



**THE LEGAL IMPUNITY FOR MARITAL RAPE IN KENYA:
A WOMEN'S EQUALITY ISSUE**

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*The African woman never says YES
Her NO or SILENCE are YES
If she says YES or comes to you
RUN
Unless you want a prostitute
Anonymous*

INTRODUCTION

The status of women in any society is crucial to their participation in its development. Despite the steps taken toward gender equality and although women form just over half of the population, Kenyan women remain disadvantaged socially, politically and economically. Gender-based violence is a manifestation of unequal social relations between men and women. Women are disproportionately affected by gender based violence, including sexual violence. Sexual violence is one of the clearest expressions of women's subjugation and oppression on the basis of sex. It is closely linked with the overall inferior position of women in society. One of the forms of sexual violence is marital rape (also known as spousal rape), that is, non-consensual sex in which the perpetrator is the victim's spouse. This is a manifestation of violence that is prevalent in intimate relationships.

There is a high prevalence of gender based violence in Kenya, which mostly occurs in domestic settings. Domestic violence includes sexual violence, which is often perpetrated by intimate partners. Marital rape generally occurs in the context of abusive relationships characterized by violence in various forms, including physical, sexual and psychological. Marital rape affects women physically, emotionally and mentally, and has significant negative impact on individuals, families and society in general. Following intense lobbying, advocacy and controversial debate, the Sexual

Offences Act¹ was passed into law in 2006. The Act, whose purpose was to extend protection to victims of sexual offences has, for the most part, been lauded as a progressive piece of legislation. While the Act successfully addressed a variety of important issues for women, this legislation would have been a golden opportunity for Kenya to address the issue of marital rape. However, the opportunity was missed. Indeed, while the initial intention of its proponents was to include provisions outlawing marital rape, this provision was eventually deleted from the Bill and an explicit marital rape exemption enacted. The effect of this exemption is to establish the basis for legal impunity for marital rape, leaving no protection for married women. This constitutes discrimination against women on the basis of marital status and a violation of their fundamental human rights, particularly the rights to equality, dignity and bodily integrity.

This paper examines the legal position of marital rape in Kenya. It traces the roots of the marital rape exemption from the British common law heritage, and how this interacts with the customary/traditional framework. Using a substantive equality analysis, the paper discusses Kenya's obligations under international and regional legal frameworks as well as constitutional provisions which can form the basis of removal of the marital rape exemption. Finally the paper explores various strategies for change, including criminalization of marital rape.

Situational analysis of marital rape

The actual extent of incidence of marital rape in Kenya is difficult to determine. This is due to several factors that make the collection of data on the subject difficult. The key factor appears to be the dominant culture of silence that surrounds rape. Further, since marital rape is not categorized as a crime, there are no official government statistics on incidents of marital rape. Any available information is fragmented, because documentation on marital rape is often done by non-state actors. The dearth of information has compromised advocacy efforts targeting legal protection against marital rape. There is, however, limited data from which one can make reliable deductions regarding the incidence and magnitude of marital rape in Kenya.

¹No. 3 of 2006.

In 2006, it was reported that two-thirds of women in Kenya who are physically and sexually abused identify the abusers to be their husbands. Furthermore, approximately 16% of married, divorced, or separated women experience sexual assault by their spouse.² These findings are bolstered by the 2008-09 Kenya Demographic and Health Survey which showed endemic rates of marital violence, with 13% of married women - more than one out of every 10 women - reporting being raped by their male partners.³ Similarly, a 2008 study undertaken by FIDA-Kenya found that up to 74.5% of respondents indicated that they have been physically abused within the home. The study found that the respondents experienced various forms of violence, including physical, economic, sexual, psychological and emotional violence. This report indicated that the most common form of sexual violence reported by women who participated in the study was marital rape. The women respondents lamented that their abusive husbands treated them as property and disregarded any notions of consent to sexual activity.⁴

Marital rape has significant impacts on individuals, families and society at large. Women who have been sexually abused by their partners experience pain, humiliation and distress, with accompanying physical, emotional and psychological harm. Children in households where marital rape occurs often suffer from the psychological effects of witnessing violence, and such violence can undermine the ability of their mothers to care for them. Marital rape impacts negatively on productivity, as affected women are often unable to engage fully in productive economic activity.

Health problems resulting from marital rape include poor maternal and child health, repeat infections with sexually-transmitted infections (STIs) and long-term exposure to the risk of HIV infection.⁵ HIV/AIDS continues to be a serious public health issue in

²UNAIDS, *Violence Against Women and Girls in the Era of HIV and AIDS: A Situation and Response Analysis in Kenya*, June 2006: http://data.unaids.org/pub/Report/2006/20060630_GCWA_RE_Violence_Women_Girls_Kenya_en.pdf (last accessed 11 November 2013).

³ Republic of Kenya, *Kenya Demographic & Health Survey, 2008-09*.

⁴ Federation of Women Lawyers – Kenya, *Gender Based Domestic Violence in Kenya*, 2008 pp 26-27.

⁵African Population and Health Research Centre, "Marital Rape and its Impacts: A Policy Briefing for Kenyan Members of Parliament." 2011: <http://www.aphrc.org/insidepage/?articleid=574> (last accessed on 13 November 2013).

Kenya, with women and girls being disproportionately affected.⁶ Women and girls are particularly susceptible to infection owing to gender-specific norms and the persistence of unequal power relations between women and men. The inferior status of women and girls may hamper their ability to negotiate safe sexual practices thereby increasing their vulnerability to infection. For example, fear of violence may prevent an abused woman from insisting on the use of condoms or other safer sex methods from her intimate partner. Women who experience violence are therefore at greater risk of contracting HIV/AIDS from their sexual partners.

