cases of incest. It does not however specifically link rape to sexual violence in marriage. Owing to the current legal and social exclusion of marital rape, it is highly unlikely to have been reported to the Police in Kenya.

In the 2010-11 Annual Report, the Nairobi Women's Hospital Gender Violence Recovery Centre<sup>29</sup> had received over 2909 cases of physical and sexual violence, with 90% being female

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<sup>22</sup> The Kenya National Bureau of Statistics report 'Kenya Demographic and Health survey 2008-09' (2010) 253. Available at <https://dhsprogram.com/pubs/pdf/fr229/fr229.pdf>, assessed 2 February 2019.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid. (Table16:14) 263.

<sup>26</sup> Ibid. (Table 16:15) 264.

<sup>27</sup> KDHS (2008-09) 270.

<sup>28</sup> National Police Service, Kenya, 'Annual Crime Report' (2016) appendix 11 at 24.

<sup>29</sup> The Centre is specialized in providing physical and mental health care to survivors of Gender Based Violence in Kenya. See [www.gvrc.or.ke](http://www.gvrc.or.ke).

victims.<sup>30</sup> Out of 2909 reported cases, 2524 were cases of sexual violence recording a 20% increase from the previous year.<sup>31</sup> Most cases of domestic violence, sexual and physical, reported by female patients were perpetrated by husbands, ex husbands and boyfriends, usually arising from disagreements, mistrusts or power imbalance.<sup>32</sup>

In the succeeding KDHS of 2014-15, the report indicates that 47 percent of women age 15-49 reported that they have experienced either physical or sexual violence.<sup>33</sup> Thirty-three percent have experienced physical violence only, 3 percent have experienced sexual violence only, and 12 percent have experienced both physical and sexual violence.<sup>34</sup> The survey pointed out that the percentage of women who have experienced physical or sexual violence increases steadily with age, from 35 percent among those aged 15-19 to 54 percent among those aged 40-49.<sup>35</sup>

As reported by the KDHS reports, GBV within the family setting is tremendously high in Kenya, with research on violence suggesting that the most common form of domestic violence for adults is spousal violence.<sup>36</sup> Intimate Partners, in this case, husbands, form a big percentage of the perpetrators, hence perverting the existence of the family setting as the protector of its vulnerable members.

#### **1.4. Marital rape in Kenya**

Sexual violence has found its way in marriage institutions through marital rape, with the most common forms of marital rape constituting a man physically forcing his wife to have sex against her will.<sup>37</sup>

According to section 3 of the Sexual Offences Act of Kenya<sup>38</sup>, a person commits the offence termed rape if:-

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<sup>30</sup> Gender Based Violence Recovery Centre Annual Report (2010-11)14-15 Available at [http://gvrc.or.ke/wp-content/uploads/2015/09/GVRC\\_Annual\\_Report\\_April\\_2010\\_March\\_2011.pdf](http://gvrc.or.ke/wp-content/uploads/2015/09/GVRC_Annual_Report_April_2010_March_2011.pdf) accessed on 16 January 2019.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid Table 7 at 17-18.

<sup>33</sup> The Kenya National Bureau of Statistics 'Kenya Demographic and Health survey 2014' (2015)297-302. Available at <https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf>, accessed on 2 February 2019.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> KDHS (2008-09) 271.

<sup>37</sup> KDHS (2014-15) 306.

<sup>38</sup> Sexual Offences Act no. 3 of 2006, Laws of Kenya

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

Frequency of sexual violence in spousal relationships is an indication of the extent to which violence against women is a current or recurring problem for Kenyan women within the family setting. This kind of sexual violence is unique as it occurs within the complex precincts of marriage. It is under-reported due to the private nature and the fear of stigma and shame associated with such acts. Its occurrence and largely neglected by state actors<sup>39</sup> responsible for protecting members of the family from violence within the family setting.

Due to the unreported nature of this nature of violence, the best research on marital rape has come from interviews with women about their experiences of sexual violence.<sup>40</sup> The limitation is that it may under-represent women who never report their experiences or ‘over-represent women who are rape and battered because convenience samples of women in battered women’s shelters are frequently used.’<sup>41</sup> However this type of data has presented us with important information surrounding marital rape, how survivors experience it and the risk factors they are exposed to as a result.

Survivor Testimonies<sup>42</sup> recorded by Women Rights Awareness Programme (WRAP)<sup>43</sup> in Kenya indicate that sexual violence within marriage is often accompanied by other forms of violence, notably physical and psychological. Some perpetrators use force or threats of force either immediately before the act or after the rape, to intimidate and subjugate the victims.

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<sup>39</sup> Despite the guarantee by Article 21 (1) of the Constitution of Kenya that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights, there is no law that specifically addresses marital rape in Kenya. This shows neglect by the state to protect the right to dignity and equality of victims.

<sup>40</sup> Raquel Kennedy Bergen ‘Marital Rape, New Research and Directions’ (2006) National Online Resource Centre on Violence Against Women at 2-3.

<sup>41</sup> Ibid at 2.

<sup>42</sup> The African Population and Health Research Center (APHRC) *Marital rape and its impact: A policy brief for Kenyan members of parliament* (2010) Policy Brief no 13 §. Available at <http://www.realising-rights.org/docs/newsletter/Marital%20Rape%20Policy%20Brief%20for%20MPs.pdf>, accessed 6 January 2019.

<sup>43</sup> Women Rights Awareness Programme (WRAP) is a non-governmental organization that provides shelter, counseling, practical and legal advice and other services to survivors of gender-based violence in Nairobi, Kenya. The study drew on evidence from more than 1,200 Kenyan women who used WRAP’s services between 1999 and 2005.

Others perpetrate continuous acts of psychological abuse including having multiple sexual partners, increasing the risk of transmitting STIs to victims. Campbell and Alford report that one half of the marital rape survivors recorded in their survey were kicked, hit, or burned during sex.<sup>44</sup> This shows that intimidation, threats and force are largely used to perpetrate marital rape, with the intention of instilling fear and suppression to the victim. The testimonies recorded by WRAP indicate that marital rape continues to occur in painful silence in Kenya.<sup>45</sup>

*Tessy\*, 38: She has been married for 12 years and is blessed with two children. Her husband battered her and she now suffers from pains in her body, but Tessy's worst problem is the way her husband uses force to have sex and this hurts her badly because she suffers from the wounds he causes during forced sex.*

WRAP noted that a majority of the cases reported involved high risk sexual behavior on the part of the perpetrator, increasing the risk of transmitting HIV to the victims in addition to exposure to other Sexually Transmitted Infections (STIs). The victims infected with HIV reported that their husbands were having sex with multiple sexual partners and the nature of suppression rendered them unable to negotiate condom use or forceful sex to prevent the spread of HIV.

*Sally\*28: Her late husband used to force her into sex, which resulted in fights. [She] was not comfortable with her husband since he had signs of a sexually-transmitted infection (STI). Her husband's death made her go to a Voluntary Counseling and Testing Center (VCT) so she could know her status and that was when she found she was HIV-positive.*

*Alice\*36: Her husband forces her to have sex and this is one of the main reasons for the continuous abuse. She says she knows he has many girlfriends and sleeps around a lot. She knows of HIV/AIDS and does not want to get it but in her efforts to avoid getting any diseases she is severely beaten up.*

It is evident from the testimonies that the suffering caused by marital rape is aggravated by taboos against discussing sexual violence in marriage, economic dependence<sup>46</sup> on their husbands

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<sup>44</sup> Campbell, J. C & Alford, P 'The dark consequences of marital rape' (1989) 7 American Journal of Nursing at 946-949.

<sup>45</sup> Supra. APHRC *Marital rape and its impact: A policy brief for Kenyan members of parliament* (2010).

<sup>46</sup> The 2014-15 KDHS report (Supra at 303) attributes a strong correlation between violence within marriage and emotional and financial control exercised by the abusive partner. Raquel Kennedy Bergen in 'Marital Rape, New

and by widespread tolerance of forced sex and other forms of violence against women. It was also noted by WRAP that family members often fail to support women who are being raped by their partners.

*Monica\* 28: Her husband forces himself on her during sex and if she happens to refuse she ends up getting hurt more. Her private parts are now swollen and very painful due to the forced sex. She told her relatives and they said that it's part of life.*

Other reasons for marital rape tolerance as reported by WRAP, are attribute to the desire for the victim to maintain her marriage at all costs. Marriage in the African society is characterized by strong family expectations usually strengthened by the payment of the bride price, or dowry, as required by African Customary Law.<sup>47</sup> The payment of the dowry, usually, a token of appreciation by the groom to the bride's family, signifies the commencement of marriage, of which it is considered a woman's role to make the marriage work thereafter.<sup>48</sup> Conjugal rights form an important aspect of marriage and therefore difficult to discuss sexual matters outside the confines of the matrimonial bed. Married women testified to WRAP that they chose to stay in the marriage despite experiencing marital rape, to preserve the 'face' of the marriage.

*Margaret\* 30: Her husband got another lady. He has stayed with her [...] on and off. When he comes home to [his wife] he demands sex by force and he does not use a condom. She said that she complies to his demands as she is legally married to him in the church.*

*Grace\*, 34, was battered and abused sexually by her husband. [...] She talked to her parents about this and they said that she has to persevere because the dowry was already paid and she could not leave the marriage.*

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Research and Directions' (2006) opines that economic resources play a particularly significant role in women's ability to leave an abusive relationship as those women who are most likely to leave their abusive partners are the ones who are financially independent.

<sup>47</sup> See Patrick Kiage 'Domestic Violence in Kenya: Towards More Effective intervention' (2005) 1 Law Society of Kenya Journal at 45. He notes: '...The situation is compounded further by the fact that African Customary Law is recognized and given pride of place in the hierarchy of the sources of Kenyan Law. The *Judicature Act (Cap 8 Laws of Kenya)* provides that all courts in Kenya shall be guided by African Customary Law in deciding the cases before them. The only limitations imposed on the use of customary law are the tests of consistency with written law and non-repugnancy with morality and justice'

<sup>48</sup> WHO 'Changing Cultural and Social Norms that Support Violence' (2009) 5.

In some cases, women feel trapped in abusive relationships because of economic dependence on their partners. Some do not have the confidence, skills or resources to support themselves financially. They opt to stay with the abusive partner who is the bread winner, and continue to suffer in the abusive marriage.

*Christine's\* husband [...] forces her to have sex [and] has now infected her with the HIV virus. She is only 25 years of age and is expectant [...] She says she cannot leave the house since she has nowhere to take the children.*

\*Pseudonyms were used to protect confidentiality

Researchers have raised concern that marital rape often involves severe physical violence, threats of violence, and the use of weapons by men against their partners.<sup>49</sup> There is a strong correlation between marital control behaviour displayed by the husband and the prevalence of sexual violence within the marriage. This behaviour may be manifested in physical, psychological, emotional or financial forms. The more controlling behaviour exhibited by the husband, the less likelihood that the wife will report experience of spousal violence.<sup>50</sup> The KDHS reports that women who have experienced emotional, physical, or sexual violence increases from 26 percent among those whose husbands display none of the controlling behaviour to 87 percent among those whose husbands display 5 or 6 of the behaviour.<sup>51</sup>

### **1.5. Steering factors**

Marital rape in Kenya and globally is accelerated by the presence of certain social dynamics in society. These include unequal power relations within the family, a culture of perceived male control and dominance and misinterpretation of religious doctrines. Such dynamics may not directly encourage sexual violence, but expose women to the risk of such violence by condoning male dominance and control that easily translates to violence against women. They also encourage endurance of behaviour, attitudes and practices that promote tolerance of aggression towards women.

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<sup>49</sup> Raquel Kennedy Bergen 'Marital Rape, New Research and Directions' (2006) 3.

<sup>50</sup> KDHS (2008-09) 283.

<sup>51</sup> Ibid.

### (i) The presumed ‘privacy’ of family matters

The role of the family in social-economic growth cannot be underpinned. Ronald Reagan<sup>52</sup> captured a popular perception that:

‘Strong families are the foundation of society. Through them we pass our traditions, rituals and values. From them we receive the love, encouragement and education needed to meet human challenges. Family life provides opportunity and time for the spiritual growth that fosters generosity of spirit and responsible citizenship.’<sup>53</sup>

The family is a place where intimate relationships are shared and nurtured. A major concern over families is the level of sexual and physical abuse that takes place against the weakest members, notably against women and children. The most common forms of domestic violence in this context include intimate partner violence (sexual and physical abuse), defilement and incest.

Analysis from the testimonies recorded by WRAP survivors<sup>54</sup> of marital rape reveal that some victims did not leave the abusive relationships, even after acknowledging the harm posed by the perpetrator.<sup>55</sup> Nedelsky’s theory of relational autonomy suggests that people may not be completely autonomous as their freedom depends on their relations with others.<sup>56</sup> The decisions of family members may not be their own but a result of norms and desires of those in close connection.<sup>57</sup>

On examining the relationship between masculinity and intimate partner violence, Nicole contends that the notion of a ‘man being in control’ in the context of intimate partner relationships formed the basis of the men she interviewed not allowing their partners to express their own individuality.<sup>58</sup> This creates undue influence that may not only lead to violence but

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<sup>52</sup> Ronald Reagan ‘A Proclamation: National Family Week 1984’ published by Ohio State University in *Code of Federal Regulations* volume 3(1985-1999) at 138.

<sup>53</sup> Ibid.

<sup>54</sup> African Population and Health Research Center (APHRC) *Marital rape and its impact: A policy brief for Kenyan members of parliament* (2010) Policy Brief no 13 §.

<sup>55</sup> Leslie Morgan Steiner *Why Domestic Violence Victims Don’t Leave* Ted Talks. Available at [https://www.ted.com/talks/leslie\\_morgan\\_steiner\\_why\\_domestic\\_violence\\_victims\\_don\\_t\\_leave?language=en](https://www.ted.com/talks/leslie_morgan_steiner_why_domestic_violence_victims_don_t_leave?language=en), uploaded on 25 January 2013.

<sup>56</sup> Jennifer Nedelsky ‘Violence against women: Challenges to the liberal state and feminism’ in *Law Relations: A relational theory of self, autonomy and the law* (2011) 200-228.

<sup>57</sup> Ibid at 216.

<sup>58</sup> Nicole de Kwaadsteneit *Male perpetrators’ construction of masculine identity: Attitudes and beliefs on intimate-partner violence* (Stellenbosch University, 2017) at 61.

also constrain the freedom of the controlled to act against the controller and explains the defeating silence surrounding intimate partner violence.<sup>59</sup>

Moreover, when violence takes place within the family, it is often seen as a ‘private’ issue and it becomes difficult to gather information about it.<sup>60</sup> Nedelsky notes that many acts which constitute part of violence against women may not be viewed as such by close family members, and survivors are placed in a position to elect their own view or to downgrade the violence so as to remain in connection with others.<sup>61</sup> The view that family affairs are private in nature and the state shall not interfere makes the society view sexual violence within marriage as a ‘bedroom matter’ that should be dealt with ‘privately’ and not be disclosed to the public. This misconception has caused survivors to endure months and years of suffering in silence. There is fear of humiliation, retaliation and shame as well as cultural inhibitions against public discussions or complaints on sexual matters. World Health Organisation reports that many abused women take time to leave their partners for the following reasons:<sup>62</sup>

- fear of retaliation;
- lack of alternative means of economic support;
- concern for their children;
- lack of support from family and friends;
- stigma or fear of losing custody of children associated with divorce; and
- love and the hope that the partner will change.

