

**INADEQUACY OF LAW IN DEALING WITH MARITAL RAPE**

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## Table of content

DECLARATION.....	iii
ACKNOWLEDGEMENT.....	iv
DEDICATION.....	v
ABSTRACT.....	vi
TABLE OF ABBREVIATIONS.....	vii
TABLE OF CASES.....	viii
TABLE OF AUTHORITIES.....	ix
CHAPTER ONE.....	1
INTRODUCTION.....	1
1.1 Introduction.....	1
1.2 Background of the study.....	2
1.3 Statement of the problem.....	4
1.4 Justification of the study.....	5
1.5 Hypothesis.....	6
1.6 Limitations of the study.....	6
1.8 Theoretical framework.....	10
1.8.1 Historical theory.....	10
1.9 Research objectives.....	11
1.10 Research questions.....	12
1.11 Research methodology.....	12
1.12 Chapter breakdown.....	12
CHAPTER TWO.....	13
OVERVIEW OF MARITAL RAPE AND LAWS GOVERNING MARITAL RAPE NATIONALLY AND INTERNATIONALLY.....	13
2.1 Introduction.....	13
2.2 Overview of Marital Rape.....	13
2.3 Statistics of marital rape in Kenya.....	19
2.4 Laws addressing marital rape in Kenya.....	20
2.4.1 Sexual offence Act.....	20
2.4.2 The Constitution of Kenya 2010.....	20
2.4.5 Protection Against Domestic Violence Act.....	22
2.5 Conclusion.....	23
CHAPTER THREE.....	24
COMPARATIVE ANALYSIS OF THE REPUBLIC OF INDIA AND THE UNITED KINGDOM.....	24

<b>3.1 Introduction.....</b>	<b>24</b>
<b>3.2 Marital rape in the Republic of India .....</b>	<b>25</b>
<b>3.2.1 Statistics of marital rape in India .....</b>	<b>25</b>
<b>3.2.2 Laws governing marital rape in India .....</b>	<b>26</b>
<b>3.2.3 Reasons why India has not criminalized marital rape .....</b>	<b>29</b>
<b>3.2 Marital rape in the United Kingdom.....</b>	<b>30</b>
<b>3.2.1 Statistic of marital rape in the United Kingdom.....</b>	<b>32</b>
<b>3.2.2. Laws governing marital rape in the United Kingdom.....</b>	<b>32</b>
<b>3.2.2.2. Crimes Amendment Act of 2005.....</b>	<b>33</b>
<b>3.2.3. Conclusion .....</b>	<b>34</b>
<b>CHAPTER FOUR.....</b>	<b>36</b>
<b>CONCLUSION AND RECOMMENDATIONS .....</b>	<b>36</b>
<b>4.1 Conclusions.....</b>	<b>36</b>
<b>4.2 Recommendations .....</b>	<b>39</b>
<b>4.2.1 Repeal of section 43(5) of Sexual Offence Act and criminalizing marital rape.....</b>	<b>39</b>
<b>4.2.3 Amendment of the Protection against Domestic Violence Act.....</b>	<b>40</b>
<b>4.2.4 Education and public awareness .....</b>	<b>41</b>
<b>BIBIOGRAPHY.....</b>	<b>43</b>

**DECLARATION**

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

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*“Trust the process. Your time is coming. Just do the work and the results will handle themselves.”*

Tony Gaskins.

Womenforone.com

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## **DEDICATION**

This paper is dedicated victims of marital rape who have suffered in silent because of marital rape exception created by the Sexual Offence Act. To my mother **Magdalene Mwikali Kimeu** and father **Daniel Onyango** for their sacrifice, love and unrelenting support they have always shown me.