Despite the adverse physical and psychological consequences of marital rape, little attention is given to it. To begin with, marital rape is largely under-reported as many abused women are afraid to report the violence since they rely financially on their husbands for their upkeep and that of their children. There is also fear of retaliation, humiliation and shame, as well as cultural inhibitions against public discussion of issues of sex, thereby promoting a culture of silence. Further, since rape is generally perceived as an act involving a stranger, the victim of spousal rape may not view demands of sex from her partner as a crime. In addition, intimate partner violence is often perpetrated over a long period and it may be difficult for the victim to keep track of the specific events and dates when the acts were committed.⁷ Even when such incidents are reported, the police often treat them as “domestic” matters which do not warrant intervention by the criminal justice system. This is compounded by a slow and inefficient criminal justice system and unavailability of doctors who could provide the necessary evidence for conviction.⁸

The dismal response to rape by the Kenyan criminal justice system and by society at large is a reflection of the prevailing attitudes towards violence against women. Factors contributing to violence against women include gender stereotypes as well as negative cultural norms and practices that condone or tolerate violence against women, thus perpetuating the subordinate position of women in Kenyan society. Some forms of

⁶ HIV prevalence among women age 15-49 is 8% as compared to 4.3% among men (4.3 per cent): see supra note 2.

⁷Christine Wanjiru Kung’u, *Criminalization of Marital Rape in Kenya*, LLM Thesis, University of Toronto, 2011, pp 2- 3.

⁸Supra, note 2.

domestic violence are still considered normal, or as routine chastisement,⁹ and two out of three Kenyan women believe that a husband is justified in beating his wife.¹⁰ Sexual violence against women is often not viewed as a crime warranting harsh punishment but rather a mere infraction for which the offender can be mildly reprimanded. This attitude has meant that marital rape as a wrong is inconceivable particularly in a society where all issues between husband and wife are largely viewed as 'bedroom matters' and there is general acceptance of a man's entitlement to sex.

Violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms, and hence is an obstacle to the achievement of equality, development and peace.¹¹ Sexual violence in whichever form is inconsistent with the exercise of freedom and liberty, as it violates and debases the individual victim, and is also an affront to their dignity. Marital rape constitutes denial of sexual autonomy for married women as it denies the opportunity to make a free choice on whether to engage in sexual activity. Further, marital rape amounts to discrimination against women on the basis of their marital status. It is a health issue due to its negative impact on women's physical, emotional and psychological health, including heightened exposure to HIV/AIDS and STIs.

Kenyan Law Relating to Marital Rape

Historical Legal Background

The establishment of British colonial rule in Kenya in the late 19th century was accompanied by the superimposition of English law over the indigenous people. This resulted in legal plurality, where customary law co-exists with state law. The inherited colonial laws were infused with British values and culture. At the time, the British concept of the family was that of a husband/wife arrangement in which the husband was the breadwinner and head of household. In this nuclear family, the wife was the "domesticated", economically dependent consumer.¹² Thus Kenyan law reflected an era in Britain when married women were not regarded as persons; upon marriage, spouses

⁹ "Kenya Rape: The Invisible Crime." *Amnesty International* 32.001. Mar. (2002): 1-33. <http://amnesty.name/en/library/info/AFR32/001/2002/en>.

¹⁰Supra note 2.

¹¹ Preamble, UN Declaration on Violence Against Women, A/RES/48/104, 20 December, 1993.

¹² B. Rogers. *The Domestication of Women: Discrimination in Developing Societies*. Tavistock Publications, London (1980)

became one legal personality and the “one person” created was the husband.¹³ It was therefore inconceivable that a husband could rape his wife, as she was part of his person. This was reinforced by customary law norms that lent credence to the idea that upon marriage a woman became part of her husband’s property for him to do with her as he pleased. The interplay of common law principles with customary norms and practices generally worked to the disadvantage of women and served to entrench the patriarchy inherent in both systems.

The current law in Kenya reflects the widespread cultural stereotype that marriage confers upon men presumed rights of sexual access to their wives.¹⁴ This position was exemplified by Lord Matthew Hale’s proposition (known as the Hale doctrine) as follows:

“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.”¹⁵

The above proposition constituted a common-law marital rape exemption, under which husbands could not be accused of committing the crime of rape against their wives.¹⁶ Thus marital rape was not considered real rape. This shows a failure to recognize that consent to sexual activity, even in an intimate relationship, is a dynamic process, which requires constant negotiation and renegotiation between the partners, and cannot be assumed to exist by virtue of the existence of an ongoing intimate relationship.¹⁷

Until 2006, sexual offences were prosecuted under the Penal Code where they were categorized as “offences against morality”. While there was no explicit marital rape exemption, the principles of the received English common law were applied in the application of the Penal Code. This encompassed the common law marital exemption

¹³ See Sir William Blackstone, *Commentaries on the Laws of England 1* (Oxford: Clarendon Press, 1765-1769) at 430.

¹⁴ Patricia Kameri-Mbote, “Violence against women in Kenya, An Analysis of Law, Policy and Institutions”, International Environmental Law Research Centre, IELRC Working Paper, 2000-1.

¹⁵ *Supra*, note 13.

¹⁶ Jennifer A. Bennice & Patricia A. Resick: Marital Rape; History, Research and Practice; Trauma, Violence and Abuse, Volume 4, No.3, July 2003, Sage Publications 228-246.

¹⁷ Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law: Honest But Mistaken Judicial Beliefs" (2008) 32 *Manitoba Law Journal*, 144 - 181.

under the Hale doctrine.¹⁸ Under section 139 (now repealed), rape was defined as unlawful carnal knowledge of a woman or girl without her consent or with her consent if the consent is obtained through force, coercion or false representations as or *in the case of a married woman, by personating her husband*. This implicitly assumes it would not be rape if the impersonator were actually the husband, based on the premise that a married woman has given perpetual consent to sex with her husband.