They eventually leave after multiple attempts and often after the realization that the abusive partners may not change and that the violence negatively affects their children.<sup>63</sup>

In Kenya, the *Protection Against Domestic Violence Act* no 2 of 2015, was enacted to protect members of a domestic settings from gender based violence by fellow members. However, this Act is insufficient to address marital rape in Kenya as discussed in chapter 2 of

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<sup>59</sup> Ibid at 41-43, 61-63.

<sup>60</sup> Namati ‘Reporting Gender Based Violence: A Handbook for Journalists’ (2009) 10.

<sup>61</sup> Jennifer Nedelsky *Law Relations: A relational theory of self, autonomy and the law* (2011) 216.

<sup>62</sup> World Health Organisation ‘Understanding and Addressing Violence Against Women: Intimate Partner Violence’ (2012)2. Available at [https://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf;jsessionid=0E39758338E93E71A77DB4528CD22F80?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=0E39758338E93E71A77DB4528CD22F80?sequence=1), accessed on 3 April 2019.

<sup>63</sup> Ibid

this dissertation. There is need for the State to pierce the presumed privacy of family relations and specifically respond to sexual violence in marriage.

## **(ii) The ‘rape’ culture and male dominance**

Cultural and social norms are highly influential in shaping individual behavior, including the use of violence to coerce sexual activity.<sup>64</sup> Culture is a way of life. It is composed of norms of behavioral standards that are passed down from one generation to another, and is dynamic. The term ‘rape culture’ is coined to refer to ‘a setting where rape is common, and the norms, attitudes and practices of that culture normalise, condone, excuse, encourage or ignore rape’.<sup>65</sup> It describes contexts where the ‘predominant cultural attitudes facilitate continued tolerance of aggression towards women, and thus the occurrence of sexual violence’<sup>66</sup> This may be interpreted to explain the ‘entitlement’ to sex by perpetrators of marital rape, to the extent of applying violence to have non-consensual sex with a spouse.

Rape is also attributed to manifestation of power and ‘toxic masculinity’, a concept that attributes to exaggerated masculinity traits like violence and social control which functions to ‘keep women in their place’.<sup>67</sup> The following statements from convicted rapists for instance, reveal that rape is a manifestation of power, as opposed to a desire for sex.<sup>68</sup>

*‘Rape gave me the power to do what I wanted to do without feeling I had to please a partner or respond to a partner. I felt in control, dominant. Rape was the ability to have sex without caring about the woman’s response. I was totally dominant’<sup>69</sup>*

*‘Rape is a man’s right. If a woman doesn’t want to give it, the man should take it. Women have no right to say no. Women are made to have sex. It’s all they are good for. Some women would rather take a beating but they always give in; it’s what they are for.’<sup>70</sup>*

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<sup>64</sup> World Health Organisation ‘Changing Cultural and Social Norms that Support Violence’ (2009) 3.

<sup>65</sup> Flintoff, R ‘Sexual Assault’ in J. Nicoletti, S. Spencer-Thomas, C.M. Bollinger (eds) *Violence goes to college: The authoritative guide to prevention and intervention* (2001) §.

<sup>66</sup> Aosved A C & Long P J ‘Co-occurrence of rape myth acceptance, sexism, racism, homophobia, ageism, classism, and religious intolerance’ in 55 (7) *Sex Roles* (2006) 481-492.

<sup>67</sup> Brownmiller Susan *Against our will : men, women, and rape* (1993) §.

<sup>68</sup> Scully D & Marolla J *Riding the bull at Gilley’s: Convicted rapists describe the rewards of rape. Social Problems* (1985) 251-263.

<sup>69</sup> Ibid at 259.

<sup>70</sup> Ibid at 261

The above testimonies prove the existence of a culture that ‘condones’ rape, by ‘allowing’ men to feel in control and exercise dominance against women through rape.

The World Health Organization finds a strong correlation between alcohol consumption and violent behavior and links it to cultural and social norms around alcohol use which can be used to wrongfully condone or justify such violent acts.<sup>71</sup>

Kamau observes that the ‘rape culture’ is manifested in form of retrogressive traditional practices that portray women as ‘sex objects.’<sup>72</sup> An example is a cultural practice where it is permissible for a man to have sexual relations with the wife of his age-mate where the latter is not at home.<sup>73</sup> The man will signify his intention to engage in such relations by leaving his spear outside the door of the woman’s house.<sup>74</sup> Given the nature of social relations in such communities, it is highly unlikely that a woman will exercise autonomy as to whether or not to accede to the man’s advances.<sup>75</sup>

Nedelsky proposes that ending violence against women requires a transformation of the power relations between men and women and the intervention of laws that shift them.<sup>76</sup> Laws that create sexual offences send a message to society that such behaviour is not acceptable. A Law that criminalises marital rape may not single-handedly address this form of sexual violence. However, it will demonstrate the willingness of the State to end the ‘rape culture’ and respond to social norms that encourage violence against women.

### **(iii) Misconceived religious beliefs**

Religious institutions are key players in officiating marriage ceremonies. Consequently, practices and beliefs in spousal relationships develop strongly from religious doctrines and scriptures

When it comes to marriage life, interpretations of religious doctrines presume lifetime consent to sexual intercourse upon marriage. Reference to Biblical<sup>77</sup> verses for instance, implies

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<sup>71</sup> World Health Organisation ‘Changing Cultural and Social Norms that Support Violence’ (2009) 6-7.

<sup>72</sup> Winifred Kamau ‘Legal treatment of consent in sexual offences in Kenya’ (2013) 15.

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Jennifer Nedelsky *Law Relations: A relational theory of self, autonomy and the law* (2011) 217.

<sup>77</sup> Christianity is the predominant religion in Kenya, practiced by an estimated 84.8% of the total population. See [https://en.wikipedia.org/wiki/Religion\\_in\\_Kenya](https://en.wikipedia.org/wiki/Religion_in_Kenya), accessed on 8 August 2019.

that upon marriage, a husband and wife become one and grant each other exclusive rights over their bodies. In the Bible it is also stated, ‘Wives, submit to your husbands as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Saviour.’(Ephesians 5:22-24). In the Hindu Code of Manu there is a statement, ‘In childhood a woman must be subject to her father, in youth, to her husband, [and] after the husband’s death, to her sons. A woman must never be free of subjugation.’<sup>78</sup> The Islamic Qur’an states in Sura 4, ayah 34: ‘Men are in charge of women, because Allah hath made the one of them to excel the other ...’<sup>79</sup>

Human argues that women are often intimidated to comply with religious doctrines subjugating their freedom and sexuality by being threatened with the fear of harsh religious punishments or being ex-communicated from the religious group.<sup>80</sup> The social status of women in biblical societies assumed an inferior role to that of man, and women continue to be treated unfairly in the name of religion.<sup>81</sup>

*“[I]t has been said that marriage [in Islam] is a contract whose object is that of dominion over the vagina (buz’), without the right of its possession. It has also been said that it is a verbal contract that first establishes the right to sexual intercourse, that is to say: it is not like buying a female slave when the man acquires the right of intercourse as a consequence of the possession of the slave”<sup>82</sup>*

The role of religion in perpetrating gender based violence has seldom been addressed in Kenya. Denying women the opportunity to be actively involved in religious leadership roles further decreases the opportunity for gender reforms in religion. There is need for gender mainstreaming in religion to provide opportunity for dialogue and discussions on intimate partner violence. This is also necessary to offer victims ‘safe spaces’ to talk about their experiences. The State should leverage on the influence of religion to establish psycho-social support mechanisms within faith facilities and incorporate messages of gender equality and non-discrimination religious scripture.

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<sup>78</sup> Dirk J Human *If God is Male, then the Male is God* (2007) 5.

<sup>79</sup> Ibid

<sup>80</sup> Ibid at 10.

<sup>81</sup> Ibid

<sup>82</sup> Hilli, Muhaqqiq ‘Sharayi’ al-Islam’ (1985) in ‘Innovations in Islam: Traditions and Contributions’ 2(2011) at 428.

Also see “Wanted: Equality and Justice in the Muslim Family’ (2009). Available [http://www.musawah.org/sites/default/files/WANTED-EN-2edition\\_0.pdf](http://www.musawah.org/sites/default/files/WANTED-EN-2edition_0.pdf)

Religious practices remain outside the scope of judicial interference in Kenya, due to the Constitutional<sup>83</sup> freedom of religion guaranteed by the Bill of Rights<sup>84</sup>, to the extent they do not infringe on the Constitutional rights and freedoms of other citizens. To this end, it is important for the State to hold faith based institutions accountable in the prevention of gender based violence that may be perpetrated by misinformed and barbaric religious doctrines. There is need for religions to reform such doctrines that may be insensitive to the health and wellbeing of married women.

### **1.6. Effects of Marital Rape**

Marital rape inhibits the physical and mental wellbeing of the victim, and impacts the victim in the following ways:

*It causes, pain, humiliation and distress to the victims*

Psychologists and researchers have pointed out a strong correlation between all forms of rape and trauma. Plichta and Falik report that women raped by their intimate partners are more likely to suffer depression or anxiety than those who are victims of physical violence and those who were sexually assaulted by someone other than one's partner.<sup>85</sup> Other long-term effects of intimate partner violence include disordered eating, sleep problems, depression, sexual distress, problems establishing trusting relationships, distorted body image, and increased negative feelings about themselves.<sup>86</sup> Researchers also report a likelihood of recurring and long lasting effects. Some marital rape survivors report flash-backs, sexual dysfunction, and emotional pain for years after the violence.<sup>87</sup> Due to the nature of silence surrounding marital rape in Kenya, there is insufficient health response to victims. Traumatization affects the victim's mental health and wellbeing and consequently inhibits her productivity.

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<sup>83</sup> The Constitution of the Republic of Kenya, 2010.

<sup>84</sup> Article 32 (1) states that every person has the right to freedom of conscience, religion, thought, belief and opinion.

<sup>85</sup> Plichta S & Falik M *Prevalence of violence and its implications for women's health* (2001) *Women's Health Issues* 11, 244-258.

<sup>86</sup> Bergen R K *Wife rape: Understanding the response of survivors and service providers* (1996). Also see Frieze *Investigating the causes and consequences of marital rape* *Journal of Women in Culture and Society* (1983) 532-553.

<sup>87</sup> *Ibid*

### *Exposure to Health Risks*

Current research places survivors of sexual violence at substantial risk for possible physical and mental health challenges.<sup>88</sup> Women who are abused, particularly those suffering sexual violence, are at increased risk of reporting a sexually transmitted disease (STD) or a urinary tract infection.<sup>89</sup> Specific gynecological consequences of marital rape include vaginal stretching, anal tearing, pelvic pain, urinary tract infections, miscarriages, stillbirths, bladder infections, infertility, and the potential contraction of sexually transmitted diseases including HIV/AIDS.<sup>90</sup> The relationship between sexual intimate partner violence and an increased STD risk might be explained by the inability to negotiate for condom use due to the numerous threats and intimidation acts that often characterize marital rape.<sup>91</sup> As reported by WRAP survivor testimonies, studies have shown that abusive partners are also likely to have multiple sexual partners and engage in risky sexual behavior, increasing the victims' vulnerability to STDs.<sup>92</sup> Moreover, UNAIDS reports that violent or forced sex is more likely to result in HIV transmission than non-violent sex.<sup>93</sup> This is because abrasions and cuts created during forceful penetration facilitate the entry of the virus if present in the abuser. In addition to increased risk of STDs, women who have been sexually and physically abused are more likely to have more hazardous health behaviors than other women, including weight loss, greater use of medication and drug addiction.<sup>94</sup>

### *Affects the Victims' wellbeing*

Women are mainly responsible for providing labour within the home, performing household chores, cooking, child rearing and child care, and caring for the sick and elderly.<sup>95</sup> Sexual

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<sup>88</sup> Stacey B Plitcha *Intimate Partner Violence and Physical Health Consequences, Policy and Practice Implications* (2004) Vol 19 *Journal of Interpersonal Violence* 1296-1323.

<sup>89</sup> *Ibid*

<sup>90</sup> Campbell J & Alford P *The Dark Consequences of Marital Rape* (1989) at 946-949.

<sup>91</sup> See WRAP testimonies. *Supra*.

<sup>92</sup> Wingood G M, DiClemente R J & Raj A *Identifying the prevalence and correlates of STDs among women residing in rural domestic violence shelters* (2000) 30(4) *Women and Health* at 15-26.

<sup>93</sup> The UNAIDS report 'Violence against Women and Girls in the Era of HIV and AIDS: A Situation and Response Analysis in Kenya' (2006)13. Available at [http://data.unaids.org/pub/report/2006/20060630\\_gcwa\\_re\\_violence\\_women\\_girls\\_kenya\\_en.pdf](http://data.unaids.org/pub/report/2006/20060630_gcwa_re_violence_women_girls_kenya_en.pdf), accessed 7 March 2019.

<sup>94</sup> Raquel Kennedy Bergen 'Marital Rape, New Research and Directions' (2006) at 5.

<sup>95</sup> UNDP notes that unpaid care work is unevenly distributed between women and men, with women taking up a higher burden of unpaid care work, mostly in the subsistence sector, household or community activities. See

violence affects the physical and emotional wellbeing of the victim both in the short and long term thus affecting her ability to pursue her normal household chores and be economically productive. For women who are engaged in an income generating activity, injuries caused by sexual violence may cause the victim to stay out of work. This has direct consequences on her income earning ability, and where she eventually quits working, the family is deprived of her income.<sup>96</sup> There is also an increased cost on unmet needs for medical care and increased medical costs, causing a financial burden on the victim.<sup>97</sup> The victim or her relatives may be forced to set aside part of the normal income for her treatment consequently constraining family resources. Experiencing and/or treating marital rape has a negative effect not only on the victim's productivity, but also on her family and ultimately impacts on the national development.

### 1.7. Conclusion

GBV is a form of subjugation of a person because of their gender or socially defined role, and affects women more than men.<sup>98</sup> This is attributed to unequal power dynamics either inherently biological, cultural or socially constructed, and those attributed to social and economic disparities between men and women. The 2008-09 Kenya Demographic and Health Survey ("KDHS") recorded high rates of sexual violence within marriage with 13 percent of married women having experienced sexual violence.<sup>99</sup> In 2014, the KDHS further indicated that about 14 percent of women have ever experienced sexual violence committed by a spouse/partner, while 10 percent of women experienced sexual violence by a spouse/partner in the past 12 months to the survey.<sup>100</sup> These Statistics are alarming and immediately call for the need to discuss marital rape, a type of sexual violence that has been largely neglected in Kenya. Marital rape leads to detrimental health, psychological and economic effects to the victim. It causes fear and suffering,

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UNDP Policy Brief on Gender Equality and Poverty Reduction (2009)

<https://www.undp.org/content/dam/undp/library/gender/Gender%20and%20Poverty%20Reduction/Unpaid%20care%20work%20English.pdf>

<sup>96</sup> Namati 'Reporting Gender Based Violence: A Handbook for Journalists' (2009) Supra at 12.

<sup>97</sup> Ibid

<sup>98</sup> World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council 'Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence' (2013)2. Available at <https://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>, accessed on 7 March 2019.

<sup>99</sup> KDHS (2008-09) 253.

<sup>100</sup> KDHS (2014-15) 306.

threatening the existence of the institution of marriage, and inhibits the role of the family to provide care and protection to its vulnerable members. In addition to enacting legislation that specifically addresses and criminalises marital rape, it is important to address the social and cultural dynamics that condone sexual violence. Ultimately, such legislation will demonstrate the willingness of the State to regulate sexual conduct and encourage change behaviours, attitudes and practices that condone violence against women.