## **ABSTRACT**

In 2013 the Minister of Gender, children and social development stated that one in five Kenyan women experience on the form of many forms of domestic violence however this number has continually increased. In Kenya 2/3 of the victims who report abuse cases report their significant others or relatives to be the perpetrators. The parliament has however tried to provide a legal framework for protection and relief of victims of domestic violence, providing protections to spouses and any children or other dependent persons from domestic violence however, many of the existing laws lack adequacy they tend to focus more on sexual abuses and physical abuse leaving out marital rape.

The purpose of this research is to get a clear understanding of why marital rape is still an alarming problem in Kenya despite the existing laws governing domestic violence and sex offences. The focus is to critically analyse existing laws on marital rape and rape in general. The Protection against Domestic Violence Act, Sexual Offence Act, Marriage Act, Matrimonial property Act which is the existing piece of legislation. The paper is also to focus on the practicability of the laws in Kenya and advocate for the inclusion of other forms of abuse such as marital rape and criminalization of marital rape. It also aims to solve the long-standing question of where the issue of Kenya laws is lack of adequate laws or poor implementation process by looking at already decided cases and comparing our legal framework on dealing with marital violence with other countries together with giving relevant recommendations.

## **TABLE OF ABBREVIATIONS**

ICCPR – International Covenant on Civil and Political Rights.

UDHR – Universal Declaration of Human Rights.

UK – United Kingdom.

ACHPR – African Charter on Human and Peoples’ Rights.

USA - United States of America.

UN-United Nations.

APHRC African Population and Health Research Center.

CEDAW- Convention on the Elimination of All Forms of Discrimination against Women

FIDA - The International Federation of Women Lawyers.



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Constitution of Kenya 2010.

Crime amendment Act 2005.

Evidence Act 2014.

India penal code 1860.

Judicature Act 1967.

Protection against Domestic Violence Act 2015

Marriage Act 2014.

Sexual Offences Act 2006.

The Constitution of India 2018.

The Penal Code 2012.

UK Sexual Offence Act 2003.

### **CONVENTIONS/ TREATIES**

African Charter on Human and Peoples' Rights 1998.

Declaration on the Elimination of Violence against Women 1993.

Convention on the Elimination of All Forms of Discrimination against Women, September 1981.

International Covenant on Civil and Political Rights, 23 March 1976.

Universal Declaration of Human Rights 1948.

# CHAPTER ONE

## INTRODUCTION

### 1.1 Introduction

Rape is defined as forcible sexual relations with a person against that person's will. The Sexual Offences Act<sup>1</sup> sets out instances where rape can be said to have been committed. On the other hand, violence is defined as 'the intentional use of physical force or power, threatened or actual, against oneself, another person or against a group, which either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development or deprivation.'<sup>2</sup> Sexual violence is an increasing decadence on the rising. Kenya is not an exception concerning the rise in these incidences. It is further enhanced by ignorance of the law, as well as the insufficient coverage of legal regulation to control incidences of sexual violence.<sup>3</sup> Up to today, the legal regime hasn't incorporated all the forms of sexual violence making it difficult to effectively deal with their rise or emergence. Sexual violence also infringes on the many human rights of the victim, including the right to health.

Marital rape is defined as any unwanted sexual acts by a spouse or ex-spouse that is committed without the other person's consent.<sup>4</sup> It is obtained by force, threats, and intimidation. These sexual acts include any forced sexual behaviour with other individuals as well as other sexual activities that the victim considers degrading, humiliating, painful and unwanted. It is an intimate and personal traumatic experience. Estimates of the prevalence of marital rape suggest that 10 to 25 per cent of women are victims of rape or attempted rape by a current or former spouse.<sup>5</sup> From the above estimates, it is apparent that spousal exemption from marital rape affects a significant number of victims and it is an issue that needs to be addressed. Within marriage, if a partner gives consent to sexual intercourse because of a threat of injury to the children or herself, depriving the

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<sup>1</sup> Sexual Offences Act 2006, s 3.

<sup>2</sup> WHO's <[Http://www.who.int/violence\\_injury\\_prevention/violence/en/](http://www.who.int/violence_injury_prevention/violence/en/)>.accessed on 19 February 2019.