The stance of the common law was reflected in the attitudes of the Kenyan judiciary in sexual offence cases. For instance, judges were inclined to assume that women had a tendency to lie in sexual matters or were ambivalent about saying “yes” or “no” to sexual advances.¹⁹ Evidential rules relating to corroboration, consideration of the complainant’s sexual history, or the existence of a prior sexual relationship operated to disadvantage women victims of sexual offences.²⁰

In 1991 the English House of Lords, in *Regina v. R*²¹ recognizing that the common law had evolved in light of changing social and cultural developments, finally conceded to a wife’s right to withdraw her consent. As stated by Lord Keith of Kinkel:

“Hale’s proposition ... reflected the state of affairs in those respects as at the time it was enunciated. Since then, the status of women and particularly married women has changed out of all recognition... [One] of the most important changes was that marriage in modern times was regarded as a partnership of equals and no longer one in which the wife was to be the subservient chattels of the husband... on the grounds of principle there was no good reason why the whole proposition of marital exemption to rape should not be held inapplicable in modern time.”²²

Lord Keith went further to declare that the doctrine of implied consent had no useful purpose to serve today in the law of rape and that the marital rights exemption was a “common law fiction which had never been a true rule of English law.”²³ Kenya should now follow the example of the United Kingdom from where the common law doctrine of implied consent was inherited in the first place.

¹⁸ Section 3 of the Penal Code (now repealed) required that the Code be interpreted in accordance with the principles of legal interpretation obtaining in England.

¹⁹ *Maina v. R* [1970] EA 370.

²⁰ Under section 3 of the Evidence Act, the credibility of a woman complainant in a rape case may be impeached by showing that she was of generally immoral character.

²¹ [1992] 1 A.C. 599.

²² *Ibid.*

²³ *Ibid.*

Customary/Traditional Framework

Customary law plays a crucial role in the maintenance of cultural norms about the place of women in the family and society. For Kenyan women, custom is particularly important as it defines their identity within society, and mediates their family relationships, entitlements and access to resources.²⁴ Traditional African societies were governed on the basis of patriarchal structures where women's individual interests were subsumed under the interests of the group, dominated by males.

Rape is generally recognized as an offence under the customary laws of Kenyan communities. In the marital context there are specific instances where a woman is permitted to withhold sex from her husband, namely during menstruation, during pregnancy, shortly after childbirth or during a period of mourning. Hence there is no certainty that marital rape as such was permitted in traditional African societies. However, there were, and continue to be, several cultural norms and practices sanctioned by customary law that contribute to women's subordination to men, and to the condoning of violence against women.

One of these practices is the payment of bridewealth or dowry. Bridewealth is paid by the husband to the wife's family and is intended to seal the marriage contract and to be a symbol of unity between the two families. While such payment is not intended as purchase of the woman, it is sometimes seen as a way of validating a man's right to "own" his wife so that wives are sometimes viewed as the property of their husbands. This can be used as a justification for perpetrating violence against a wife, couched in terms of "disciplining" her.

Another cultural practice is wife inheritance, where a woman whose husband has died is obligated to marry her husband's brother in order to ensure that she and her children are taken care of by her husband's family. Young widows are inherited by a brother-in-law or any other suitor chosen by the village elders. The practice was originally

²⁴ Customary law is a source of law in Kenya along with statutes and English common law and is particularly relevant in the realm of family law. It is applicable in civil matters where one or more parties is subject to it: section 3 (b) of the Judicature Act (Chapter 8, Laws of Kenya).

intended to ensure that a young widow's sexual needs were provided for and her children were taken care of. Although in theory the wife is free to refuse to be inherited, the reality is that such a woman faces the prospect of social exclusion and disenfranchisement. Related to this is the practice of “widow cleansing” where a widow is obligated to undergo ritual cleansing in order for her to be integrated into the community. Cleansing involves having sexual intercourse with a man appointed by the husband’s clan, who is often a man with mental health issues. The widow usually has no choice over whether to accept being cleansed or as to the man involved in the activity. Wife inheritance and widow cleansing have contributed significantly to the spread of HIV/AIDS in the communities where they are practiced.

Early marriages performed under customary law also contribute to violence against women. Under customary law, there is no set minimum age of marriage and a person is deemed ready for marriage upon reaching puberty and after the accompanying initiation rites. Hence in some communities young girls are married off to men much older than themselves. Due to the unequal balance of power inherent in such marriages, young wives are often subjected to violence by their husbands and have little say in whether or not to consent to sex during the marriage. However, no protection is afforded to such girls due to the marital rape exemption. This practice goes contrary to the Constitution and the Children Act.

Another harmful practice is female genital mutilation (FGM) also known as female circumcision which sometimes results in reproductive health problems as well as reduction in women’s sexual response. FGM is prohibited under the Children Act and the recently enacted Prohibition of Female Genital Mutilation Act of 2011.²⁵ However, despite the legislation the practice continues to thrive in some communities; and prosecutions are rare.

Culture is often invoked in society to block attempts at legal reform. Hence in Kenya, the predominantly male legislators in Parliament have been generally reluctant to pass legislation that seems to go against cultural norms, for fear of upsetting the *status quo* and/or of recrimination or loss of voter support. Such legislation is usually depicted as

²⁵ Act No. 32 of 2011.

foreign and contrary to African culture. For example, during debate on the Marriage Bill in 1968, the proposal by the Commission on the Law of Marriage and Divorce to outlaw wife beating were strongly opposed and the draft section was deleted. One MP felt particularly strongly against the provision and was of the opinion that corporal punishment was necessary for disciplining wives in order to teach them “manners” as this was the normal African way. Another MP stated that a wife should be beaten as it was a pleasure to her, and was a way of expressing love under the customs of his community.²⁶

Similarly, in the debate on the passing of the *Sexual Offences Act*, one MP used the practice of dowry payment to negate arguments for the possibility of marital rape:

“I have paid dowry for my wife and we are formally married. I cannot rape her by any chance. You can see the damage that western indoctrination has done to us. I cannot rape my wife! I don’t think there is one man who can rape his wife...you can rape someone else.”²⁷

However, it should be noted that customary law in Kenya is only applicable in civil cases (s. 3 Judicature Act) and cannot therefore be directly appealed to as a marital rape exemption in a criminal case. Further, customary law has been subordinated to the Constitution.²⁸

The Marital Rape Exemption under the Sexual Offences Act

The Sexual Offences Act of 2006 (SOA) represents a major step forward in efforts to protect victims of sexual violence, who are predominantly women. The Act has been lauded as a progressive piece of legislation, as it was the first statute to comprehensively address sexual offences in Kenya and reflects a significant change of orientation in the handling of sexual offences. Prior to 2006, sexual offences were dealt with under the Penal Code and were categorized as “offences against morality”. The Act repealed most of the offences under the Penal Code and substituted its own provisions. The Act was a culmination of debate and negotiation in the context of high incidences of rape,

²⁶ Phoebe M. Asiyu, “Legislative Process and Gender Issues” in Mary Adhiambo Mbeo & Oki Ooko-Ombaka, eds., *Women and Law in Kenya*.

²⁷ Kenya National Assembly Official Record (Hansard), Second Reading of the Sexual Offences Bill, April 27, 2006 at 780, cited in Kungu, *supra* note 7 at p. 21.

²⁸ (Art. 2(4); see also sec. 26, Sexual Offences Act.

defilement, and incest in the country, as well as the scourge of HIV/AIDS, and new social realities such as child sex tourism and developments in the field of forensics, such as DNA profiling. The Act introduced new offences,²⁹ imposed minimum mandatory sentences³⁰ and provided for the setting up of a DNA data bank and a sex offender's registry, among other measures.

The new definition of rape introduced by the SOA contemplates that the perpetrator or the victim may be either male or female, unlike the Penal Code which provided only for the rape of women or girls. Section 3 (1) provides that: *A person commits the offence termed rape if he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; the other person does not consent to the penetration; or the consent is obtained by force or by means of threats or intimidation of any kind.* Related offences include sexual assault and indecent acts which may equally be committed by men or women. Sexual assault covers penetration of the genital organs with objects such as a bottle or even digital penetration.³¹

Section 42 provides that *“a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice”*. Although the section does not elaborate on the meaning of choice or freedom, this definition appears to emphasize the importance of free will and the ability to make a decision about whether or not to take part in the sexual activity at the time in question, in the absence of coercion or deceit.

The SOA also provides for rebuttable and irrebuttable presumptions of lack of consent, which are intended to make it easier for the prosecution to prove lack of consent. Under section 44, lack of consent will be presumed where it is proved that the following circumstances existed:

- a) *Any person used or threatened violence against the complainant at the time of the act or immediately before the first sexual activity began;*

²⁹ These include gang rape, sexual assault, sexual harassment, deliberate infection with HIV/AIDS, child trafficking for sexual exploitation and child pornography, among others.

³⁰ This is by contrast to the Penal Code which only provided for maximum sentences and left a lot of room for discretion in sentencing.

³¹ See definition in Sec. 5, SOA. However, penetration for proper and professional hygienic or medical purposes is exempted.

b) Any person caused the complainant to fear at the time of the act or immediately before the first sexual act, that violence was being used or would be used immediately against another person.³²

As noted above, rape consists of “an intentional and unlawful” act which causes penetration.³³ Under section 43, an intentional and unlawful act comprises acts committed in coercive circumstances, which includes the use of force against the complainant or the property of the complainant, or the threat of harm against the complainant or against the property of the complainant. A reading of the above provisions on rape and consent would indicate that they cover situations of marital rape, where one spouse engages in sexual activities without the other’s consent, or where consent is obtained through coercive means, that is by use of violence, threats or intimidation.

However, Kenyan legislators in their determination to provide immunity for spouses, deliberately sought to exempt the rape provisions from being applied to legally married persons. They therefore inserted sub-section (5) which expressly declares that section 43 *shall not apply in respect of persons who are lawfully married to each other.*³⁴ The effect of sub-section (5) is to exclude the application of the rape provisions from spouses, thereby denying them protection from sexual violence within marriage. This effectively amounts to an exemption for marital rape and non-recognition of marital rape as an offence. Hence marital status is used as a basis of discrimination to exclude married persons from protection against sexual offences. The wording of the sub-section suggests that the exemption applies equally to both married men and women. However, the gender-neutral language obscures the inherently unequal position of married men and married women, and the fact that the victims of rape are predominantly women. Therefore it is married women who suffer most from lack of

³² This is an evidential presumption which may be rebutted where sufficient evidence is adduced to raise an issue as to whether the complainant consented. Conclusive (irrebuttable) presumptions are provided in section 45. This section extends to impersonation of persons known to the complainant, which would include the husband; implicitly assumes it would not be rape if the impersonator were actually the husband or a person known to the victim.

³³ Section 3, SOA.

³⁴ Persons in Kenya may get married under any of the four systems of marriage, namely customary, statutory, Muslim and Hindu systems. Cohabitation is not recognized as marriage; however, Kenyan courts may apply the common law presumption of marriage to cohabiting couples if they meet the laid down criteria for this presumption.

legal protection from marital rape. This burdens married women with exposure to sexual violence, and denies them the right to equal protection of the law.

A look into the process of the making of the SOA is instructive in unearthing the reasons behind the marital rape exemption. From the outset, the Sexual Offences Bill³⁵ which culminated in the Act, was the product of much negotiation and compromise. The Bill fuelled much controversy among the Kenyan public. In Parliament, battle lines were drawn between the traditionalists, who saw the provisions of the Bill as running counter to African culture, and the liberals who were in favour of equal rights for women.