## CHAPTER TWO

### 2.0. DOMESTIC LEGAL FRAMEWORK GOVERNING SEXUAL VIOLENCE IN KENYA

#### 2.1. Introduction

A significant portion of scholarly work on marital rape has emerged from the legal community, as it has been generally legally acceptable for a man to rape his wife in the historical development of sexual offences in many jurisdictions.<sup>101</sup> By examining the development of legal jurisprudence, it can be deemed that there were direct ties between law, property and rape as in the case of common law.<sup>102</sup> The application of common law in Kenya was qualified by the post-independence *Judicature Act*<sup>103</sup> of 1967 which establishes certain grounds to define its scope of application. One of the grounds for application of common law in Kenya includes, ‘where there is no written law’ as provided by section 3 of the *Judicature Act*. Kenya has further enacted written laws regulating sexual conduct as guided by the Constitutional<sup>104</sup> Bill of Rights. This chapter critically examines the current domestic laws governing sexual violence in Kenya and determines if they are sufficient to address and prosecute marital rape.

#### 2.2. History of marital rape legal exclusion

The Kenyan legal system is descended from the British common law system. Colonisation of Kenya by the British supported the application of English precedents in Kenya, as was the practice of applying the coloniser’s legal system on the colony. The East Africa Order in Council provided for 12<sup>th</sup> August, 1897 as the reception date for Kenya. This was given effect by Section 3 of the *Judicature Act* provided for Common Law as a source of Law in Kenya, if the following conditions were met:-

- In the absence of an Act of Parliament
- If it is consistent with the Constitution or other written law
- If the law was applicable in England on the reception date

<sup>101</sup> Raquel Kennedy Begen ‘Marital rape: New research and directions’ (2006) at 2.

<sup>102</sup> Julia R & Herman Schewendinger *Rape and Inequality* (1993) Sage Publications at 9.

<sup>103</sup> *Judicature Act* CAP 8, Laws of Kenya.

<sup>104</sup> The Constitution of Kenya (2010).

- If the circumstances of Kenya and its inhabitants permit

Upon attaining independence in 1963, Kenya did not abolish common law but upheld its application via the *stare decisis* doctrine. This is captured in the Latin maxim: *stare decisis et non quieta movere*, meaning, 'it is best to adhere to decisions and not to disturb questions put at rest.' The effect is that Kenyan courts have been guided by previous decisions from English courts, subject to certain conditions stipulated by section 3 of the Judicature Act as noted above.

There are three Common law theories that can be attributed to the history of legal exclusion of marital rape in Kenya.<sup>105</sup>

#### **(i) Implied consent theory**

At Common law, marital rape was considered legally impossible. It was argued that a woman's marriage vows provided ongoing consent to her husband's sexual demands as repeated by Sir Matthew Hale in the seventeenth century. Hale believed that 'matrimonial consent' was irrevocable, as and until "ordinary relations" in the marriage are suspended.<sup>106</sup> This meant that a woman could revoke her implied consent when she and her husband were separated or divorced, but not during the course of marriage.

The Common law position on marital rape created the *exemption doctrine* to the effect that a man cannot be held liable for the rape of his wife. This was the finding in *R v Clarence*<sup>107</sup>, where the husband's conviction for inflicting grievous bodily harm to his wife (by knowingly infecting her with gonorrhoea) was quashed. In this case, the defendant was convicted under section 47 and section 20 of the then English legislation governing common assault and battery, the *Offences Against the Person Act, 1861* for infecting his wife with gonorrhoea, a sexually transmitted disease, which she was unaware of his infection. It was held under the exemption doctrine that no technical assault or battery occurred because the wife had consented to the intercourse, even if she was unaware of the risk. There could be no assault, as sexual intercourse within a marriage was consented to by default, and therefore could not amount to conviction under Section 47 of the Act.

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<sup>105</sup> Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975) 18.

<sup>106</sup> Sir Mathew Hale *History of the Pleas of the Crown* (1786) 629.

<sup>107</sup> (1889) 22 QB 23

This was upheld by the Louisiana Supreme Court in the American case of *State v. Haines*<sup>108</sup> ‘...*But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.*’<sup>109</sup>

The implied consent theory was applied to the effect that rape could not have occurred as the wife consented to sexual intercourse with the husband by virtue of being married to him. It treats marriage as a ‘contractual agreement’ where sex is an obligation, and thus making it impossible to hold a charge for marital rape.

### **(ii) Conjugal unity theory**

This theory is based on the Christian biblical interpretation as read with common law that once a man and a woman are joined in marriage they cease to exist as two separate and distinct beings but become one. The theory leads to the belief that a woman is not capable of being raped in matrimony as she cannot be in essence separated from her husband. This was upheld in the words of Sir William Blackstone that: ‘*by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband.*’<sup>110</sup> Common law doctrine of coverture also guarantees spousal privilege. Spouses may not testify adversely against each other, hence difficult to bring claims of sexual violence when they arise.

### **(iii) The Property Theory**

This theory presupposes that a wife, is viewed as the ‘property’ or ‘chattel’ of her husband upon the commencement of marriage. Under the common law, women were viewed as the property of their husbands.<sup>111</sup> Men could not rape their wives as a man could not rape his own property.<sup>112</sup> This theory is in line with the African Traditional view of marriage, which largely prescribed that a woman’s body and her sexual autonomy belonged to her husband. The proponents of this

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<sup>108</sup> *State v. Haines* (1899 (25) 372 (La.)

<sup>109</sup> Sir Mathew Hale *History of the Pleas of the Crown* (1786) 628.

<sup>110</sup> William Blackstone *Commentaries on the Laws of England I* (1765) 442, 445.

<sup>111</sup> Stacy-Ann Elvy ‘A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond’ 22 *Mich. J. Gender & L.* 89 (2015) 105.

<sup>112</sup> *Ibid.*

theory advance that sexual intercourse does not amount to marital rape as the husband is only making appropriate use of his 'property'.<sup>113</sup>

### **2.3. The existing domestic legal framework**

Legislation is used by the State as a means of governing behavior, restoring order and ensuring social justice in the society. Laws and policies that make violent behaviour an offence or criminalise gender-based violence send a message to citizens that such behaviour is not acceptable.<sup>114</sup> One of the mechanisms for States to combat sexual form of violence is to enact legislation that defines inappropriate sexual conduct and criminalises sexual offences. The introduction of legislation that criminalises marital rape would be beneficial in three ways. First it would provide a mechanism for reporting such cases, thus breaking the silence and improving the ability of victims to speak about their experiences. Secondly, it would enable prosecution of perpetrators and thus enable access to justice for victims. Lastly, it would generate behaviour change for fear of punishment, and reduce the number of perpetrators. The following pieces of domestic legislation address sexual conduct in Kenya:

#### **2.3.1. The Constitution of Kenya**

On 4<sup>th</sup> August 2010, the current Constitution was ratified at a national referendum held on the same day, and later promulgated on 27 August 2010. Article 2 (1) of the Constitution of Kenya declares the Constitution the supreme law of the Republic and binds all persons and all State organs at both levels of government. The Constitution places emphasis on human rights, equality and justice, with chapter four containing the Bill of Rights modeled from the principles and standards of international human rights. Article 10 (2) (b) sets out the national values and principles of governance to include, among others, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of marginalized groups. These principles are important in the quest for gender equality and provide a basis for addressing gender based violence in Kenya.

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<sup>113</sup> Sonya A. Adamo 'The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries' (1989) 560.

<sup>114</sup> World Health Organisation 'Changing Cultural and Social Norms that Support Violence' (2009) 9.

Article 27 of the Constitution of Kenya guarantees equal rights to every person and freedom from discrimination on certain grounds such as race, sex, marital status, pregnancy, class among others.<sup>115</sup> It is important to note that this provision prohibits the State from both direct and indirect discrimination. Article 27 (5) further provides that a person shall not discriminate directly or indirectly against any person on the same grounds. The concept of ‘discrimination’ in Kenya is not specifically defined in the Constitution but is construed to infer the ‘equal treatment’ principle. This can be interpreted loosely to mean that if person X is treated less favourably than person Y because she is a woman, then she has been subjected to unlawful discrimination.<sup>116</sup> Kenyan courts have previously referred<sup>117</sup> to the Indian case of *State of Kerala & Anor v N. M. Thomas & Others*, for the test on ‘equal treatment’ where Khanna, J stated as follows:<sup>118</sup>

‘[E]quality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be Constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.’

From the extrapolation of the ‘equal treatment’ test set in *State of Kerala*<sup>119</sup> the exclusion of marital rape amounts to differential treatment of married women from other women by distinguishing their rape by spouses from other forms of rape. Inclusion of ‘sex’ and ‘marital status’ as grounds for non- discrimination in Article 27 of the Kenyan Constitution implies that exclusion of marital rape is discriminative to married women. This is because any other form of rape is considered a sexual offence, except for the rape of a married woman by her husband.

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<sup>115</sup> Article 27 (4) of the Constitution provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

<sup>116</sup> Sandra Fredman *The Role of Equality and Non-Discrimination Laws in Women’s Economic Participation, Formal and Informal* (2013) OHCHR Working Sessions at 7.

<sup>117</sup> See *Charles Omanga & another v Independent Electoral & Boundaries Commission & another* [2012] eKLR; and *Richard M. Kagiri & 2 others v Minister for State for Provincial Administration and Internal Security & 2 others* [2014] eKLR.

<sup>118</sup> 1976 AIR 490, 1976 SCR (1) 906. In the Constitutional petition of *E.G & 7 others v. Attorney General & others* (Petition 150 & 234 of 2016 eKLR at para 287) the Court issued three guiding principles to determine ‘discrimination’. First, the court has to establish whether the law differentiates between different persons. Second, whether the differentiation amounts to discrimination, and, third, whether the discrimination is unfair.

<sup>119</sup> 1976 AIR 490, 1976 SCR (1) 906.

Lack of recognition of marital rape is equally discriminatory against victims as it directly prevents them from reporting their experiences and subsequently from access to justice.

Indirect discrimination on the other hand outlaws ‘an apparently neutral criterion, provision or practice that puts persons of one sex at a particular disadvantage compared with persons of a different sex, unless it is a proportionate means of achieving a legitimate aim.’<sup>120</sup> It focuses on impact rather than treatment.<sup>121</sup> This is demonstrated by the existence of deep rooted stereotypes and patriarchal attitudes that have an effect of conveying unequal power dimensions in society, which male perpetrators take advantage of to execute violence against women.

Article 29 of the Constitution provides for the freedom and security of the person. Article 29 provides that every person has the right to freedom and security of the person, which includes the right not to be *inter allia*<sup>122</sup>

- subjected to any form of violence from either public or private sources;
- treated or punished in a cruel, inhuman or degrading manner.

Equality includes the full and equal enjoyment of all rights and fundamental freedoms.<sup>123</sup> Marital rape is a manifestation of physical, sexual and psychological violence occurring in the private sphere and depriving women of their security. The right to dignity is provided by article 28, which guarantees every person the right to have that dignity respected and protected. Failure to address marital rape is a violation by the State to protect women from full enjoyment of their right to have their human dignity respected and protected. The State is under an obligation to protect the dignity of married women by enacting legislation that will specifically protect them from all forms of violence, including marital rape.

The Constitutional rights to dignity and equality form the foundation for the protection of women from all forms of violence in Kenya. Aura commends the Constitutional right to dignity and equality as a fundamental step towards gender equality for the following reasons:<sup>124</sup>

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<sup>120</sup> Sandra Fredman & Beth Goldblatt ‘Gender Equality and Human Rights’ (2014) UN Women Discussion Papers at 10.

<sup>121</sup> *Ibid* at 11.

<sup>122</sup> The Constitution of Kenya 2010 at art 29 (c) to (f).

<sup>123</sup> *Ibid* at art 27 (2).

<sup>124</sup> Ruth Aura-Odhiambo ‘Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities’ (2014) Kenya Law Reporting 14. Available at

- It states explicitly that men and women have the right to equal treatment and equal opportunities in the ‘political, economic, cultural and social sphere’.<sup>125</sup>
- The grounds on which the state is not to discriminate have been expanded and are now much broader than existed under the repealed independence Constitution.<sup>126</sup>
- The Constitution not only prohibits the State from discrimination, but this prohibition applies horizontally among all persons.<sup>127</sup>
- The Constitution provides for the principle of affirmative action,<sup>128</sup> in order to ‘give full effect to the realization of the rights guaranteed under Article 27.

In order to give full realization of the freedom from discrimination and right to equality before the law, the Constitution recognizes that women are among the groups previously marginalized. It is therefore necessary for the State to take measures beyond those expressly mentioned in the Constitution, to redress past patterns of discrimination, such as those that relate to gender relations.<sup>129</sup> One of such measures ought to be the enactment of adequate legislation to address and criminalise all forms of violence against women, including marital rape.

### **2.3.2. The Sexual Offences Act 3 of 2006**

The *Sexual Offences Act 3 of 2006* (The Act) is the main legislation governing criminal sexual conduct in Kenya. It was enacted in 2006 to qualify sexual offences, protect victims of unlawful conduct and punish offenders. Before the Act was enacted in 2006, Sexual offences were covered under the *Penal Code*<sup>130</sup> under ‘Offences Against Morality’, whose section has since been repealed. A major milestone brought by the *Sexual Offences Act* is that it provides for minimum mandatory sentences for specific sexual offences, as opposed to the *Penal Code* which

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[http://kenyalaw.org/kl/fileadmin/pdfdownloads/Situational\\_Analysis\\_and\\_-Aura.doc](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Situational_Analysis_and_-Aura.doc), accessed on 9 August 2019.

<sup>125</sup> Article 27 (3) of the Constitution of Kenya 2010.

<sup>126</sup> Article 27(4).

<sup>127</sup> Article 27(5).

<sup>128</sup> Article 27(6) of the Constitution of Kenya, 2010, provides, ‘To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.’

<sup>129</sup> Ruth Aura-Odhiambo ‘Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities’ (2014) at 14.

<sup>130</sup> The Penal Code, CAP 63 of the Laws of Kenya

only provided for maximum sentences and offered judicial discretion in sentencing.<sup>131</sup> The Act creates the offence of rape, defilement, gang rape, attempted rape, forced prostitution among other sexual offences. Under section 3 of the Act, a person commits an offence of ‘rape’ if he or she intentionally and unlawfully committing an act which causes penetration with his or her genital organs, without the other person’s consent or where such consent is obtained by means of threats or intimidation of any kind.

This Act does not mention ‘marital rape’ but defines ‘rape’ in general. The term ‘person’ is construed to mean any person, including a married person. Section 43 of the Act provides for intentional and unlawful acts that constitute sexual offences under the Act as occurring:-

- a) in any coercive circumstance;
- b) under false pretenses or by fraudulent means; or
- c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.<sup>132</sup>

Despite marital rape occurring under coercive circumstances, section 43 (5) of the Act provides that *‘this section does not apply in respect of persons lawfully married to each other’*. This ultimately rules out a conviction of marital rape under the Act. In light of this section, the *Sexual Offences Act* of Kenya does not guarantee justice to victims of marital rape. This can be distinguished from the wording in progressive legislations in other jurisdictions, such as South Africa’s *Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA)*.<sup>133</sup> Section 56 (1) of SORMA *explicitly* provides that *the existence of a marital or other relationship shall not be a valid defence for an offence of rape or sexual assault*. The wording in section 43 (5) of the *Sexual Offences Act* of Kenya is therefore far from criminalising marital rape.