<sup>3</sup> Kithiki Kindure, *towards a sexual offences law: reappraising the legal framework on sexual violence in Kenya*.

<sup>4</sup>US legal Inc. marital rape law and definition (US legal 23<sup>rd</sup> September 2019) <<https://definitions.uslegal.com/m/marital-rape>> accessed on September 2019.

<sup>5</sup> Finkelhor, David & K Yllo, '*License to Rape: Sexual abuse of Wives*' (New York: Holt, Rinehart and Winston 1985) pg. 5.

woman her right to stay in the house or receive maintenance, it is not a valid consent and it is still rape.<sup>6</sup>

The Sexual Offences Act does not prohibit or criminalize forced sex within marriage. Spousal rape has been explicitly exempted in section 43 (5) which states that rape shall not apply in respect of persons who are lawfully married to each other. This exemption clause tends to legalize rape within marriage. The lack of laws criminalizing marital rape creates an assumption that the wife is exclusive property of the husband. It also asserts a lower status of married women. Marital rape is a form of domestic violence which reinforces women's equality in the institution of marriage and the greater society.<sup>7</sup> Until recently, marital rape was not considered as a crime because it was argued that, a husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract.<sup>8</sup>

In 2015 Kenya drafted the Protection against Domestic Violence Bill<sup>9</sup> which seeks to provide for protection and relief of victims of domestic violence, to provide for the protection of a spouse and children or other dependent persons. However, this Act failed to expressly provide for the criminalisation of marital rape. The research focuses on marital rape as a form of domestic violence often overlooked by society because of patriarchal ideologies that emphasize male superiority in marriage and myths justifying marital rape. It provides arguments and reasons necessitating criminalization of rape within marriage. It also appraises the Kenyan legal regime and existing legislation by accessing their effectiveness.

## **1.2 Background of the study**

During the patriarchal traditional days, many violence's in marriages were considered as normal and not offences. Once a man had fully paid dowry, the wife was considered his property. It was not only in African it was a worldwide problem were women were belittled by their husband and even bitten when they failed to respect and obey their husbands. In 1874 the court of North

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<sup>6</sup> R. K Bergen, *wife rape: understanding the response of survivors and service providers* (thousand oaks, CA Sage 1996).

<sup>7</sup> F Sampson, 'the Legal Treatment of Marital Rape in Canada, Ghana, Kenya and Malawi: A Barometer of Women's Rights' (2010) pg. 14.

<sup>8</sup> Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, (California law Review. 1373 2000).

<sup>9</sup> Protection against Domestic Violence Act, 2015.

Carolina overruled old law that a husband had a right to whip his wife.<sup>10</sup> Even after the invention of colonial rule in Africa, the cycle was still the same because the British concept was not different from African traditional view of the family. The husband was still the head of the family and the breadwinner the wife was left in the private sphere. Kenyan law reflected an era in Britain when married women were not regarded as persons; upon marriage, spouses became one legal personality and the “one person” created was the husband. It was therefore inconceivable that a husband could rape his wife, as she was part of his person.<sup>11</sup>

Today once people fulfil conditions stated in marriage Act for a formation of a void marriage<sup>12</sup> they are perceived to have consented to marital sex. Denial of such rights and desertion during the marriage can be used as a ground for divorce this has given spouses some entitlements regardless of situations where a partner doesn't consent. Even though the constitution clearly states that parties to a marriage are entitled at the time of marriage and during the marriage<sup>13</sup> spouses don't consider that. Sexual Offence Act defines rape as a person who 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 by force.<sup>14</sup> However, according to Sections 43(5), it does not apply in respect of persons who are lawfully married to each other.