The Bill contained a number of contentious issues, among which was marital rape.³⁶ It would appear that the original version of the Bill contained a clause criminalizing rape in marriage. However, this clause was strongly objected to by some Members of Parliament who argued that it would be difficult to prove rape in marriage. They further argued that conjugal rights were given by virtue of the marriage covenant entered into between the parties involved and there could therefore be no rape in marriage. This argument was extended to infer that there was no marital rape in the African context.

According to one MP:

“An activity between a man and his wife in his bedroom cannot within reason be constituted to be rape. Many people believe this is not an African issue. Marriage creates sexual licence to each party ... that is the licence they get by saying ‘I do’.”³⁷

During the debate, one MP declared that “women usually say ‘No’ to sex, even if they mean Yes’, unless they were prostitutes”, prompting 12 of Kenya's 18 female MPs to walk out in protest. Others felt that the law would prevent men from courting women and this will be a serious impediment to the young who would want to marry.”³⁸ Several male MPs feared that the original bill went too far and could lead to a spate of false accusations by women. Another concern was the possibility of marital rape being

³⁵ Popularly known as the “Njoki Ndungu Bill” after the woman MP who sponsored it in Parliament.

³⁶ Others were chemical castration, female genital mutilation, the rape shield, burden of proof, definition of a child and age of consent for marriage.

³⁷W. Onyango-Ouma, Njoki Ndungu, Nancy Baraza & Harriet Birungi, *The Making of the Sexual Offences Act: Behind the Scenes*, Nairobi, Kwani Trust, 2009 at p.22.

³⁸ Anger at Kenya's Diluted Rape Law – Thurs. 1 June, 2006 <http://news.bbc.co.uk/2/hi/africa/5036398.stm>(accessed on 15 October, 2013)

abused as a way of settling scores in marriage, and the corresponding need to protect families from such abuses. Said one MP:

“Every day your wife suspects that you have spent half of your salary on someone outside the home, she will go and complain that you have raped her. People were not keen on that and again as leaders we are looking at the protection of families.”³⁹

On the other hand, supporters of the marital rape clause were emphatic in their contention that rape in marriage was very common in Kenya and constituted a violation of women’s rights. They argued that marriage did not automatically confer conjugal rights if there was no consent.

Eventually, the marital rape clause was deleted from subsequent versions of the bill. This was done as part of a strategy by the mover of the bill as a trade-off to allow for other contentious clauses, including a clause prohibiting sexual harassment, to be accepted by the opposers. However, the majority legislators insisted on the insertion of section 38, which made it an offence for a person to make false allegations of a sexual offence against another person, with a penalty equivalent to that of the offence complained of. This clause was harmful to women, as it discouraged them from reporting sexual crimes for fear of being prosecuted themselves. It also insinuates that women are liars and are therefore likely to bring up false cases of sexual violence. Happily, the section has now been repealed.⁴⁰

Assault Provisions in the Penal Code

Due to the marital rape exemption, married women (and men) who are victims of domestic violence are left with the option of using the assault provisions provided under the Kenyan Penal Code. Relevant offences include common assault (assault that does not amount to bodily harm) as well as assault occasioning actual bodily harm or grievous bodily harm.⁴¹ However, these provisions are grossly inadequate for several reasons. First, the provisions do not deal explicitly with gender-based violence but with violence generally. Assault related offences under the Code are not gender specific and do not take into account the different experiences of men and women as perpetrators

³⁹ Ibid.

⁴⁰ Vide Statute Law (Miscellaneous Amendments) Act, 2012.

⁴¹ Covered under sections 250, 251 and 234 respectively.

and as victims of assault. Secondly, assault under the Penal Code is very narrowly conceived as it covers only physical injury or threat of physical injury. Harm is defined as any bodily hurt, disease or disorder whether permanent or temporary.⁴² Other types of harm, such as emotional or psychological harm, or economic harm or threat to livelihood are not covered.

Thirdly, the assault provisions also require physical proof or injury- to distinguish, where there was actual harm, grievous harm, to determine punishment. However, as marital rape mainly constitutes coerced sex, proof of injury may be absent where no other physical abuse was meted. Further, charges relating to assault usually require witnesses or evidence of a physical struggle. As marital rape takes place in the privacy of the home, there will usually be no witnesses. Evidence of a physical struggle is not usually easy to provide as many women do not feel able to struggle physically when their husbands try to force them into sex, in order to avoid further violence or to protect their children from witnessing the abuse.⁴³ Finally, the penalties for assault related offences are very low, especially in comparison to those under the Sexual Offences Act.⁴⁴

Attempts by women to prosecute cases of physical violence in marriage have not been effective. For instance, in the widely publicized case of *Wilmina Ochieng*,⁴⁵ a man who had pushed the broken legs of a stool into his wife's private parts. During his court appearance, he justified his cruelty on the grounds that "his community allowed such punishments" and he was merely punishing his wife for having left home "with no valid reason." He was convicted of assault causing actual bodily harm to his wife and fined 10,000 shillings (US\$120), which he promptly paid. He then went back home and beat his wife again threatening to kill her, and was once again charged with assault and

⁴² "Grievous harm" is defined to mean any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.

⁴³ Supra note 5.

⁴⁴ For instance, the penalty for assault occasioning actual bodily harm is a maximum 5 years' imprisonment (s. 210 Penal Code) compared to the penalty for rape which is a minimum 10 years' imprisonment but which may be enhanced to life imprisonment (s. 3 SOA).

⁴⁵ Criminal Case No. 177736 of 1998 (unreported).

sentenced to six months' imprisonment.⁴⁶ Shortly afterwards he was pardoned under a presidential amnesty on a national holiday.