Section 43 (4) further construes the offence of ‘rape’ in the circumstances where a person is incapable in law of appreciating the nature of an act, for instance where at the time of the commission of such act the victim is asleep; unconscious; in an altered state of consciousness among others. Survivors of marital rape have testified of being sedated to become ‘lifeless’

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<sup>131</sup> Winifred Kamau ‘Legal Treatment of Consent in Sexual Offences in Kenya’ (2013) at 4.

<sup>132</sup> Section 43 (1) of the Act

<sup>133</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA), is the main Act governing criminal sexual conduct in South Africa

during the act.<sup>134</sup> Section 43 (5) however excludes the applicability in respect of persons who are *lawfully married* to each other. At this juncture, the *Sexual Offences Act* has failed to criminalise marital rape.

### 2.3.3. The Protection Against Domestic Violence Act

This Act<sup>135</sup> was enacted in 2015 as the first legislation to provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependent persons, and to provide for matters connected therewith or incidental thereto.<sup>136</sup>

Section 3 of the *Protection Against Domestic Violence Act* defines ‘domestic violence’ to mean, ‘...violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship’ and includes ‘violence within marriage’ as a form of domestic violence.

This Act is instrumental in establishing domestic violence in the following ways:

- A single act may amount to abuse.
- It does not provide strict rules of evidence.
- The court may award damages as compensation.
- The court may direct parties to seek counseling and conciliation from religious institutions and traditional conciliatory mechanisms.
- The victim may be awarded protection orders.
- The Act widens the rules of standing to allow people other than the victim to apply for protection orders on behalf of the victim.
- The court may direct parties to participate in recommended counseling and conciliation programmes.

This Act is a milestone towards protection from domestic violence. However, the Act is prohibitive and not punitive. Its main aim is reconciliation of families by issuing protection

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<sup>134</sup> Mandy Boardman *My Husband Raped Me* Published in Times Magazine on 29 2015. Assessed at <http://time.com/3976180/marital-rape/> accessed on 2 November 2018.

<sup>135</sup> The Protection Against Domestic Violence Act No. 2 of 2015.

<sup>136</sup> Ibid, preamble.

orders, counseling and conciliation. It does not relay criminal sanctions on the offenders and is thus insufficient to provide justice to victims of marital rape.

#### **2.4. Towards criminalization; Elements to consider in proposing new legislation**

As noted, the *Sexual Offences Act* excludes sexual acts of coercion within spousal relationship. The *Protection Against Domestic Violence Act* on the other hand mentions ‘violence within marriage’ as a form of domestic violence but fails to stipulate any criminal sanctions. Both legislations are currently insufficient in criminalising marital rape or providing justice to victims of marital rape. The proposition is for Parliament to enact a new legislation with regards to recognizing, addressing and criminalizing marital rape. The proposed legislation should encompass the following key elements:

- i) A proper definition of marital rape
- ii) A reporting mechanism
- iii) Clear rules of evidence that take into account the protection of the complainant and witnesses
- iv) Minimum penalties and other criminal sanctions
- v) Preparation of a national policy to guide the implementation and administration of the new legislation

To establish the offence of rape of an adult under the Sexual Offences Act, the element of ‘lack of consent’ on the part of the complainant is the most critical element to be proved by the prosecution beyond reasonable doubt. Section 42 of the *Sexual Offences Act* provides that a person consents if ‘he or she agrees by choice, and has the freedom and capacity to make that choice.’ The standard of proof is that of a criminal case, and the burden is beyond reasonable doubt, which ought to be discharged by the prosecution. An act of rape has three fundamental elements that must be proved; (i) that there was sexual intercourse; (ii) that the act of sexual intercourse was unlawful; and (iii) that the act of sexual intercourse was without the consent of the complainant.<sup>137</sup>

There are no clear rules on how to establish lack of consent, but recent cases of *Upar v Uganda*<sup>138</sup> and *R. v Oyier*<sup>139</sup> have ruled that violence, physical coercion and undue influence or

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<sup>137</sup> *Achoki v. Republic* 2000 (LLR) 1130 (CAK).

<sup>138</sup> *Upar v Uganda* 1971 (EALR) 98.

‘reign of terror’ may indicate lack of consent. In the case of *R v Oyier*,<sup>140</sup> decided before the enactment of the Sexual Offences Act, the accused was charged with and convicted of rape on count 1 contrary to section 140 of the Penal Code. The accused argued that there was consent to sex, and the court stated that the required *mens rea* was the intention of the accused. The prosecution examined circumstantial evidence to prove lack of consent beyond reasonable doubt. Evidence was given that the complainant resisted physically and was beaten and punched by the respondent showing that she did not consent to intercourse. It was held *inter alia* that the conduct of the complainant in taking the risk of running from the respondent’s house at night without her property was circumstantial evidence which strongly corroborated the lack of consent on her part and so was the circumstantial evidence in the conduct of the respondent in making no attempt to look for her that night when she ran away.<sup>141</sup>

The defence of ‘consent’ is likely to arise in the prosecution of marital rape, and the burden would be on the prosecution to establish ‘lack of consent’ on the part of the complainant. Courts have since moved away from the requirement of corroboration of evidence in establishing the guilt of an accused in the offence of rape. It is now a settled rule that the prosecution may rely on medical evidence or circumstantial evidence to prove its case.<sup>142</sup> Marital rape may however occur in multiple acts and therefore difficult to keep track of exact dates and time. Due to the continuity of the acts, they may not be immediately reported and it becomes difficult to obtain credible medical evidence to warrant conviction of the offender.<sup>143</sup>

MacKinnon<sup>144</sup> criticizes the law for failing to protect women from rape, where the act ‘appears like sex’, such as within the institution of marriage. This attempt to distinguish rape from sex is assessed from the male perspective. MacKinnon is uncomfortable with the treatment of consent as a factual issue of the presence of force, and suggests that not all rape may be violent and it is unjust to rule out rape cases finding insufficient force as acceptable sex.

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<sup>139</sup> *R v Oyier* (KLR) Criminal Appeal 158 of 1984.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Maina v. R* 1970 (EA) 370.

<sup>143</sup> ‘I was raped by my husband’ published on *Her View from Home*, available at <https://herviewfromhome.com/i-was-raped-by-my-husband/>, accessed on 5 April 2019.

<sup>144</sup> Catherine A. MacKinnon *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (1983) 16.

*'The law does this by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or women's, point of violation'*<sup>145</sup>

In discharging the burden of proof in sexual offences in Kenya, section 44 of the *Sexual Offences Act* creates a presumption that the complainant is taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether the complainant consented or whether the accused reasonably believed there was consent. Borrowing from MacKinnon's theory, proceedings on marital rape should trend carefully on admitting evidence on lack of force or violence to rebut the presumption of lack of consent on the part of the complainant. A new law on marital rape should be accompanied by new rules of evidence to address the evidential burden in relation.

The evidential burden is further heightened by the spousal privilege granted by the *Evidence Act*,<sup>146</sup> which prohibits spouses from testifying against each other in criminal proceedings except in circumstances provided by the Act.<sup>147</sup> Section 27 (3) of the *Evidence Act* provides that in criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged *inter allia* with offences under the *Sexual Offences Act*. Since that there has been no past prosecution of marital rape in Kenya, the clause is currently applicable to witnesses testifying against spouses charged of committing sexual offences against third parties. Kindiki acknowledges the danger of coercion of victims willing to testify against their spouses.<sup>148</sup> They may be coerced from not giving evidence<sup>149</sup>, or to give false evidence, thus impacting the integrity of the proceedings.

A new law on marital rape should certainly include the complainant as a competent and compellable witness to testify against her spouse in the case of *her* own rape. The proceedings should seek to protect the victim's identity and confidentiality. Measures established under section 27 of the *Sexual Offences Act* with respect to protection of vulnerable witnesses should

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<sup>145</sup> Ibid.

<sup>146</sup> Evidence Act CAP 80 Laws of Kenya.

<sup>147</sup> Ibid section 127.

<sup>148</sup> Kithure Kindiki 'Towards a Sexual Offences Law; Repraising the legal framework on sexual violence in Kenya' (2005) 2 EALJ at 68.

<sup>149</sup> Ibid

equally be extended to the prosecution of marital rape. The court should in this regard allow the witness to give evidence in a witness protection box or through an intermediary. The proceedings need not take place in open court to safeguard privacy and confidentiality of the complainant's case if she so wishes.

## **2.5. Conclusion**

Kenya has failed to prosecute marital rape by excluding sexual violence in lawful marriage as a sexual offence under 43 of the *Sexual Offences Act*. The exemption doctrine under common law forms the background of this exclusion. It is based on Hale's proposition that upon marriage, consent to sexual access is granted, extinguishing the possibility of criminal liability for marital rape. There is need for law makers to acknowledge the reality that sexual violence is happening within spousal relationships in Kenya. This should be followed by the urgent need to enact legislation that will define marital rape, establish clear rules of evidence in view of the evidential burden in establishing 'lack of consent' and determine punitive sanctions for offenders.

## CHAPTER THREE

### 3.0. STATE OBLIGATION TO END DISCRIMINATION AND VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW

#### 3.1. Introduction

In chapter two, I examined the domestic legal framework governing sexual offences in Kenya, and revealed that there is no law that explicitly criminalises marital rape in Kenya. At this juncture, I shall examine the international human rights treaties prohibiting violence against women and in particular the Convention on the Elimination of All Forms of Violence Against Women (CEDAW). I will analyse what this means for Kenya in terms of fulfilling her obligations to respect, protect and fulfill human rights pertinent to women under international human rights law. I propound that Kenya should explicitly criminalise marital rape in order to respect, fulfill and protect the rights of women under international law.

#### 3.2. The position of International law in Kenya

Treaty law is the supreme source of international law. Ultimately, State accountability and responsibility are at the heart of treaty making. States parties are required to take actions at national level to implement the recommendations of the treaties they have adopted.

The Constitution of Kenya<sup>150</sup> allows Courts to refer to the general principles of international law in matters that are not addressed by national law. Since the inception of the current Constitution in 2010, Kenya now boasts of progressing from a ‘dualist’ to a ‘monist’ system.<sup>151</sup> This is by virtue of article 2(5) of the Constitution which provides that ‘the general rules of international law shall form part of the laws of Kenya’; and article 2(6) which provides that ‘any treaty or convention ratified by Kenya shall form part of the law under this Constitution.’ These clauses have however not been easy to interpret by courts, and have been characterized by all sorts of ambiguity, including the question of whether or not Kenya requires treaty domestication.

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<sup>150</sup> The Constitution of Kenya, 2010.

<sup>151</sup> In *Echaria v Echaria* (Civil Appeal 75 of 2001; [2007] eKLR) decided before the 2010 Constitution of Kenya, it was held that principles of international law did not form part of law until they were domesticated.

The case of *Re Zipporah Wambui Mathara*<sup>152</sup> decided after the 2010 Constitution was among the first cases to put the monist approach to test. In this case, the applicant sought to rely on article 11 of the International Covenant on Civil and Political Rights (ICCPR)<sup>153</sup> to stay execution of orders of detention issued in failure to fulfill a contractual obligation in a bankruptcy cause under the Civil Procedure Rules<sup>154</sup> of Kenya. The court in this regard found the international law prohibiting such detention as set out in the ICCPR to be superior to the Civil Procedure Rules and stated that a conflict between the two would result in international law prevailing over the national law.<sup>155</sup> The court noted that the covenant made provisions for the promotion and protection of human rights and recognized that individuals were entitled to basic freedoms to seek ways and means of bettering themselves, such as not being detained for a contractual obligation.<sup>156</sup> The case however does not set any further guidelines as to the reliance of international law but merely gives effect to article 2 (6) of the Constitution. Oduor argues that the first red flag was posed by the failure of the Constitution to specify where ‘general principles of international law’ rank in the hierarchy of laws in Kenya, causing confusion and ambiguity in courts on when to apply international law principles in the determination of Kenyan cases.<sup>157</sup> He suggests that the court in *Re: Zipporah Wambui Mathara* should have taken the opportunity to engage in a thorough analysis of the relationship between international law and local law in order to settle further ambiguities.<sup>158</sup>

Parliament enacted the *Treaty Making and Ratification Act*<sup>159</sup> to give effect to section 2 (6) of the Constitution. This Act provides for the procedure of making and ratification of treaties. It still grants Parliament the discretion to implement international laws through legislation causing more inconsistency on the monist approach set out in the Constitution. The discrepancy is yet to be settled by Kenyan Courts. What is clear is that in case of a conflict between the Constitution

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<sup>152</sup> In *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR.

<sup>153</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

<sup>154</sup> Legal Notice No 151, *The Civil Procedure Rules* (2010), pursuant to the Civil Procedure Act Cap 21, Laws of Kenya.

<sup>155</sup> In *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR at para 9.

<sup>156</sup> *Ibid.*

<sup>157</sup> Maurice Oduor ‘The State of International Law in Kenya’ (2013) SSRN 98.

<sup>158</sup> *Ibid* at 113.

<sup>159</sup> *Treaty Making and Ratification Act* no. 45 of 2012, Laws of Kenya.

and any other law, the supremacy of the Constitution prevails as provided by article 2 (1) as read with article 2 (4).<sup>160</sup>

In this regard, this chapter will not attempt to examine the general principles of international law or the hierarchy of laws in Kenya, but is concerned that Kenya has specifically ratified human rights treaties which call for the elimination of forms of violence against women. The international human rights framework is anchored by the adoption of the Universal Declaration of Human Rights (UDHR)<sup>161</sup> by the United Nations General Assembly (“The General Assembly”) on 10 December 1948. The UDHR, together with the International Covenant on Civil and Political Rights<sup>162</sup> and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights<sup>163</sup>, together with other treaties adopted overtime post 1945, form the body of International Human Rights. The Convention on Elimination of all Forms of Discrimination against Women (CEDAW)<sup>164</sup> is the most fundamental international human rights convention addressing discrimination against women. In addition to treaties, international declarations and resolutions such as the Universal Declaration of Human Rights form the most basic foundation for combating sexual violence. They do not have the binding force of treaties but contribute to the development of international norms and jurisprudence.<sup>165</sup> International human rights law institutes obligations that States are bound to respect. This develops my argument of why Kenya should *explicitly* criminalise marital rape to protect women from human rights abuses under international human rights law.

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<sup>160</sup> Article 2 (1) as read with article 2 (4) of the Constitution of Kenya provides that the Constitution is the supreme law of the Republic and any law that is inconsistent with the Constitution is void to the extent of the inconsistency.

<sup>161</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, available at

<https://www.refworld.org/docid/3ae6b3712c.html>, accessed 18 January 2019.

<sup>162</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976)

<sup>163</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976)

<sup>164</sup> Convention on the Elimination of all forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981)

<sup>165</sup> See Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT’L L 782 (1966).

### 3.3. Kenya's international law obligations under CEDAW

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>166</sup> is the main international convention addressing discrimination against women and has been ratified by 187 countries, including Kenya in 1984. Kenya has however not ratified the Optional Protocol to CEDAW.