According to an interview done by University of Hampshire USA among the women interviewed one had been raped at knifepoint by a husband who held her up against the wall and threatens to kill her, one was gang-raped by her husband and his friends after surprising her in a vacant apartment. None of this offences was reported to the authorities.<sup>15</sup> This is because either the women depend on their husbands for financial support or they have a notion that children should not be raised outside a family surrounding. Cultural perception about marriage and gender role has also created a big thrift because once you report such cases to your parents, they end up telling that thus a woman job in marriage, therefore, there is lack of acknowledgement of the violence by many

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<sup>10</sup> *Oliver v United State*, 466 U.S.170 [1984].

<sup>11</sup> B. Rogers. *The Domestication of Women: Discrimination in Developing Societies*, (Tavistock Publications, London press 1980).

<sup>12</sup> Marriage Act 2014, s 11.

<sup>13</sup> The constitution of Kenya 2010, Article 45(3).

<sup>14</sup> The Sexual offence Act 2006, s 3.

<sup>15</sup> Finkelho , David & K Yllo, '*License to Rape: Sexual abuse of Wives*'(3<sup>rd</sup> edition New York: Holt, Rinehart and Winston press 1985).

people in the society. Women experience either force only rape, battering rape or obsessive rape<sup>16</sup>. However, the stereotype about women and sex such as women say 'NO' when they mean 'YES' such stereotypes have misled men into believing that they should ignore women protest.

Every individual has a right to be free from force, coercion and violence in relation to sex, it is a human right stated by several international and regional instruments in which most of those treaties Kenya has ratified and domesticated them as law. Kenya must present an implementing report to those committees<sup>17</sup> besides this duty, Kenyan law fails to prohibit rape within marriage. The only law that exists concerning domestic violence and protection of women is Protection against Domestic Violence Act which is a general law on assault. This law is inadequate for protecting women who are experiencing marital rape because it requires witness and proof of physical evidence which is had to obtain because the victims fear escalating and furthering the situations. The introduction of the Sexual Offences Act in 2006 tightened the legal definition of sexual offences and penalties it however excluded marital rape.

Lack of clear legal framework to deal with marital rape has continued to disadvantage a lot of women cause of cultural stereotype and societal view of marriage. In US marital rape has been criminalized in all 50 states since 1993, therefore it is possible to make marital rape an offence and put sanction on it this can be done through creation of clear sufficient legal framework to deal with rape because when raped by a stranger you have to live with the horrifying memories but when raped by your husband you have to live with your abuser all the time which can cause some psychological problems. Therefore, a legal framework has to be created to help victims of marital rape.

### **1.3 Statement of the problem**

Spouses in marriage have a right to conjugal and consummation rights. Denial of those rights by either spouse can be used as a ground to divorce. Marital rape affects people who have legally been married either through Civil, Islamic, Christian or Customary marriages. There is an

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<sup>16</sup> Kerstil Yllo, *Battered Woman's Justice Project on marital rape*, (2<sup>nd</sup> edition Oxford university press 1996).

<sup>17</sup> African population and Health Research Center; Policy brief marital rape and its impact (No.13of 2010) <<http://www.realising-rights.org/docs/newsletter/Marital%20Rape%20Policy%20Brief%20for%20MPs>> accessed on June 2019.

assumption that once a person has met the conditions under section 4 and 11 of the Marriage Act they automatically consent to sexual intercourse during the marriage. Women are the ones who suffer the most and stand at a disadvantaged position. Marital rape is an epidemic raising issue in the world some countries have tried to address the situation while others are still struggling.

The issue arising is that many men and women are afraid to report rape cases because there is no legal framework addressing such issues and for the countries that have existing laws people are still reluctant to report such situations because of what the society and the support that they may lose from their spouses i.e. financial. Marital rape needs to be addressed and a legal framework should be put in place if this issue is not addressed both women and men will continue to suffer in silence from this form of violence. Sexual violence in marriages has been an issue even before the colonial period, women during those periods were expected to fulfil their husbands and had no say in marriage. However, the problem has also progressed up to today where particular duties are perceived to be women duties, therefore, marital rape is not viewed as a big deal in the society. The problem needs to be fixed now to avoid future damages. The issue of marital rape is occurring globally but more rampant in countries that lack a legal framework addressing the issue. It is important to address this issue as a country because women are suffering and in fear of reporting such cases because it's even difficult to prove marital rape because of the two elements of criminal cases. One way to address the situation is by creating a legal framework that criminalizes the offence and putting punishment in place for such offence.