Marital Rape and HIV

Kenyan law contains provisions intended for the protection of partners of persons with HIV/AIDS. Under Section 26 (1) of the Sexual Offences Act it is an offence for a person to deliberately transmit HIV or any other life threatening STD to another person. The penalty for such an offence is a minimum term of 15 years' imprisonment but which may be enhanced to life imprisonment. It is noteworthy that the provisions operate whether or not the parties are married to each other. This is one instance where the marital status of the parties does not prevent the law coming into operation. Thus it seems possible for one party in a marriage to have the other prosecuted for a sexual offence, and it is immaterial whether or not the other party consented to the act. However, in the face of the marital rape exemption in section 43 (5), it is unclear how the law can handle a husband's deliberate or reckless infection of his wife without dealing with the non-consensual sex that led to that infection in the first place. This provision is therefore rendered ineffective.

A similar provision is found in the HIV and AIDS Prevention and Control Act, 2006. Under section 24, an infected person who knowingly and recklessly places another person at risk of becoming infected with HIV is guilty of an offence, *unless that other person knew that fact and voluntarily accepted the risk of being infected*. The penalty for this offence is a fine not exceeding Kshs. 500,000/- or seven years' imprisonment or both. This section contemplates the possibility of a sexual partner (including a spouse) refusing consent to a sexual act with the infected person, and is a welcome provision. However, like section 26 of the Sexual Offences Act, this provision conflicts with the marital rape exemption in the Sexual Offences Act, and it is therefore doubtful how much protection is offered for married women. This also raises the question of voluntary acceptance of risk of infection. Women are often unable to bargain on equal terms with men in sexual matters, by virtue of their subordinate socio-economic status as well as the presence of or threats of violence from their partners. It is therefore very difficult for

⁴⁶ Cited in Kameri-Mbote, *supra* note 14, p. 17.

such women to refuse to have sex with their partners even where there is a risk of infection.

There is need to harmonise the provisions of section 26 of the Sexual Offences Act with those of section 24 of the HIV and AIDS Prevention and Control Act, particularly with regard to sentencing. Further, concerted efforts should be made to remove the marital exemption from the Sexual Offences Act in order that protection may be offered to all persons without discrimination on the basis of marital status.

Marital Rape and Civil Law

Although marital rape is not treated as a criminal offence, lack of consent in marital sexual relations can be considered as a form of cruelty thus constituting a ground for divorce in civil cases. In cases of divorce, marital rape has been cited under the grounds of cruelty in seeking dissolution of marriage, even though it is not explicitly recognized under Kenyan family law. For example, in *Esther Nangwana Nandi versus John Chewe Bobo*⁴⁷ the wife sought dissolution of her marriage on the grounds of cruelty and adultery because her husband had assaulted her, locked her out of their matrimonial home, and forced her to have sex with him while he was drunk. The High Court found that the husband's behavior constituted cruelty that endangered her life and health. The acts of cruelty were of a serious nature and caused danger to her health. Such cruelty could not be accepted as the usual wear and tear of married life and of living together amidst marital problems. The court held that non-consensual sex, even within a marriage, was an act of cruelty by the respondent and hence a ground for dissolution of the marriage.

Reform Proposal: Protection against Domestic Violence Bill, 2012 (Draft)

The stated objective of this draft Bill is to provide protection and relief of victims of domestic violence, spouses, children and other dependent persons.⁴⁸ Domestic violence is defined to mean violence against or threat of violence or imminent danger to a person perpetrated by another person in a domestic relationship with the victim. Domestic relationship covers persons in a subsisting or previous marriage or a marriage that has

⁴⁷ Nairobi High Court Divorce Cause No. 84 of 2005.

⁴⁸ In 2007, a similar bill known as the Domestic Violence Bill had been tabled in Parliament but was later withdrawn.

been dissolved or declared null, while a spouse is defined to include a former spouse or estranged spouse. However, this definition does not cover persons in cohabitation relationships.

The Bill adopts a wide definition of violence which encompasses physical, sexual, emotional, psychological and economic abuse. It is notable that violence includes abuse derived from cultural, customary and religious practices including but not limited to: child marriage, female genital mutilation (FGM), forced marriage, forced wife inheritance, *sexual violence within marriage*, virgin testing and widow cleansing. The specific inclusion of sexual violence within marriage in the definition of violence is laudable as it covers marital rape.

An important aspect of the Bill is the provision for protection orders for victims of domestic violence, including interim orders that cover threats of violence. This is the first time that any law in Kenya has provided for such orders. Further, the Bill establishes a fund to provide financial and other welfare assistance to victims of domestic violence as well as support programmes for victims. Counselling programmes for victims and perpetrators are also provided for, as well as programmes for public education on domestic violence. Another important feature of the Bill is that it provides for the development of policy to facilitate the establishment of temporary shelters or safe houses and other relevant services for the protection of victims of domestic violence. This is a welcome provision as there is dire need for such shelters.⁴⁹ The Bill has not yet been debated in Parliament.

International, Regional and Local Standards

Kenya is a party to several international and regional human rights instruments that relate to the issue of gender-based violence, including sexual violence. Kenya also promulgated a new Constitution in 2010 which contains important principles and protections relevant to gender-based violence. All these constitute standards against which the current legislative framework in Kenya relating to marital rape may be measured. It is notable that under Art. 2 of the Constitution of 2010, the general rules of international law, as well as any treaty or convention ratified by Kenya, form part of the

⁴⁹ Currently only one such shelter exists which is run by the Women's Rights Awareness Programme (WRAP).

law of Kenya. This is a significant shift from the previous dualist approach where Kenya could not apply international conventions that she had ratified until Parliament had enacted domesticating legislation. The new monist approach has positive implications for the promotion of gender equality and the protection of women's rights by the courts as it means that international instruments ratified by Kenya, such as CEDAW, are now deemed to form part of its law without the need for domestication in the form of municipal legislation. Kenya now has a constitutional obligation to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.⁵⁰

International standards

The UN Declaration on Violence against Women of 1993 (DEVAW) defines "violence against women" to mean any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, whether occurring in public or in private life. Violence against women shall be understood to encompass, but not be limited to sexual violence, including marital rape.⁵¹ The main instrument that deals with discrimination against women is the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by Kenya in 1984. While there is no explicit reference in CEDAW to violence against women⁵² the CEDAW Committee has affirmed the definition of discrimination to include gender based violence which covers sexual violence. In General Recommendation 19 of 1992, the Committee 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 and urged state parties to adopt penal sanctions in order to protect women from such violence.⁵³

In 2008, the CEDAW Committee called for the criminalization of marital rape by Kenya. It also called for the repeal of section 38 of the Sexual Offences Act and the enactment of

⁵⁰ Article 21 (4), Constitution.