Article 1 of CEDAW defines the term 'discrimination against women' to mean 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, *irrespective of their marital status*, on a basis of *equality* of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'<sup>167</sup>

The Committee on the Elimination of Discrimination against Women adopted General Recommendation 28<sup>168</sup> to clarify on the core obligations of States parties under Article 2 of CEDAW ("the Convention") to implement domestically the substantive provisions of the convention.<sup>169</sup> Under Article 2 of CEDAW, State parties must address all respects of their legal obligations under the Convention to respect, protect and fulfill women's right to non-discrimination and to the enjoyment of equality.<sup>170</sup> CEDAW imposes state responsible not just for the actions of the State, but also for eliminating discrimination that is being perpetrated by private individuals and organizations. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights.<sup>171</sup> There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or

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<sup>166</sup> Convention on the Elimination of all forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981)

<sup>167</sup> Ibid at Article 1.

<sup>168</sup> General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW (16 October 2010)

<sup>169</sup> Ibid at Par 1.

<sup>170</sup> Ibid at Par 9.

<sup>171</sup> *International Human Rights Law*, United Nations Human Rights Office of the High Commissioner, Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>, accessed on 30 August 2019.

character. The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.<sup>172</sup>

By its ratification of CEDAW in 1984, the State of Kenya agreed to be bound by the Convention, which infers an undertaking to put into place domestic measures and legislation compatible with the obligations and duties conferred by the convention.

### ***Duty to respect***

The obligation to *respect* under CEDAW requires that States refrain from legal, administrative procedures and institutional structures that directly or indirectly deny equal enjoyment by women of their civil, political, economic, social and cultural rights.<sup>173</sup> This means that the State of Kenya must refrain from interfering with or curtailing the enjoyment of these rights. With regards to respecting the rights pertinent to women under CEDAW, Kenya has failed to embody the principle of equality as recommended by Article 2 of CEDAW. This principle has been violated by the unequal treatment of married persons under Section 43 of the *Sexual Offences Act* of Kenya,<sup>174</sup> which exempts the application of ‘intentional and unlawful’ acts, including coercive sexual acts, from applying to persons lawfully married to each other, consequently depriving justice to survivors of marital rape. This provision is discriminative to married women and should be amended.

It is noted in the preamble of CEDAW that ‘a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.’<sup>175</sup> By failing to address the prevailing social dynamics that condone sexual violence, such as patriarchy and culture, the State of Kenya directly curtails the rights of women, specifically the rights to dignity and equality. As obliged by Article 1 (f) of CEDAW, Kenya should abolish existing customs and practices that increase the vulnerability of women to sexual violence and particularly marital rape. This will include addressing the ‘rape culture’ which encourages male exercise of power, control and dominance to perpetrate rape.

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<sup>172</sup> *Responsibility of States for Internationally Wrongful Acts*, Adopted from the Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10) at Article 32.

<sup>173</sup> General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW at Par 9.

<sup>174</sup> Sexual Offences Act No. 3 of 2006, Laws of Kenya.

<sup>175</sup> Preamble of CEDAW.

### ***Duty to protect***

The obligation to *protect* under CEDAW requires that ‘States parties protect women against discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.’<sup>176</sup> Kenya has failed to protect women from marital rape by not taking appropriate legislative measures that *explicitly* criminalise marital rape, as obliged by article 1 (f) of CEDAW. The inadequacy of legislation demonstrates the neglect by the State to protect survivors of marital rape from discrimination on grounds of *marital status* under CEDAW. Article one of CEDAW explicitly obliges states not to discriminate on the basis of *marital status*. The fact that the rape of an *unmarried woman* by *any person* can sustain a criminal conviction but not that of a *married woman* by a *spouse* is by itself discriminative on grounds of marital status. *Rape is rape, regardless of the victim’s marital status*. Article 3 of CEDAW obliges States to ensure women’s full development and advancement in order to enjoy their human rights in political, social and cultural measures, suggesting legislation as a means to guarantee women the enjoyment of fundamental freedoms on the principle of equality with men. It is time for Kenya to enact such legislation with regards to marital rape.

### ***Duty to fulfill***

The obligation to fulfill requires States to take positive action to facilitate their citizens’ enjoyment of basic human rights, and ensure men and women enjoy equal rights *de jure* and *de facto*.<sup>177</sup> CEDAW obliges States to eliminate all forms of discrimination against women in all spheres of life, including private sphere. As discussed in chapter one, the family is considered a private setting where States may be reluctant to intervene in what may be deemed as ‘intimate family affairs’. The State nevertheless has a duty to intervene in the social protection of women within private family settings because of the apparent manifestation of unequal power relations within such settings that pose the likelihood of vulnerability to sexual violence. One of the ways the State can take positive action in protecting vulnerable members in private family settings is

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<sup>176</sup> General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW at Par 9.

<sup>177</sup> *Ibid.*

to regulate behaviour by criminalising abusive conduct such as sexual and physical violence in domestic relationships.

Article 5(a) of CEDAW obligates state parties to take all appropriate measures to modify the social and cultural patterns of conduct for both men and women, with a view to eliminate prejudices and customary practices which are based on the idea of perceived inferiority or superiority of either of the sexes or on stereotyped roles for men and women. To this end, Kenya is under a duty to address the social and cultural dynamics that tolerate behavior, practices and attitudes likely to promote sexual violence. Article 1 (b) of CEDAW obliges States to adopt appropriate legislative measures, including sanctions where appropriate, to prohibit all discrimination against women. This is an urgent call for Kenya to criminalise marital rape, in fulfillment of her obligation to eliminate all forms of violence against women under CEDAW.

### ***Recommendation 19 of CEDAW***

CEDAW as adopted in 1979, contains no clear reference to violence against women. Article 21 of CEDAW permits the CEDAW committee to ‘make suggestions and general recommendations based on the examination of reports and information received from state parties’.<sup>178</sup> In 1992, the Committee adopted general recommendation 19<sup>179</sup> of CEDAW on ‘Violence Against Women’ which recognized gender based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.<sup>180</sup>

General recommendations however do not have the binding effect of treaties by themselves. They do not require ratification by state parties. They are nevertheless authoritative statements that are instrumental in clarifying the State’s obligations, suggest approaches to implementing treaty provisions, update the main treaty and highlight thematic issues.<sup>181</sup>

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<sup>178</sup> Article 21, CEDAW

<sup>179</sup> CEDAW General Recommendation No. 19: Violence against women (1992). Available at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_GEC\\_3731\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf)

<sup>180</sup> Ibid at para 1.

<sup>181</sup> Centre for Women, Peace and Security, Tackling Violence against women *General Recommendations* <https://blogs.lse.ac.uk/vaw/int/cedaw/general-recommendations/>

Paragraph 1 of General Recommendation 19 expounds further on article 1 of CEDAW, to include *gender based violence* as a form of discrimination against women.<sup>182</sup> Paragraph 6 defines gender based violence to include ‘physical, mental or sexual harm or suffering, threats of acts, coercion or other deprivations of liberty’. The recommendation further affirms that family violence is one of the most insidious forms of violence against women, whose forms include battering, rape, other forms of sexual assault, mental and other forms of violence, perpetuated by traditional attitudes.<sup>183</sup> This recommendation expresses concern that *intimate partner violence* affects women disproportionately, demarcating women as a group in need of proactive state protection.

Paragraph 24 (b) of recommendation 19 requires States parties to ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to *all women*, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims, including gender-sensitive training of judicial and law enforcement officers and other public officials.<sup>184</sup>

Paragraph 9 of the recommendation expounds on the State’s duty to protect human rights by calling upon States to take appropriate measures to eliminate discrimination against women by any person, organization or enterprise. In this regard, States have a responsibility to prevent violations of rights by private actors or to instigate and punish acts of violence.<sup>185</sup>

Recommendation 19 elaborates on the mandatory obligations created by CEDAW thus establishes State obligations with respect to ending violence against women. This calls for Kenya to undertake its responsibility under international law to protect *all women* from human rights violations by domesticating and implementing the obligations of CEDAW. One such mechanism involves enacting adequate legislation that addresses violence against women in the public and private sphere, more importantly stressing the need for Kenya to criminalise marital rape.

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<sup>182</sup> Paragraph 1 of *CEDAW General Recommendation No. 19: Violence against women* (1992) provides that gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.

<sup>183</sup> *Ibid* at para 23.

<sup>184</sup> *Ibid*.

<sup>185</sup> CEDAW Recommendation 19, para 9.

### *CEDAW Reporting Committee*

Article 17 of CEDAW establishes a Committee on the Elimination of Discrimination against Women (“The Committee”) for the purpose of scrutinizing the progress by member states in the implementation of CEDAW. To ensure State compliance, the Convention obliges States parties to submit to the Secretary-General a report on the legislative, judicial, administrative or other measures that they have adopted to implement the Convention within a year after its entry into force and then at least every four years thereafter or whenever the Committee on the Elimination of Discrimination against Women (CEDAW) so requests.<sup>186</sup>

In its latest report,<sup>187</sup> the CEDAW Committee applauded Kenya for the initiatives to strengthen the gender machinery in the country, and in particular enacting recent laws addressing gender equality.<sup>188</sup> The Committee was however concerned about the high level of gender based violence against women and girls in the public and private sphere.<sup>189</sup> The Committee raised questions for Kenya to account for the number of prosecutions and convictions on sexual violence under the Protection Against Domestic Violence Act<sup>190</sup> as well as steps taken to investigate, prosecute and punish perpetrators of sexual violence.<sup>191</sup> In response, the State of Kenya cited the effectiveness of the Sexual Offences Act in imposing stiff penalties for sexual offences except for poor law enforcement during investigation of complaints.<sup>192</sup> Despite raising a query on access to justice, the committee concerned itself with institutional and financial barriers limiting women access to justice<sup>193</sup> such as cost and illiteracy but failed to question the State of

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<sup>186</sup> UN Women, *CEDAW Reporting Guidelines*, Available at <http://www.un.org/womenwatch/daw/cedaw/reporting.htm>

<sup>187</sup> The Committee on the Elimination of Discrimination against Women concluding observations on the eighth periodic report of Kenya on its implementation of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women on 22 November 2017. Available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2fCO%2f8&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2fCO%2f8&Lang=en)

<sup>188</sup> Ibid at para 4. The recently enacted legislation include: Protection Against Domestic Violence Act (2015), Legal Aid Act (2016), Protection Against Domestic Violence Act (2015), Victim Protection Act (2013), Prohibition of Female Genital Mutilation Act (2011) and National Gender and Equality Commission Act (2011).

<sup>189</sup> Ibid at para 22.

<sup>190</sup> Committee on CEDAW, List of issues and questions in relation to the eighth periodic report on Kenya, 13 March 2017 <https://undocs.org/en/CEDAW/C/KEN/Q/8> at Para 9.

<sup>191</sup> Ibid at para 10.

<sup>192</sup> Committee on CEDAW, Replies of Kenya to List of issues and questions in relation to the eighth periodic report on Kenya, 13 March 2017, at para 33. <https://undocs.org/CEDAW/C/KEN/Q/8/Add.1>

<sup>193</sup> Ibid at para 3.

Kenya on the inadequacy of legislation to address forms of sexual violence such as marital rape. The report also failed to include information on the legal, preventive and protective measures that Kenya has taken to address marital rape, a form of violence against women.

### **3.4. The African Charter on Human and Peoples' Rights (The African Charter)**

The African Charter<sup>194</sup> was created to promote and protect human rights and basic freedoms in the African continent. The Charter was ratified by Kenya in 1992. By ratifying the Treaty, Kenya has agreed to be bound by it.

Article 18 of the Charter provides for the elimination of all forms of discrimination against women and obliges States to protect the rights of women as stipulated in international declarations and conventions. This provision constitutes an obligation for member states to protect human rights pertinent to African women under international human rights law. The Charter provides for the right to equality and equal protection of the law in article 3;<sup>195</sup> the right to the respect for life and integrity of person under article 4<sup>196</sup> and the right to the respect of the dignity inherent to a human being by prohibiting all forms of exploitation and degradation such as torture, cruel, inhuman and degrading punishment and treatment under article 5.<sup>197</sup>

Article 2 of the Charter provides that all individuals are entitled to the enjoyment of the rights and freedoms provided therein irrespective of any distinction of any kind. This includes distinctions based on sex, which are used to discriminate against women. Article 3 of the Charter provides that all individuals are equal before the law and are entitled to equal protection by it. Equality in this sense would include gender equality.

Article 18 acknowledges the importance of the family as the basis of society and calls for States to ensure elimination of all forms of discrimination against women and ensure protection of all rights of women and children as stipulated in international declarations and conventions. Article 28 imposes a duty on individuals towards the community and the state, including *inter allia*, the duty to treat others without discrimination, maintain mutual respect and tolerance.

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<sup>194</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <https://www.refworld.org/docid/3ae6b3630.html>, accessed on 19 January 2019.

<sup>195</sup> Ibid at art 3.

<sup>196</sup> Ibid at art 4.

<sup>197</sup> Ibid at art 5.

A unique aspect of the Charter is the establishment of the African Commission on Human and Peoples' Rights ("the Commission")<sup>198</sup> which shall be guided<sup>199</sup> by international law on human and peoples' rights in exercising its mandate to promote human and peoples' rights and ensure their protection in Africa.<sup>200</sup>

The African Court on Human and Peoples' Rights ("the Court") was further established by virtue of article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("the Protocol"). The Protocol came into force on 25 January 2004 and the Court is now fully operational, based in Arusha, Tanzania. The court has jurisdiction over all cases and disputes submitted to it concerning the application and interpretation of the African Charter.<sup>201</sup> An individual or organisation can make a complaint to the Commission or the Court against a state that has ratified the charter, and concerning a violation by a state party of any rights guaranteed by the Charter.

The State and its citizens have a duty to eliminate all forms of discrimination against women in the family and ensure the protection of the women under the African Charter. To this regard, the African Court may be a good platform to enforce Kenya's obligation to protect women by enacting legislation to address marital rape, a form of violation of women's rights.

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (Maputo Protocol)<sup>202</sup> came into force in July 2003 as a supplement of the African Charter, and in particular to expound on the human rights pertinent to African women. The protocol provides stronger provisions for the protection of African women from gender based violence. It emphasises on States obligation to uphold women's right to equality and non-discrimination.<sup>203</sup> Article 4 of the Maputo Protocol urges State parties to take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women, including unwanted or

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<sup>198</sup> The Commission is established pursuant to Article 30 of the African Charter. The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia, and its secretariat subsequently located in Banjul Gambia. Its core functions are: Protection of human and peoples' rights, Promotion of human and peoples' rights and the interpretation of the African Charter. Available at <https://www.achpr.org/>.

<sup>199</sup> Article 60 of the African Charter.

<sup>200</sup> Article 30 of the African Charter.

<sup>201</sup> See <https://www.achpr.org/>, accessed 1 September 2019.

<sup>202</sup> African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, available at: <https://www.refworld.org/docid/3f4b139d4.html>, accessed on 19 January 2019.

<sup>203</sup> *Ibid* at Art 2 (1) a).

forced sex whether the violence takes place in private or public spheres.<sup>204</sup> Kenya has signed but not ratified the protocol. It is highly recommended for Kenya to ratify the Maputo Protocol with respect to enacting adequate penal reforms in the protection of women from sexual violence.