#### **1.4 Justification of the study**

Even though different institutions and organizations have tried to address marital rape, a legal solution is yet to be found. Women are still experiencing this form of violence because there is no legal framework to address the issue. This topic is based on the premise that the Sexual Offence Act article 45(3) has directly and eliminated rape among spouses, therefore, disadvantaging those victims who would like to seek courts intervention. This section also goes against international instruments such as CEDAW<sup>18</sup> which states that states should condemn all form of discrimination against women by adopting and pursuing appropriate policies and laws. This section is also an

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<sup>18</sup> Convention on Elimination of All Forms of Discrimination against Women September 1981, Article 2.

infringement on article 3 of ACHPR<sup>19</sup> and article 27 (1) of the Constitution, that everyone is equal before the law and has the right to equal protection and benefits of the law.

There is a need to address marital rape legally and develop a favorable procedure to be followed during the prosecution of this offence. Like any other criminal offence, victims will be required to prove both mens rea and actus reus however for marital rape it is hard to prove beyond a reasonable doubt that, the mens rea in a case against a legally married husband because it is perceived that he has a right to conjugal rights. The study is needed to analyze and find solutions on how we can prosecute marital rape and why we need to make it an offence. We also need to understand why all 50 states in the United States have made this particular case an offence.

### **1.5 Hypothesis**

1. This paper assumes that women who are victims of marital rape are not okay with the act done by their husbands. They neither consent nor approve of it as a conjugal right that their husbands are entitled to exercise.
2. It also assumes that the reason why marital rape has not been addressed or the reason why victims do not seek court intervention is that we lack a legislative framework and policies that are set out to address marital rape.
3. This paper also assumes that it is only women who are victims. They have been affected and discriminated by Sexual Offences Acts and that spouses are capable of raping each other.

### **1.6 Limitations of the study**

There are some possible limitations of this study such as;

- i) **Conflicts arising from cultural bias and other personal issues.** This is the case because marital rape is surrounded by cultural stereotypes and believes. Culturally marital rape is acceptable and people don't believe that a woman can be raped by her husband. Once a woman is married, she has to ensure that her husband is satisfied. This might limit my study because a lot of women think it is not an offence and it is their duty as wives.

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<sup>19</sup> African Charter on Human and Peoples' Rights 1998, Article 3.



**ii) Limited access to data.** The overall statistic of some countries is available worldwide, however since it is not a crime in Kenya and many countries in Africa. It is hard to get information and an accurate statistic of the affected victims. It is also difficult to access individual data of the victims since just like rape cases the matter is treated as private and confidential therefore it becomes hard to learn different facts, situations and circumstances that lead to the occurrence of marital rape since the information is concealed.

### **1.7 Literature review**

Numerous scholars and researchers such as, have linked marital rape to culture and societal dictations of what is right or wrong. However, many authors have not linked marital rape to the right to dignity and discussed the issue of shared dignity in marriages. This research views marital rape as a violation of human dignity. It also gets to question if human beings have shared dignity. If after marriage violation of one's dignity is a crime which attracts a sanction. Many people have viewed marriages as a bond of trust where the husband exercises a high sexual demand and superiority in the union.<sup>20</sup> Such acts have been justified by religion, culture and even some laws such as article 43(5) of the sexual offence Act. A study by FIDA demonstrated that 74.5% of women have been abused in their homes this increase needs to be addressed. It also showed that marital rape has various adverse effects on women which include a higher risk of HIV infection.<sup>21</sup>