⁵¹Article 2, DEVAW.

⁵² Article 6 of CEDAW calls for the suppression of all forms of traffic in women and exploitation of prostitution of women).

⁵³ General Recommendation 12 of 1989 urges States parties to include in their periodic reports to the Committee information about: the legislation in force to protect women against violence, including sexual violence, and to provide statistical data on the incidence of violence against women.

the Family Protection Bill. The Committee also noted that the continuing prevalence and belief in negative gender stereotypes contribute to and reinforce the existence of violence against women and harmful practices against them and urged the State party to take systematic action to modify or eliminate such stereotypes and negative cultural values and harmful practices.⁵⁴

In its General Recommendation No. 28 of 2010⁵⁵ regarding the core obligations of state parties to respect, protect, and fulfill women's rights, the Committee again stressed the duties of state parties to impose penal sanctions on perpetrators of domestic and other forms of violence against women:

*"States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence... Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, bring the perpetrator(s) to trial and impose appropriate penal sanctions."*⁵⁶

Regional Standards

The principal regional human rights instrument is the African Charter on Human and Peoples' Rights (Banjul Charter) which Kenya ratified in 1992. The Charter does not contain explicit provisions on gender based violence or sexual violence. However, it does provide general protections which are of relevance to the issue of sexual violence. The Charter provides for the right to equality and equal protection of the law, the right to respect for life and integrity of the person, and the right to inherent dignity.⁵⁷ The Charter also prohibits all forms of exploitation and degradation including torture, cruel and inhuman punishment and treatment. It also places on States the duty to eliminate all forms of discrimination against women.

⁵⁴ Concluding Observations and Recommendations of the 48th Session of the CEDAW Committee on 8 February 2011, E/CN.6/2011/CRP.1: <http://www2.ohchr.org/english/bodies/cedaw/cedaws48.htm> (last accessed on 14 November, 2013).

⁵⁵ CEDAW, General recommendation No. 28 -- forty-seventh session, 2010 - The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>.

⁵⁶ Ibid. at paras. 19 and 34.

⁵⁷ *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 2, 3, 5.

The Protocol to the Banjul Charter on the Rights of Women in Africa, on the other hand, contains detailed provisions for the protection of women from all forms of violence. The Protocol defines violence against women widely to include all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including threats to take such acts, whether in private or public life in peace time and during situations of armed conflict or of war.⁵⁸ States Parties are required to take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.⁵⁹ They should also take measures to actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women.⁶⁰ Although Kenya is a signatory to the Women's Protocol, it has not ratified the Protocol. There is need to lobby the Kenyan government to ratify the Protocol urgently.

The Constitution

The Constitution of 2010 represents major victories for women's human rights, which is seen both in its general orientation and in its specific provisions. The national values and principles of governance on which the State is founded are stated to include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Chapter 4 of the Constitution contains an extensive Bill of Rights which has elaborate provisions relating to fundamental rights and freedoms. Notably, the Constitution explicitly provides for gender equality and non-discrimination as follows:

Article 27 (1): Every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.⁶¹

Article 27 (3): Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

⁵⁸ Article 1.

⁵⁹ Art. 4 (2) (a).

⁶⁰ (Art. 4 (2) (d);

⁶¹Article 27 (2).

Neither the State nor any person is allowed to discriminate, whether directly or indirectly against any person on any ground, including sex, pregnancy or *marital status*, among others.⁶² For the first time, anti-discrimination provisions target not just the State but also non-State persons. This enables women to obtain redress from individuals, groups and corporate bodies in relation to discriminatory action. Further, women have been recognized as a category of vulnerable or marginalized groups and an obligation imposed on all state organs and public officers to address the needs of such groups.⁶³

Apart from recognition of general principles related to respect for human rights, gender equality, non-discrimination, there are also some more specific rights relevant to the issue of gender based violence. Article 29 provides for the right to freedom and security of the person, which includes the right not to be subjected to any form of violence from *either public or private sources*, to torture in any manner, whether physical or psychological, or to corporal punishment, or to be treated or punished in a cruel, inhuman or degrading manner. This right is not subject to any limitation, which means that no law or policy can operate to derogate from it.⁶⁴ Article 28 recognizes the inherent dignity of every person and the right to have that dignity respected and protected.

Another important provision is that all laws in force before the passing of the Constitution “shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.”⁶⁵ This means that existing legislation must be interpreted in a manner that is consistent with the Constitution, thus providing a basis for the invalidation of law that is overtly discriminatory, such as the provisions of section 43 (5) of the Sexual Offences Act.

⁶² Art. 27 (4) and (5). The other grounds are race, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth.

⁶³Article 21 (3) as read together with Article 260 which defines “marginalised group” to mean a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4). Some of the grounds of discrimination in that clause relevant to women include sex, pregnancy, marital status and dress.

⁶⁴ Art. 25 (a).

⁶⁵ Article 7 (1) of Schedule 6. This means that existing legislation must be interpreted in a manner that is consistent with the Constitution.