### 3.5. Soft law – DEVAW

Unlike treaties, soft law does not have the binding legal authority. They however shed more light on State obligations under the main treaties and cannot be underpinned in emphasizing the duty of States to protect women under international law. The *Declaration on the Elimination of Violence against Women* (DEVAW)<sup>205</sup> is one such example of a soft law on the rights of women. For the first time, article 2 (a) of DEVAW expressly recognizes marital rape as a form of ‘violence against women.’ Article 4 urges States to condemn all forms of violence against women and develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women, including acts perpetrated by private persons.<sup>206</sup>

### 3.6. Conclusion

In addressing marital rape, it is important to recognize that it is not only a ‘women issue’ but a violation of fundamental human rights. It trots upon various human rights such as the right to dignity and equality, and manifests discrimination on the basis of sex and marital status. With the Constitution upholding the application of general principles of international law in Kenya, and noting that the national legal framework is insufficient to address marital rape, Kenya should be held accountable for its treaty obligations under international law. The most significant human rights convention addressing discrimination against women is the CEDAW, which Kenya is a member state. Kenya is urged to respect, protect and fulfill its human rights obligations under CEDAW by enacting penal reforms to promote the rights of women. Kenya is also a party to the African Charter which further encourages African states to establish mechanisms that promote human and peoples’ rights in Africa. The existence of international human rights law is a call for Kenya to fulfill its duty to end all forms of violence against women, which includes specifically criminalising marital rape.

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<sup>204</sup> Ibid, Art 4 (2) (a).

<sup>205</sup> UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, available at: <https://www.refworld.org/docid/3b00f25d2c.html> [accessed 19 January 2019]

<sup>206</sup> Ibid, Article 4 (c).

## CHAPTER FOUR

### 4.0. MARITAL RAPE: A COMPARATIVE STUDY OF THREE JURISDICTIONS

#### 4.1. Introduction

Despite variations around the world, there is one similarity that draws across different cultures from time immemorial, which is the differential treatment of women from men. History portrays that women were treated as chattels, lacking autonomy and not having an independent mindset.<sup>207</sup> The act of matrimony translates to life-long consent to sexual intercourse. Establishing rape within marriage is an arduous task throughout the world. Owing to difficulties experienced in collecting data specific to marital rape, global statistics can be drawn from studies on intimate partner violence, which describes violence perpetrated by a person whom the victim shares an intimate relationship. WHO reports that almost one third (30%) of women globally who have been in a relationship have experienced some form of physical and/or sexual violence by an intimate partner in their lifetime.<sup>208</sup>

The approach to marital rape varies from State to State. Positive strides have been witnessed in recent years as more and more jurisdictions have enacted legislation to criminalise marital rape.<sup>209</sup> Another development is that gender neutral terms are now used to define the offence of ‘rape’ in most jurisdictions, as opposed to the common law position where the perpetrator could only be a man and the victim a woman. Some jurisdictions still take the traditional view as propounded by Hale that a husband cannot be held liable for rape of his wife. This chapter examines how marital rape is treated in three jurisdictions, that is, South Africa, India and Australia. Like Kenya, India and South Africa report high GBV prevalence and in particular sexual violence. South Africa became one of the first African Countries to criminalise spousal rape. It is vital to appreciate the progress (or lack of it) made by other States in terms of addressing marital rape, to see how Kenya compares globally.

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<sup>207</sup> S.B Miller, *Against Our Will: Men, Women and Rape* (1975) 18.

<sup>208</sup> WHO ‘Violence Against Women: A Factsheet’ (2017) §. Available at <https://www.who.int/news-room/factsheets/detail/violence-against-women>, accessed on 24 June 2019.

<sup>209</sup> See, List of Countries that have made Spousal Rape a Criminal Offence, Wikipedia [https://en.wikipedia.org/wiki/Talk%3AMarital\\_rape%2FCountry\\_lists#Countries\\_that\\_have\\_made\\_spousal\\_rape\\_a\\_criminal\\_offence](https://en.wikipedia.org/wiki/Talk%3AMarital_rape%2FCountry_lists#Countries_that_have_made_spousal_rape_a_criminal_offence), accessed on 2 August 2019.

## 4.2. South Africa

According to the 2017-2018 crime statistics, sexual offences, appear second on the list of 17 most serious community-reported crimes in South Africa, after murder, with 40,035 sexual offences reported against women, with sexual abuse amounting to 2.7% of domestic crimes reported.<sup>210</sup> South Africa has been progressive in recognizing marital rape and further enacting provisions to address and criminalise it, being among the first African countries to criminalise.<sup>211</sup> The basis of recognizing the right to dignity of all people in South Africa is the Constitution.<sup>212</sup> The Bill of Rights is enshrined in Chapter 2 of the South African Constitution to contain the rights of the people and ‘affirm the democratic values of human dignity, equality and freedom.’<sup>213</sup> Section 7 (2) further obliges the State to respect, promote and fulfill these rights. Section 10 provides for inherent human dignity as a non-derogable right and the right to have that dignity respected and protected. The protection of women from violent family spaces can be deduced from the right to freedom and security of the person, provided by Section 12 (1) which includes the right to be free from all forms of violence in both public and private spaces. The State has taken legislative and institutional action to uphold the bill of rights including enacting important legislation to protect women from violence in private sphere.

The *Domestic Violence Act* (DVA) 116 of 1998<sup>214</sup> is the main legislation prohibiting domestic violence in South Africa. It replaced the *Prevention of Family Violence Act*,<sup>215</sup> expanding the scope of ‘family’ and broadening the definition of a ‘domestic relationship.’<sup>216</sup> The preamble of the Act recognises the need to uphold the constitutional freedom and dignity of the person noting that domestic violence is rampant in South Africa, taking many forms and committed in a wide range of domestic relationships.<sup>217</sup>

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<sup>210</sup> South African Police Service Report, *Crime Situation in RSA Twelve Months 01 April 2017 to 31 March 2018* (2018) 32. Available at [https://www.gov.za/sites/default/files/gcis\\_document/201809/crime-stats201718.pdf](https://www.gov.za/sites/default/files/gcis_document/201809/crime-stats201718.pdf), accessed on 2 August 2019.

<sup>211</sup> Oyebanke Yebisi & Victoria Balogun ‘Marital Rape: A Tale of Two Legal Systems’ (2017) 38 *Obiter* 546.

<sup>212</sup> The Constitution of the Republic of South Africa, 1996.

<sup>213</sup> *Ibid* at Section 7 (2) (1).

<sup>214</sup> Domestic Violence Act 116 of 1998.

<sup>215</sup> Prevention of Family Violence Act 133 of 1993.

<sup>216</sup> Section 1 of the Domestic Violence Act (DVA) of 1998.

<sup>217</sup> *Ibid* preamble.

Section 1 of the DVA defines a ‘domestic relationship’ to include the situation where the complainant and respondent were married to each other, either by law, custom or religion. It also defines the term ‘domestic violence’ to include *inter allia* sexual abuse.<sup>218</sup> From the wording of section 1, marital rape is included in the DVA as a domestic violence act. The DVA, by virtue of section 2 protects victims of such abuse by issuing protection. The South African DVA is closely similar to the *Protection Against Domestic Violence Act* of Kenya, which similarly focuses on protection of the family from violence. The South African DVA vests the duty of protection to the South African Police Service assisting the victim to find alternative shelter or to obtain medical treatment.<sup>219</sup> The complainant may further apply to the Court for a protection order, which is issued at the discretion of the Court, upon examination of witnesses, which prohibits the defendant from the following actions:<sup>220</sup>

- (a) Committing any act of domestic violence
- (b) Enlisting the help of another person to commit such act
- (c) Entering a residence shared by the complainant and respondent
- (d) Entering a specified part of such a shared residence
- (e) Entering the complainants residence
- (f) Entering the complainants place of employment
- (g) Preventing the complainant who ordinarily lives or lived in a shared residence
- (h) Committing any other act specified in the protection order

The DVA is a milestone towards the protection of domestic violence victims from further violence, and does not preclude the complainant from lodging a criminal complaint to pursue criminal action.<sup>221</sup> Studies on the implementation of South Africa’s DVA however reveal that rarely have protection orders been granted for sexual violence.<sup>222</sup> Karimakwenda criticizes the unwillingness of State actors in South Africa to take sexual violence in intimate relationships seriously.<sup>223</sup>

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<sup>218</sup> Ibid section 1.

<sup>219</sup> Ibid section 2.

<sup>220</sup> Ibid section 4-7 of the Act.

<sup>221</sup> Ibid section 4 (2) (b).

<sup>222</sup> 183-184 Also see Machisa et al., *Rape Justice in South Africa*, 42.

<sup>223</sup> Nyasha Karimakwenda *Where Rape Does Not Exist: Tracing the Unsettled Position of Marital Rape in South Africa Through Women’s Recourse-seeking Journeys* (PhD Thesis, University of Cape Town 2018) 183-184.

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA)*<sup>224</sup> is the main Act governing criminal sexual conduct in South Africa. Section 3 of SORMA clearly defines the offence of rape as ‘unlawfully and intentionally committing an act of sexual penetration’ with another. According to section 1 of the Act, sexual penetration includes:

‘Any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or the genital organs of an animal, into or beyond the mouth of another person.’

Like the *Sexual Offences Act* of Kenya,<sup>225</sup> SORMA draws the line between rape and sex on the ability to consent, and goes further to include the use of ‘force, threats or intimidation’ as some of the circumstances to imply involuntary consent.<sup>226</sup>

The question of whether a husband can be guilty of raping his wife in South Africa was brought into test to warrant for legal developments. Section 5 of the *Prevention of Family Violence Act* of 1993 abolished the common law position of the impossibility of spousal rape. This provision can be termed as among the first remarkable steps made by an African State to recognize marital rape and protect married women from sexual violence by husbands. The section was later amended by SORMA, from the wording of Section 3, to infer that ‘any person’ could mean a person who is a spouse or intimate partner. Perhaps the most significant reference to the criminalization of marital rape in SORMA is section 56 (1) which provides that *the existence of a marital or other relationship shall not be a valid defence for an offence of rape or sexual assault*. This shows that South Africa has made a significant milestone in responding to the criminal aspect of marital rape. In comparison, the *Sexual Offences Act* of Kenya under section 43, does the very opposite by exempting persons lawfully married to each other from ‘intentional and unlawful’ sexual acts under the Act.

Before the enactment of the sexual offences law, South African courts were accused of ignoring or ‘downgrading’ rape cases involving intimate partners, as that not warranting a

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<sup>224</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA).

<sup>225</sup> The Sexual Offences Act No.3 of 2006, Laws of Kenya.

<sup>226</sup> Section 1 (2) of the SORMA.

criminal conviction.<sup>227</sup> Judges would tend to propagate ‘rape myths’ that it was not possible for a woman to be raped by a person she was in an intimate relationship with. In the matter of an appeal between *Moipolai v The State*,<sup>228</sup> the appellant and the complainant had two children together at the time of the alleged act of rape, which occurred at the appellant’s home. The complainant was then eight months pregnant with their third child and they were lovers for seven years. The appellant denied having raping the complainant simply because he had two children with her. The appellate court in this case reduced the sentence from fifteen to ten years, citing among other factors, that the appellant and the complainant were ‘no strangers to one another.’

The court opined, ‘[T]his rape should therefore be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable.’<sup>229</sup> The reasoning of the court in this case was that consensual sex could be implied if the complainant knows the assailant.

Yebisi and Balogun allude that the recent case of *S v Mvamvu*<sup>230</sup> could have been an opportunity for the South African court to take a clear stand on marital rape, but the judges applied what they perceived to have been the ‘normal’ situation, being the assumption that a man raping his wife is unthinkable.<sup>231</sup> There are also instances where the sentence of a rapist was reduced on the basis that no violence had been applied to rape the victim and thus could not warrant a conviction of rape.<sup>232</sup> This shows a similar evidential problem as experienced in Kenya, where it proves difficult to establish ‘lack of consent’ where the rape, in the words of MacKinnon ‘looks like sex’.<sup>233</sup>

Cultural practices have played a big role in contributing to marital rape in South Africa. Karimakwenda extensively examined the customary practice of *Ukuthwala*<sup>234</sup>, and how it perpetrates marital rape in South Africa.<sup>235</sup> She argues that the custom by its very nature constitutes rape as most victims she interviewed in her research testified to have been forced into

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<sup>227</sup> Oyebanke Yebisi & Victoria Balogun ‘Marital Rape: A Tale of Two Legal Systems’ (2017) 38 *Obiter* 547.

<sup>228</sup> *State v Moipolai* (CA 53/2004) [2004] ZANWHC 19.

<sup>229</sup> *Ibid* para 23.

<sup>230</sup> *S v Mvamvu* 2005 (1) SACR 54 (SCA).

<sup>231</sup> *Supra*. Oyebanke Yebisi & Victoria Balogun ‘Marital Rape: A Tale of Two Legal Systems’ (2017) 547.

<sup>232</sup> *State v. Sebaeng* (CA 16/2007) [2007] ZANWHC 25.

<sup>233</sup> Catherine A. Mackinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (1983) 16.

<sup>234</sup> *Ukuthwala* refers to the isiXhosa and isiZulu word for the customary practice of abducting a girl or woman for purposes of marriage.

<sup>235</sup> Nyasha Karimakwenda *Where Rape Does Not Exist: Tracing the Unsettled Position of Marital Rape in South Africa Through Women’s Recourse-seeking Journeys* (PhD Thesis, University of Cape Town 2018) 120-155.

their first sexual experience on the night abduction, and in most cases, the violence continued throughout the marriage.<sup>236</sup> In the *Jezile* case,<sup>237</sup> the Court strongly affirmed the intolerance of the law towards such cultural practices that tend to violate the rights of women.

‘It is intolerable that very serious crimes such as trafficking, rape and assault are committed under the guise of culture, tradition and religion. Both parties must consent thereto. Hiding behind now defunct customs to satisfy one’s needs must be discouraged.’

A remarkable step taken by South Africa in prosecuting sexual offences is the establishment of the Sexual Offences Court (SOC) to specifically handle sexual offences.<sup>238</sup> These courts consisting of specialized professionals in health and law enforcement were created with the purpose of:

‘reducing the insensitive treatment of victims in the criminal justice system by following a victim-centered approach; to adopt a coordinated and integrated approach among the various role-players who deal with sexual offences; and to improve the investigation and prosecution, as well as the reporting and conviction rates in sexual offences cases’<sup>239</sup>

Key features of the courts include separate chambers and private waiting rooms in a separate floor to prevent face-to-face contact of sexual offences complainants and witnesses with the public.<sup>240</sup> This is no doubt a unique intervention of separating sexual offences from other criminal offences and granting the cases privacy and sensitivity. Marital rape is deemed a private affair and victims may not readily report or give out information for fear of testifying against their husbands. The sexual offences courts therefore are a good benchmark for Kenya in establishing mechanisms to address marital rape.

Despite the progress in legislation and implementation of specific measures to address marital rape, marital rape remains problematic in South Africa. Yebisi and Balogun call for a more comprehensive approach which goes beyond criminalisation to enacting measures targeted at prevention, psychological health support, reporting and investigation. Nevertheless, the

<sup>236</sup> Ibid, Chapter 8: *The life histories of two Ukuthwala survivors*, 208-214.

<sup>237</sup> *Jezile v S and others* (A 127/2014) [2015] ZAWCHC 31.

<sup>238</sup> Supra. Oyebanke Yebisi, Victoria Balogun ‘Marital Rape: A Tale of Two Legal Systems’ 548.

<sup>239</sup> Department of Justice and Constitutional Development “Report on the Re-establishment of Sexual Offences Courts” August 2013 <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf> (accessed 2018-03-05) 17.

<sup>240</sup> Oyebanke Yebisi, Victoria Balogun, *Marital Rape: A Tale of Two Legal Systems*

progress noted so far is commendable, especially the criminalisation of marital rape, progressive case precedents prohibiting cultural practices that promote marital rape and establishing specialized sexual offences Courts to specifically address sexual offences.