Under the UN declaration of violence against women<sup>22</sup>, any form of violence against women is an infringement on their fundamental rights and privileges, this invalidates the enjoyment of the rights and as a consequence, it curtails the achievement of development in equity and peace. Kenya has ratified several international treaties on human rights which form part of our laws as per the constitution.<sup>23</sup> These include the ICCPR, ICESCR, CEDAW and the Convention against Torture. By ratifying the treaties, it ensures regulation of the actions of non-state actors as well as ensuring and measuring if compliance by the various treaty bodies. According to Torres it is hard to account

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<sup>20</sup> Gitanjali Saraf, Vikramaditya Rai '*marital rape and Indian legal scenario*' (Oxford press 2017).

<sup>21</sup> African Population and Health Research Centre, "Marital Rape and its Impacts: A Policy Briefing for Kenyan Members of Parliament < <http://www.aphrc.org/insidepage/?articleid=574>> accessed on 12/4/2019.

<sup>22</sup> UN Declaration, Violence against Women 1993.

<sup>23</sup> Constitution of Kenya, 2010 article 2.

for marital rape cross-culturally when states, religious groups and sometimes victims themselves holding onto the concept of inapplicable.<sup>24</sup> Supporting the scholar ignorance and lack of a legal framework to emphasize marital rape has been the main problem in dealing with marital rape because many people have an understanding that it is a form of violence because of use force. However, they don't think it should have any consequence because they are legally married to the victims.<sup>25</sup>

The author further argues that consent, marriage and social changes in the global context as the first account of rape from a cross-cultural perspective.<sup>26</sup> However, this doesn't mean that all cultures view and understand rape the same way. This is because according to some cultures rape in marriages might be condemned in some instances while in others marital rape is viewed as an acceptable practice. McWilliams<sup>27</sup> defines the word marital rape as a violation of a woman's universal human right. Under Constitution article 2(6), Kenya is part of international treaties which it has ratified and domesticated.<sup>28</sup> Every person has a right to human dignity. The United Nations preamble recognizes that people have inherent dignity and that everyone is born equal in dignity.<sup>29</sup> Marital rape is, therefore, a violation of human rights.

Traditionally women's role has been viewed as submissive. Sex has been treated as a taboo and the main reason why people get married. The fact that the consent age has been stipulated, as the age for a valid marriage, has disadvantaged married victims because the law tends to protect minors from sexual assaults and accord no legal protection to wives in direct contravention of human rights regulations. In countries such as Vietnam marital rape has been understood as part of marriage that women because of their gender must endure and women in such circumstances have admitted and recognized that it causes suffering and undermines their well-being.<sup>30</sup> Agreeing with

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<sup>24</sup> M. Gabriela Torres, *reconciling culture difference in the study of marital rape*(4<sup>th</sup> edition New Yock, Oxford University press 2016) page 10.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Kersti Yallo, M. Gabriela Torres, *Consent, Marriage and Social Change in Global Context*, (first published 2016 oxford university press).

<sup>28</sup> Ibid.

<sup>29</sup> Universal Declaration of Human Rights 1948 article 1.

<sup>30</sup> Kersti Yallo, M. Gabriela Torres, *Consent, Marriage and Social Change in Global Context*,(fourth edition oxford university press 2016)

the author many women have normalized marital rape and accepted it as a way of life, even in countries where legal frameworks exist, many women don't report rape cases.

Hannah Britton and Lindsay Shook discuss marital rape in Namibia where participants in parliament argue that marital rape cannot happen in marriage because the two have agreed and taken an oath to come together. They know what will take place through thick and thin and people will only complain of rape when a marriage turns sour and not during the honeymoon.<sup>31</sup> This is also the same problem that Kenya has encountered and even with the pressure of human rights bodies and civil societies such as FIDA no legislation framework has been implemented to curb this problem. Some members of parliament from Namibia such as Petrus Lilonga have termed marital rape as a distraction from real rape.