Further, customary law is clearly subordinated to the Constitution, and any conflicts between customary law and the Constitution are to be resolved in favour of the Constitution, which include the Bill of Rights and the principles of non-discrimination and equality.⁶⁶ This removes the ambivalence in the repealed Constitution with regard to customary and religious laws in the realm of personal law and is a welcome development.⁶⁷ It is therefore not permissible to defend gender-based violence or other discriminatory practices on the basis that they are allowed under the Constitution. Hence practices that are legitimated by customary law, such as spousal beating (“chastisement”), child marriages, female genital mutilation, widow inheritance and widow cleansing may be challenged on constitutional grounds.

The Constitution also recognizes the right of every adult to marry a person of the opposite sex, based on the free consent of the parties. Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.⁶⁸ While the Constitution grants recognition to multiple marriage and family law systems, including customary law, such marriages are subject to the Constitution, including the Bill of Rights and the equality and non-discrimination provisions.⁶⁹ Thus forced marriages or marriages of under-age girls are not permissible under the Constitution.

The above constitutional provisions clearly provide a firm basis for protection of married women against gender based violence, including marital rape. These provisions can therefore be used as a springboard for reform of the law relating to marital rape.

Strategies for Change

The following strategies are proposed towards ensuring protection of married women from marital rape.

⁶⁶ Art. 2 (4).

⁶⁷ Despite a prohibition of sex discrimination in section 82 of the repealed Constitution, the “claw-back” provisions in sub-section 4 effectively allowed discrimination in the area of personal law, including marriage, divorce and succession.

⁶⁸ Article 45 (1).

⁶⁹ Celestine Nyamu-Musembi, Patricia Kameri-Mbote, Winifred Kamau & Nancy Baraza, *Promoting the Human Rights of Women: A Comparative Review of the Domestic Laws* (UNIFEM Regional Office for East & Horn of Africa, 2010).

1. Criminalization of Marital Rape

Criminal law serves an important function in not only protecting individuals against harms but also in addressing threats to the wellbeing of society as a whole. Where conduct is prohibited by the criminal law, this sends a strong message to society that such conduct is unacceptable and will be punished. In addition, criminal law offers a remedy in the form of sanctions such as imprisonment which also serve as a deterrent to further criminal conduct. Criminalization therefore has significant normative value.

Criminalization of marital rape is an important first step in the protection of married women who are victims of sexual violence perpetrated by their spouses. There are three options open to the Kenyan legislature. One is by removing the exemption contained in section 43 (5) of the SOA without additional language. The effect of this would be that marital rape and rape by other perpetrators would be treated the same way. The second option involves enactment of provisions specifically proscribing marital rape, either by specifying that a husband can be held liable for the rape of his wife,⁷⁰ or by adding that the fact that the perpetrator is married to the complainant is no defence in a charge of rape.⁷¹ Thirdly, in addition to the first two options, the legislature can enact additional legislation protecting women from spousal sexual violence. An example is the draft Domestic Violence Bill, 2012 which includes marital rape in its definition of violence.

However, while criminalization is a necessary first step in the protection of women from marital rape, it is not sufficient as the only remedy. This is because of the inherent limitations of criminal law. First, the criminalization of conduct does not necessarily result in change of people's attitudes towards the conduct. Further, where penal provisions go against the established status quo, there is a high possibility of backlash, as happened with the imposition of section 38 in the Sexual Offences Act criminalizing the making of false charges. In addition, due to the complexity of marital relationships women may be reluctant to report their husbands where there is the prospect of a jail term upon conviction. It is therefore important that alternative measures be taken to deal with marital rape in addition to criminalization, including legislation that provides

⁷⁰ See the South African Prevention of Family Violence Act, section 5.

⁷¹ See the Zimbabwean Criminal Law (Codification and Reform) Act, section 68 (5).

civil remedies and mandates fostering of alternative dispute resolution mechanisms such as mediation where appropriate.

Judicial intervention

Courts have a primary role in the enforcement and protection of human rights. An active and creative judiciary can be critical in the protection of married women from spousal sexual violence. An important tool at the disposal of the Kenyan judiciary is their power of judicial review which includes nullifying and striking out legislation on the ground that it is unconstitutional.⁷² A constitutional challenge may therefore be brought against the marital rape exemption in section 43 (5) of the SOA under the equality and non-discrimination clauses of the Constitution, particularly as they clearly outlaw discrimination on the ground of marital status.

From a strategic point of view, bringing a constitutional challenge may be easier than legislative change as litigation would avoid the publicity and likely polarization of legislative reform. Legislative change can then follow as happened in the case of section 38. In this regard judicial training and education is crucial in order to create or raise awareness of gender issues among judges. This would include the incorporation of international law norms and use of gender equality analyses in judicial decision-making. Judges also need to be aware of gender biases and stereotypes that contribute to women's subordination, including their own. The Constitution provides a requirement for continuing judicial training. Such training can be included as part of the curriculum for the mandatory induction course for newly appointed judges as well as for refresher courses at the Judiciary Training Institute.

Public education and awareness-raising

There is also need for sustained public education and awareness-raising on the issue of gender based violence with a view to dismantling of gender stereotypes and negative cultural attitudes against women. Both women and men need to be aware of the physical, psychological and economic harms caused by sexual violence at an individual and societal level. It would also be useful to engage traditional and community justice

⁷² This power is solidly anchored on Article 2 which declares the supremacy of the Constitution, rendering void any law (written or unwritten) which is inconsistent with the Constitution.

structures in such a campaign with a view to making them more democratic and gender sensitive.

Conclusion

Kenyan law is inadequate to protect married women from sexual violence perpetrated by their spouses. The Kenyan state is under obligation at the international and regional levels to enact legislation and take other measures to ensure such protection, including dealing with gender stereotypes and negative cultural attitudes and practices. The Constitution provides a solid basis for reform of the law. Criminalization of marital rape is required as a first and immediate measure in order to remove the marital rape exemption in the Sexual Offences Act, as this would provide married women with an avenue to access justice which they have hitherto been denied. However, criminalization, though necessary, is not sufficient and must be supplemented by additional measures including judicial training as well as public education and awareness-raising.