### 4.3. India

Kenya and India share a common law legal system, owing to English colonial ties. Rape in India constitutes a grievous criminal offence, but not ‘rape within marriage.’ India first applied the *Indian Penal Code*<sup>241</sup>, enacted in 1860. This code was based on the 17<sup>th</sup> century implied consent theory which did not recognize marital rape as a felony under an exemption clause in section 375 of the Indian Penal Code.<sup>242</sup> Similar to Kenya, the Indian Penal Code adapted the common law ‘Doctrine of Coverture’ which considered a husband and wife as one person under common law. The Indian penal Code consequently adopted the exemption clause under section 375. Exception 2 to section 375 exempts non-consensual sexual intercourse between husband and wife, from the definition of rape, so long as the parties are above the age of fifteen.

Marital rape in India was first discussed in 1890 in the case of *Empress v. Hari Mohan Maiti*.<sup>243</sup> This case followed the rape of Phulmoni Dasi by her husband three times on her wedding night. The 10 year old girl later succumbed to the injuries sustained by the rape. Owing to the exemption doctrine, her 30 year old husband was subsequently convicted under section 338 of the Indian Penal Code for ‘causing grievous harm by an act endangering life or personal safety of others.’ This led to vehement protests in 1891 against the amendment of section 375 of the Indian Penal Code, which raised the age of consent from ten to twelve years, and making it an offence of rape to have sex with a girl below twelve, including in marriage. The public outrage at the time, seem to have focused on the girl’s age, and the legal amendment to follow was centered on increasing the age of consent.<sup>244</sup>

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<sup>241</sup> The Indian Penal Code, Act No 45 of 1860.

<sup>242</sup> Mrinalini Sinha ‘Colonial Masculinity: The ‘manly Englishman’ and The ‘Effeminate Bengali’ in the Late Nineteenth Century’ (1995) 143.

<sup>243</sup> *Queen-Empress vs Hurree Mohun Mythee* (1890) 18 Cal 49.

<sup>244</sup> Laxmi Muthy ‘Unholy matrimony: Rape by statute’ *Deccan Chronicle* 27 August 2017. § Available at <https://www.deccanchronicle.com/discourse/270817/unholy-matrimony-rape-by-statute.html>, accessed 2 August 2019.

India continues to observe the same trend of dwelling on the issues of child marriage, whose age of consent has since been increased to 15 but ignoring the possibility of marital rape.<sup>245</sup> The high prevalence of child marriage in India puts young girls at risk of forced sex and exploitation during their marriage.<sup>246</sup> According to UNICEF report, South Asia is still home to the largest number of child brides globally, at 44%, estimated at 285 million which is however a sharp decline from previous years.<sup>247</sup>

The age of consent for sex outside marriage in India was raised from 16 to 18 in 2013, still failing to address the issue of marital rape.<sup>248</sup> The words of India's Union minister for women and child development downgrading marital rape sparked outrage and nationwide protests.<sup>249</sup> Khushboo Sundar, a social activist, responded on Indian TV news program hour.

'A woman, if she is raped, and if she is married-under the so called sanctity of marriage-you mean to say that a man thinks she's his property, and that he can use and abuse her? Rape is rape, period, marital or not marital.'<sup>250</sup>

In the case of *The Chairman, Railway Board v. Chandrima*, the Supreme Court again held that the offence of rape with any women violates her right to life and her right to live with human dignity as she is the victim of rape.<sup>251</sup>

Currently, women raped by their husbands can seek recourse under the Protection of Women from Domestic Violence Act, 2005, which defines 'sexual abuse' as 'any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman'.

The lack of a proper legal framework to address marital rape in India may be attributed to the cultural and values of the Indian society, and the low autonomy granted to married women.

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<sup>245</sup> Vedang Mishra & Shubhi Khare 'Legality of Marital Rape Exception under Indian Penal Code: A case for Criminalisation' (2014) 2 IJRA at 411.

<sup>246</sup> Ibid at 417.

<sup>247</sup> United Nations Children's Fund (UNICEF) brief *Child Marriage, Latest Trends and Future prospects* (2018)§. Available at <https://data.unicef.org/wp-content/uploads/2018/07/Child-Marriage-Data-Brief.pdf>, accessed on 2 August 2019.

<sup>248</sup> Bhattacharya, Pallavi 'Fighting marital rape in India' (2017) 21. Available at <http://link.galegroup.com/apps/doc/A489080663/AONE?u=unict&sid=AONE&xid=6451d586>, accessed on 14 Apr. 2019.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> *The Chairman, Railway Board v Chandrima* AIR 2000 (SC) 988.

The women are therefore expected by culture and religion to please their husbands as a sacred duty, failure to which is regarded as sin.<sup>252</sup>

*'Hinduism is the ONLY religion in the world where the husband is put on par with God. The Laws of Manu, India's ancient revered scripture merrily educates women. His dictum that a wife ought to respect her husband as God and serve him faithfully, even if he were vicious and void of any merit, was accepted as applicable to all women.'*<sup>253</sup>

Similar to Kenya, religion, patriarchy and cultural norms present an uphill task to address marital rape in India. Article 21 of the Indian Constitution<sup>254</sup> states that 'No person shall be denied of his life and personal liberty except according to the procedure established by law.' Recent developments in India include the Supreme Court's decision of explicitly recognizing Article 21 (a) of the Constitution, as the right to make choices regarding intimate relations.<sup>255</sup> The Supreme Court precedents imply that the rights to personal liberty, dignity and bodily integrity under Article 21 of the Indian Constitution constitute the right to make private choices involving sexual relations in marital relationships.<sup>256</sup> This was upheld in *Justice K.S. Puttuswamy (Retd.) v. Union of India*.<sup>257</sup> In the *State of Karnataka v. Krishnappa*,<sup>258</sup> the Supreme Court held that '[...] Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female'. Makkar appreciates this ruling as a move towards gender equality as provided by Article 14 of the Indian Constitution.<sup>259</sup> It does not distinguish the rights of women from men in private relationships. It also guarantees to right to privacy in marital relationships and upholds the rights of women to abstain from sexual relations. The Indian Penal Code exemption 2 of Section 375<sup>260</sup> is therefore inconsistent with Articles 14 and 21 of the Indian Constitution. Just like in Kenya, there is need for amendment of the Penal Code to explicitly recognize marital rape as a criminal offence in India.

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<sup>252</sup> Vedang Mishra & Shubhi Khare *Legality of Marital Rape Exception under Indian Penal Code: A case for Criminalisation* (2014) 2 IJRA at 416.

<sup>253</sup> Ibid

<sup>254</sup> The Constitution of India, 1950.

<sup>255</sup> Sarthak Makkar *Marital Rape: A Non-criminalised Crime in India* (2019) Harvard Human Rights Journal §

<sup>256</sup> Ibid.

<sup>257</sup> 2017 AIR 2017 (SC) 4161 (India).

<sup>258</sup> 2000 (4) (SCC) 75 (India)

<sup>259</sup> Sarthak Makkar *Marital Rape: A Non-criminalised Crime in India* (2019) HHRJ §

<sup>260</sup> Indian Penal Code § 375, No. 45 of 1860, India.

#### 4.4. Australia

For a long time, Australia applied the common law exemption doctrine that exempted husbands from the prosecution of marital rape. Sir Mathew Hale Treatise Pleas of the Crown, published in 1736 stated:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract, the wife hath given herself in this kind unto her husband, which she cannot retract.<sup>261</sup>

The elements of rape in South Australia were as stated by Bray CJ in *R v Brown* as the act of unlawful sexual intercourse by a man without a woman's consent, or not caring whether or not he had her consent.<sup>262</sup> In recognizing the marital rape immunity, Bray CJ stated: 'I suppose the inclusion of the word 'unlawful' is meant to exclude intercourse between spouses and, I assume without deciding, that the necessary *mens rea* must include an intention by the accused to have intercourse with a woman whom he knows not to be his wife.'<sup>263</sup> Section 76A(1) of the *Criminal Law Consolidation Act of 1935*<sup>264</sup> ("CLCA") further provided that an allegation of rape had to be made within three years of the commission of the offence or otherwise be time barred.

South Australia reformed the above long running immunity doctrine in 1976, making it one of the first jurisdictions in the world to make such a reform.<sup>265</sup> The abolition was premised on the grounds that the immunity was outdated and sexist,<sup>266</sup> as the then Attorney General argued in Parliament in 1976.

[W]e believe that all law which continues to treat a wife as the property of her husband...should be abolished or amended. Every adult person must be given the right to consent to sexual intercourse both within and outside marriage.<sup>267</sup>

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<sup>261</sup> Sir Matthew Hale, *Historia Placitorum Coronae* (London Professional Books, first published 1736, 1971 ed) vol 1 629.

<sup>262</sup> *R v Brown* 1975 (10) SASR 139 at 141.

<sup>263</sup> *Ibid* at 147-148.

<sup>264</sup> Criminal Law Consolidation Act, 1935, South Australia.

<sup>265</sup> Wendy Larcombe and Mary Heath, 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' (2012) 34 SLR 786.

<sup>266</sup> Toole, Kellie, *Marital Rape in South Australia: R v P, GA* (July 31, 2012). (2011) 35 Crim LJ 238-239.

<sup>267</sup> South Australia Legislative Council, *Parliamentary Debates*, Peter Duncan, Attorney-General (9 November 1976) 1942-1943.

South Australia reacted by passing reforms that criminalized rape in marriage, when ‘aggravating circumstances’ existed.<sup>268</sup> The requirement for aggravating circumstances required additional proof when the accused was married to the complainant. The circumstances were of the effect that for a charge of marital rape to hold, sexual intercourse without consent had to be accompanied by force or a threat of force.<sup>269</sup> South Australia introduced further reforms in 1992 extinguishing the requirement for aggravating circumstances. After 1992, the fact that the accused was married to a complainant would be irrelevant to prove the charge of rape.<sup>270</sup>

In 1991, the court had disagreed with Hale’s statement in *R v L*<sup>271</sup>, stating ‘ It is appropriate for this court to reject the existence of such a rule as now part of the common law of Australia.’<sup>272</sup> In this case, the accused was charged with having raped his wife in 1989. At the time, he could have been prosecuted under Section 73 of the CLCA for using force or threats to have intercourse with his wife. The court instead addressed the actual immunity which Brennan J described as a ‘common law fiction.’<sup>273</sup> The case subsequently declared the abolition of the common law marital rape immunity in Australia. However it failed to answer the question whether this new position could be applied with a retrospective or prospective effect. This was not to be answered until 2010.

The issue of marital rape was not considered again until the case of *PGA v The Queen*<sup>274</sup> where the High Court was tasked with making a determination whether rape within marriage was an offence under the Australia Common law in 1963. In this case, the appellant was charged with two counts of rape which were alleged to occur in 1963 while the parties were living together as husband and wife. The majority, comprising French CJ, Gummow, Hayne, Crennan and Kiefel JJ, by a 5:2 decision, held that at common law there was no presumption of consent to sexual intercourse operative as at 1963. The minority, Heydon J and Bell J on the other hand held that impose such criminal liability would create problems of retrospective criminal liability.

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<sup>268</sup> Duncan Chappell & Peter Sallmann ‘Rape in Marriage Legislation in SA: Anatomy of a Reform’ 14 (1982) *Australian Journal of Forensic Sciences* at 51.

<sup>269</sup> Criminal Law Consolidation Act of 1935 (SA), s 73(5).

<sup>270</sup> Criminal Law Consolidation (Rape) Amendment Act of 1992, South Australia.

<sup>271</sup> *R v L* 1991 (174) CLR.

<sup>272</sup> *Ibid* at 379.

<sup>273</sup> *Ibid* at 402.

<sup>274</sup> 2012 (245) CLR 355.

Larcombe and Heath consider the PGA case a landmark in Australia as it accorded the High Court an opportunity to determine for the first time whether the marital exemption for rape ‘had been part of the common law of Australia and, if so, whether it had ceased to be part of the common law by 1963.’<sup>275</sup>

The majority held that Hale’s proposition was never a settled rule of law, and that marital immunity for rape prosecution was non-existent as a matter of law, from 1935 to 1976 in South Australia.<sup>276</sup> Steven J contended that there was further no absolute right to sexual intercourse in marriage, and a man could be liable for inappropriate sexual offence in certain circumstances.<sup>277</sup> The minority in this case ruled that the exemption remained part of the common law applied in Australia in 1963, when the offence occurred. The concern was that dating back to 1963, this would imply that acts of marital rape which were legal then would be punishable at the time. Heydon J in disagreeing with abolition of this exemption by the courts argued that retrospective operation of criminal conduct offends fundamental principles of the rule of law as it ‘criminalizes conduct which, if took place, was lawful at the time it took place.’<sup>278</sup> This implies that the legislative reforms ‘could apply to offences alleged to have been committed before the enactment of the statutory reforms.’<sup>279</sup> To conclude the case, Bell J concludes that the fact that ‘[t]he common law was demeaning to women in its provision of the immunity’ is not sufficient reason ‘to permit the conviction of the appellant for an act for which he was not liable to criminal punishment at the date of its commission.’<sup>280</sup> In her judgment, and while dissenting from Hale’s proposition, Bell J noted:

‘Hale’s reason is that the wife’s consent at marriage is irrevocable. Surely, however, the consent is confined to the decent and proper use of marital rights. If a man used violence to his wife under circumstances in which decency or her own health or safety required or justified her in refusing her consent, I think he might be convicted of rape, notwithstanding Lord Hale’s dictum. He gives no authority for it, but makes the remark only by way of introduction to the qualification

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<sup>275</sup> Wendy Larcombe & Mary Heath, ‘Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*’ (2012) 34 SLR 786.

<sup>276</sup> *Ibid* 806.

<sup>277</sup> *PGA v The Queen* (2012) 245 CLR 355, 435 [217], quoting Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan and Co, 1877) 172 n 1.

<sup>278</sup> *PGA* (2012) 245 CLR 355, 441 [235].

<sup>279</sup> *Ibid* 443 [243].

<sup>280</sup> *Ibid* 445 [247].

contained in the latter part of clause (1), for which *Lord Castlehaven's Case* (3 St Tr 402) is an authority'.<sup>281</sup>

Kos Lesse contends that *PGA v The Queen*, 'expressly denied the role of social change in Australia as a legitimate method of legal reasoning.'<sup>282</sup> Larcombe and Heath contend that the marital exemption doctrine remained very much alive in Australia until the pressure of feminists and human rights activism against violence against women. After the PGA decision, unless statute barred marital rape is now a criminal offence in South Australia, Victoria and New South Wales.<sup>283</sup> However in Queensland, Tasmania and Western, marital rape remains exempt from prosecution prior to the reforms of the 1980s which repealed the criminal codes to remove the exemption.<sup>284</sup> The scholars attribute PGA to inconsistency regarding access to justice for offences of marital rape committed prior to the 1980's as they differ depending on where in Australia the offence occurred.<sup>285</sup> They further find it discriminatory to older women who are time barred from filing a criminal complaint and criticize the decision as to not acknowledge the impact of the silence of the law on marital rape on demeaning the dignity and rights of women.<sup>286</sup>

#### 4.5. Conclusion

It is a well-established argument across the world that rape is a serious offence attracting heavy penalty under criminal law. This is however not the case in all jurisdictions when it comes to 'rape in marriage.' Upon comparison of how the three countries treat marital rape, the reluctance to include marital rape cuts across their legal history. This is until major case law and penal review milestones, as it is in the case of South Africa and Australia. As in the case of Kenya, there is a strong correlation between patriarchy and culture with violence against women in India and South Africa. In India, this is further accelerated by religion and the tolerance of child

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<sup>281</sup> *PGA v The Queen* (2012) 245 CLR 355, 435 [217], quoting Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan and Co, 1877) 172 n 1.