According to Christine Kung'u the government must take deliberate conscious steps in addressing violence against women in their homes. This includes changing the legal framework which already has existing gaps to protect married women. This would require a multi-sectorial approach in dealing with the vice as well as criminalizing the act.<sup>32</sup> In supporting the scholar this work will seek to layout the elements of marital rape which when proven it would be enough to secure a conviction. The article also quotes the case of **S v Lopez** where the concept of marital rape has been misunderstood over time beyond the legislative arm of government the court found a husband guilty for raping his wife but his sentencing was reduced from 10 to 5 years because the wife was no stranger to having sexual intercourse with the husband. The court further suggested that it is more traumatizing to be raped by a stranger than a man you once loved and trusted.<sup>33</sup> Lack of proper implementation mechanism and discretion among judges has created a problem because in Kenya marital rape has only been used as a ground to divorce when demonstrating extreme cruelty.<sup>34</sup> This paper proposes that marital rape should be addressed through the enactment of a legal framework which will stipulate the sanction. Right to human dignity in marriages should also

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<sup>31</sup> Hanna Britton Lindsey Shook, "I need to hurt you more": Namibia's fight to end gender-based violence (University of Chicago press journal volume 40 2014) pg. 168.

<sup>32</sup> Kung'u, *Criminalization of Marital Rape in Kenya*, (University of Toronto Publishers, 2011) 2- 3.

<sup>33</sup> Ibid.

<sup>34</sup> *Esther Nangwanaa Nandi v Jones Chewo Bobo* [2006] eKLR.

be addressed by making sure we adapt an implementing and monitoring body to implement the international framework.

## **1.8 Theoretical framework**

In order to understand the marital rape exemption as it is today, there must be a full comprehension and appreciation of how the 18th century legal scholars perceived and viewed marriage because the same culture has been carried to the current generation and many people have used such injustices as justification of why a woman can't be raped by her husband. This paper discusses two theories historical and equity theory.

### **1.8.1 Historical theory**

The historical theory has been used by many as a defence and justification of why a husband can't rape his wife. Tracing the history of legal development of the law regarding rape a lot of laws were developed to protect the interest of men and not the victims whom men viewed as property. Men designed laws to prevent the abduction of propertied virgins, a crime they viewed as akin to damaging another man's property. From this perspective, prosecuting a husband for raping his wife made no more sense than indicting him for stealing his property.<sup>35</sup> After being abducted and ravished, a propertied woman who was a virgin could save her rapist by marrying him this has brought the subsequent marriage doctrine that allowed a rapist to escape prosecution by marrying his victim.<sup>36</sup> The main theory developed to justify the marital rape exception under the historical theory was the implied consent theory.

Once one got married there was a presumption that consent had been given since they manifested actions and signs of consent indirectly. The legal genesis of the marital rape exemption is a statement made three hundred years ago by Sir Matthew Hale: he stated that a husband cannot be guilty of a rape committed by himself upon his lawful wife, because there is mutual matrimonial consent and contract that the wife hath give herself unto her husband.<sup>37</sup> The first examination of the validity of the marital rape exemption began in the late **1970s**. As more jurisdictions have

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<sup>35</sup> Freeman, "*But if you can't Rape Your Wife, Who[m] Can You Rape*": *The Marital Rape Exemption Re-examined* 1981 < <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=80842> > accessed on 30<sup>th</sup> June 2019.

<sup>36</sup> Ibid.