<sup>282</sup> Lesse Kos, *PGA V The Queen: Marital Rape in Australia: The Role of Repetition, Reputation and Fiction in the Common Law* (2014) 37(3) MULR 832

<sup>283</sup> Wendy Larcombe and Mary Heath, 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' (2012) 34 SLR 803.

<sup>284</sup> *PGA* (2012) 245 CLR 355, 398 [157].

<sup>285</sup> Wendy Larcombe and Mary Heath, 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' (2012) 34 SLR 804.

<sup>286</sup> *Ibid* at 805.

marriage, similar to the *Ukuthwala* practice in South Africa. In India and Australia, the common law doctrine of immunity was applied to prohibit sexual intercourse between husband and wife from being treated as a sexual offence. South Australia has been progressive in abolishing the exemption doctrine, through case law, while India and Kenya have not. Similarly, India and Kenya ought to recognize the repugnance and inaccuracy of Hale's proposition, and especially in line with modern developments in human rights and feminism, which seeks to uphold the dignity of women without separating married from unmarried women. Through legislation, South Africa has similarly fought to include marital rape as a criminal offence. South Africa further establishes special courts with tailored facilities and rules of evidence to specifically deal with such cases. This is a progressive example of an African country that has taken tremendous steps in combatting marital rape. The three jurisdictions however portray a bumpy ride towards combatting and criminalizing marital rape. It would only be compatible with the principles of international human rights that marital rape be addressed at a global level. This requires collective efforts to urge States to criminalize and take appropriate action to address.

## CHAPTER 5

### 5.0. TOWARDS COMBATING AND CRIMINALISING MARITAL RAPE: CONCLUSION AND RECOMMENDATIONS

#### 5.1. CONCLUSION

In conclusion, I take the position that it is time for Kenya to criminalise marital rape as a response to the prevailing problem of sexual violence in spousal relationships and to fulfill her human rights obligations under International law. I strongly take the view that *a rapist remains a rapist, irrespective of his relationship with the victim.*

This paper interrogated the existence and legal response to marital rape in Kenya. To understand marital rape, it was critical to examine this form of rape within the context of sexual violence. The Kenya Demographic and Health Surveys indicated high prevalence of sexual violence in intimate partner relationships, mapping husbands as key perpetrators of the violence.<sup>287</sup> Testimonies of marital rape survivors recorded by the Women Rights Awareness Program (WRAP)<sup>288</sup> were further highlighted, indicating that the existence of marital rape is very much a reality in Kenya. Marital rape forms a public health challenge, causing multiple health effects to victims. It is a barrier to civil, social and economic participation of women as it negatively impacts their productivity and wellbeing. Being a form of GBV, sexual violence against women in spousal relationships is rooted in gender inequality and unequal power relations between men and women. There are two loopholes identified in this paper with regards to inadequate protection of women from marital rape. First, the existing law has failed to expressly recognize and establish an offence of marital rape. The legal exemption of marital rape in Kenya is based on the common law exemption doctrine, which was premised on the rule that a woman's marriage vows provided ongoing consent to her husband's sexual demands. Considering the reality of the menace caused by marital rape in Kenya, the paper argues for a shift from the exemption position, and proposes for a law addressing and criminalising marital rape as an urgent and needful response to the problem. The current lack of legislation may encourage perpetrators who may commit the acts consciously aware that they cannot be held

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<sup>287</sup> KDHS (2008-09)253. KDHS (2014-15) 297-302.

<sup>288</sup> The African Population and Health Research Center (APHRC) *Marital rape and its impact: A policy brief for Kenyan members of parliament* (2010) Policy Brief no 13 §.

liable for a charge of marital rape under Kenyan criminal law. Lacking recourse, the victim's human rights to equality, dignity and freedom from cruel and degrading treatment, are subsequently violated, and consequently justice is denied. Secondly, the structures in the society discriminate women, leading to power differences between men and women, that play a big role in perpetrating a 'rape culture'. These inequalities are formed overtime from misconceived cultural and social constructions governing sexuality. Women and girls' unequal status in their family and the perceived male control and dominance within the same relationships, increases their vulnerability to abuse, their ability to exercise independent decisions, and to leave abusive situations.<sup>289</sup> With developments in international human rights, the rise of feminism and gender equality working towards ending violence against women, lack of legislation to address marital rape distorts the quest for gender equality. Kenya is a party to international treaties such as CEDAW and the African Charter which oblige states to eliminate discrimination against women and ensure women's right to equality. In this regard I conclude that Kenya should explicitly criminalise marital rape in order to respect, protect and fulfill human rights pertinent to women under international human rights law. South Africa and Australia were lauded as Jurisdictions with progressive laws that offer protection to married women by criminalizing marital rape, while India lags behind with Kenya in making such progress. Finally, in this chapter I suggest recommendations being solutions and strategies that the State ought to consider, in order to adequately protect women and respond to marital rape in Kenya.

## **5.2. RECOMMENDATIONS**

The road to criminalisation of marital rape will involve not only progress in the legal system, but a comprehensive strategy that will ensure that the rights holders, being victims of marital rape, are aware of their rights to dignity and equality, so as to claim any violation and prevent further violation. This is to hold the ultimate duty bearer, the State, accountable for the fulfillment of these rights. The prevention of marital rape will equally demand gender-transformative programming, an approach that will seek to transform gender roles and promote gender-equitable relationships between men and women.<sup>290</sup> This approach will help to institute behavior change among men and shift social and cultural practices that tend to increase the vulnerability of

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<sup>289</sup> UNFPA 'Addressing violence against women and girls in sexual and reproductive health services: A review of knowledge assets' (1998) 13.

<sup>290</sup> *Ibid.*

women. Ultimately, it is important for the State to respond to the health and social-economic challenges created by marital rape. Prevention and response on marital rape will not only involve the State but also other major actors in Kenya such as the civil society, religious institutions and the media, to work together in combatting marital rape. The recommendations' proposed constitute both legal and extra-legal solutions that Kenya should adapt with respect combatting and criminalizing marital rape.

### **5.2.1. Extra-legal recommendations**

The awareness on the very existence of marital rape is low in Kenya, as evidenced by the scarcity of data on this area of GBV. It would be difficult for women to claim for rights they are not aware of, nor acknowledge that such rights have been violated. Creating awareness on marital rape will also help to highlight on the existence, problems and challenges posed by this form of gender based violence. This will prompt the State to cease trivializing the problem and work towards finding a solution, which will ultimately lead towards legislation.

Marital rape in Kenya is highly unreported, largely due to its private and sensitive nature. There is need to improve research on marital rape in terms of data collection, analysis and academic research. The government of Kenya should fund comprehensive national survey on marital rape that will help to inform the public on the estimated prevalence. Generation of data will help the State to gain better knowledge and understanding in order to apply interventions that will provide solutions to combat marital rape.

The media is an important aspect of socialization and an agent of change in Kenya Not only do journalists relay useful information; they bring their own opinions, beliefs and attitudes into a story.<sup>291</sup> Article 34 of the Constitution of Kenya guarantees the freedom and independence of electronic, print and all types of media, in which the State shall not *inter allia* interfere or penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.<sup>292</sup> This right should be guarded sparingly with respect to the reporting of Gender Based Violence. The media should contribute in the visibility and publicity of marital rape, a form of Gender Based Violence that is currently under-reported in Kenya. This would involve

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<sup>291</sup> Namati 'Reporting Gender Based Violence: A Handbook for Journalists' (2009)18.

<sup>292</sup> The Constitution of Kenya 2010, Article 34 (1)as read with Article 34 (2) (a) and (b)

unraveling of victims' stories as news items and publications in dailies. Vernacular radio stations could also be used as a means of creating awareness in rural and grassroot areas. A public media campaign on marital rape will enable the public to appreciate the problem and further to put pressure on legislators to enact a law that criminalizes marital rape.

As observed, culture and patriarchy are key accelerators of marital rape, and gender based violence in general. Creating awareness on marital rape is a strategy that should be adopted by all state actors including the civil society, religious institutions, the media among others. To this regard, gender mainstreaming should lead the social campaign to end all forms of violence against women. The goal of gender mainstreaming would be to integrate and promote gender equality and women empowerment in the structures of society. An effective gender mainstreaming program will aim to instill knowledge, developing progressive attitudes and create a change of behaviors that will create a new culture of appreciating and respecting the rights of women. This is a long term perspective that involves change in policies, plans and cultural transformation.

An important long-term strategy is to actively involve men and boys in gender equality and women empowerment. The objective is to empower men on the importance of the rights and health of women not only to the female beneficiaries, but also to the wellbeing of their families and communities. The high prevalence of violence against women in private settings in Kenya is largely attributed to patriarchy and retrogressive cultural norms existent in the African culture. In order to break these norms, it is important to sensitise men in general through social and religious settings that play a key role in advocating for behavioral change. To create a safer place for women in the next generation, the advocacy messages against marital rape should equally challenge parents to raise their sons differently, to teach them how to respect girls and women from a tender age so as not to be future perpetrators of violence against women. Gender mainstreaming targeting men and boys will ultimately reduce the number of potential perpetrators and instill among men and boys a culture of awareness on the rights of women.

### 5.2.2. Legal recommendations

The State should seek to promote international human rights standards. These include those that are operationally directed at promoting and protecting human rights pertinent to women. The current state on marital rape in Kenya deviates from the State obligations under CEDAW and the African Charter, as well as other relevant international human rights instruments.

The State should adopt *Human Rights Based Approaches (HRBA)* as interventions, tools and strategies to achieve gender equality and elimination of violence and discrimination against women in Kenya. This kind of approach is anchored on a system of rights, with the right holders being women in this case, and corresponding obligations on the State to respect, protect and fulfill this rights as established by International law.

I suggest the following ways of applying human rights-based approaches for the State to respond to marital rape in Kenya:-

- Striving to incorporate standards and recommendations set out by the international human rights system on ending all forms of discrimination and violence against women.
- Fulfilling her obligations under CEDAW and the African Charter to address violence and discrimination against women by establishing penal reforms that will explicitly criminalise marital rape in Kenya.
- Working with women and girls to empower them to understand and demand their rights from the State.
- Ensuring that prevailing social and cultural norms do not violate women's human rights and become perpetrators of violence.
- Promoting and ensuring access to justice for victims of violence against women.
- Building the capacity of the police and other judicial officers to investigate cases of GBV.
- Ensuring that women and girls participate in the making of laws and policies on gender equality.
- Creating a political and socio-cultural environment that is committed to eliminate violence against women.
- Ensuring access to post-violence health services and rescue services for survivors of violence against women, including counseling and psycho-social support.
- Establishment of a gender violence center in every public hospital and strengthening the capacity of health workers to specifically offer tailored medical response to survivors of marital rape

- Collaborating with other actors such as international organisations, the civil society, religious organisations and the private sector in preventing human rights abuses.

The State has failed to protect the rights and dignity of women by maintaining the exemption doctrine, as evidenced in section 43 of the *Sexual Offences Act* of Kenya, which precludes sexual acts of coercion from constituting sexual offences if the persons are lawfully married. The existing legislation is insufficient and inadequate in addressing marital rape in Kenya. The current legal status of marital rape display sheer ignorance on the respect of women' right to dignity. This is a violation of Article 27<sup>293</sup> of the Constitution of Kenya, and a deviation from the State's responsibility towards fulfilling international human rights and standards. Due to the current treatment by the legal system, married women remain unprotected by the law, and as a result, the perpetrators of marital rape cannot be pursued as criminals. Justice is untendered and married women continue to suffer with no recourse. It is time for the State to take up its responsibility to protect the rights of women under national and international law.

The *proper naming and creation of the offence* would be a good start towards criminalization. The term 'marital rape' creates a legal difficulty as it is difficult to prove rape in marriage, evidenced by the burden of proof required in sexual offence cases and the presumption of sexual consent in marriage. It is important to amend the *Protection Against Domestic Violence Act*<sup>294</sup> to state 'marital rape' as opposed to a general 'violence within marriage'. The latter has been generally interpreted by courts to refer to physical forms of violence within marriage as the precedents rule out rape within marriage. The Act is also currently preventive as opposed to punitive, which further makes it difficult to hold a criminal charge of 'sexual violence within marriage' under this Act. Proper criminalization will help to aggravate the seriousness and intensity of the act within domestic settings. Similarly, the *Sexual Offences Act*<sup>295</sup> should be amended to include marital rape and categorically state what acts would constitute the offence. Alternatively, a new legislation would be enacted by Parliament to specifically address marital rape and establish it as an offence. The offense should also be accompanied by clear guidelines on discharging the evidential burden on the presumption of 'consent' which is the key

<sup>293</sup> Article 27 guarantees equal rights to every person and freedom from discrimination, which is the unfair or unjust treatment of an individual based on certain characteristics such as race, sex, class among others.

<sup>294</sup> This Act was enacted in 2015 as the first legislation to recognize Domestic Violence as an independent offence and protect persons in a domestic relationship from such violence.

<sup>295</sup> The Sexual Offences Act No. 3 of 2006 is the main legislation governing criminal sexual conduct in Kenya.

determinant in sexual offences. Section 42 of the *Sexual Offences Act* provides that: ‘a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice’. This ‘agreement’ is already presumed at marriage. The ‘freedom’ and ‘capacity’ to consent is however not automatic as presented in this paper. Marital rape should be treated as a special form of sexual offence, occurring within the most private confines of the matrimonial setting.

Noting the privacy and sensitivity of the act of marital rape, it is recommended that Kenya adapt the South African approach of *instituting special courts that specifically address marital rape*. The victims’ privacy and identity should be protected at all times in order to prevent further stigma and violation. The State should also respond by *building the capacity of police officers and judicial personnel to tackle sexual violence cases*. Police officers should be trained to employ gender-sensitive practices on receipt of sexual offences, investigation and presentation of evidence. Continuous training of judges is imperative to ensure that they are kept up-to date with global developments in human rights and in particular the rights of women. Judges should be cautious when presenting judgments so as not to replicate prevailing myths and stereotypes that continue to disadvantage women. They should strive to create progressive precedents that recognise the rights to dignity, equality of married women and their freedom from cruel and inhuman treatment, which are human rights guaranteed to all.

Catherine MacKinnon alludes that the way rape is treated by law, shapes the society’s attitudes towards it.

‘Each time a rape law is created or applied, or a rape case is tried, communities rethink what rape is. Buried contextual and experiential presumptions about the forms and prevalence of force in sexual interactions, and the pertinence and modes of expression of desire, shape determinations of law and fact and public consciousness. The degree to which the actualities of raping and being raped are embodied in law tilt ease of proof to one side or the other and contribute to determining outcomes, which in turn affect the landscape of expectations, emotions, and rituals in sexual relations, both every day and in situations of recognized group conflict.’<sup>296</sup>

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<sup>296</sup> Catharine A. MacKinnon ‘Defining Rape Internationally: A Comment on *Akayesu*’ in *Are Women Human: And Other International Dialogues*’ (2006) 237. The Belknap Press of Harvard University Press, Cambridge, Massachusetts.

I strongly argue for the criminalisation of marital rape as a necessary and urgent legal step towards the protection of married women in Kenya. It is however not a sufficient solution to combat marital rape on its own and needs to be accompanied by social transformation, awareness and gender mainstreaming to sustain a long-term change of behaviours, attitudes and practices to end violence against women.

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