<sup>37</sup> 1 M. HALE, *the history of the pleas of the crown* 629 (P. Glazenbrook ed. 1971).

grappled with similar issues, many have held that a husband *can* be criminally liable for raping his wife. The court in *State v. Smith* summarized **by** saying, "The fact that many jurisdictions have mechanically applied the rule, without evaluating its merits under changed condition does not mean it should be applied that way under the common law."<sup>38</sup>

William Blackstone states 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 is incorporated and consolidated into that of the husband.<sup>39</sup> Such conceptualization of marital rape has continued to disadvantage women who want to bring claims under marital rape. When judges are making judgments or ruling they are bound to precedence.<sup>40</sup> Therefore judges have still used the decisions of other judges to justify why marital rape cannot be a crime and why a husband cannot be convicted of raping his legal wife. The marital rape exemption, therefore, gives legal immunity to a man that has committed the above-mentioned act of forcefully assaulting his wife. While the marital rape exemption protects the interests of the husband, the wife is left to deal with harsher physical, emotional and legal consequences.<sup>41</sup>

## 1.9 Research objectives

1. To determine if the sexual offences act 2006, addressed the loopholes in the previous regime in regards to marital rape
2. To evaluate and interrogate the practicability of the provisions of the sexual offences act in dealing with marital rape.
3. To undertake a comparative analysis of India, Kenya and UK.
4. To contribute to the improvement of the legal framework regarding marital rape.
5. The research also aims at making findings and recommendations on the most effective way of dealing with marital rape, therefore ensuring that marital rape is a punishable offence under the Act.

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<sup>38</sup> *State v. Smith*, 80 Ohio St. 3d 89, 684 N.E.2d 668 [1997].

<sup>39</sup> William Blackstone commentaries 430.

<sup>40</sup> *Njenga Mwangi Wachira & Partners v County Secretary, City-County of Nairobi* [2018] eKLR.

<sup>41</sup> Maria Pracher, *the Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, (11 Golden Gate U. L. Rev. 1981).

### **1.10 Research questions**

1. What are the loopholes in our law regarding marital rape?
2. What are the possible consequences of legalizing marital rape and to what extent will criminalization of marital rape lower cases of marital rape?
3. How a victim will be able to prove the two elements of criminal cases mens rea and actus reus which is a bit difficult for marital rape cases?
4. What is the nature of laws regarding marital rape in Kenya compared to other jurisdictions?
5. What are the most favourable international standards and mechanism for dealing with marital rape?

### **1.11 Research methodology**

This paper is based on qualitative data obtained from secondary and tertiary resources. The secondary source includes journals and articles, reports from relevant organizations, textbooks, case law, internet sources and statute. Works by scholars, professionals and commentaries by those with information and knowledge appropriate for this topic.

### **1.12 Chapter breakdown**

Chapter one provides a proposal to the study which includes an introduction, background of the study, statement of the problem, justification, hypothesis, limitation of the study, literature review, research questions and objectives, research methodology and theoretical framework.

Chapter two analyses the overview of marital rape, Kenyan legal framework and international instruments and treaties addressing marital rape.

Chapter three tackle the comparative analysis of Kenya, India and the United Kingdom.

Chapter four concludes the paper and provides recommendations while trying to include both the legal and non-legal responses to the problem.

**CHAPTER TWO**  
**OVERVIEW OF MARITAL RAPE AND LAWS GOVERNING MARITAL RAPE**  
**NATIONALLY AND INTERNATIONALLY**

**2.1 Introduction**

The only law that exists concerning domestic violence and protection of women is Protection against Domestic Violence Act which is a general law on assault. This law is inadequate for protecting women who are experiencing marital rape because it requires witness and proof of physical evidence which is hard to obtain because the victims fear escalating and furthering the situations. The introduction of the Sexual Offences Act in 2006 tightened the legal definition of sexual offences and penalties, it, however, excluded marital rape. Today once people fulfil conditions stated in the Marriage Act for a formation of a void marriage<sup>42</sup>, they are perceived to have consented to marital sex. Denial of such rights and desertion during the marriage can be used as a ground for divorce this has given spouses entitlements regardless of whether a partner consents. Even though the Constitution states that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the time of the dissolution of the marriage,<sup>43</sup> spouses rarely consider that. In this chapter, discussions will be on the overview of marital rape, the factors that have influenced decision of section 43(5) of Sexual Offence Act, ancient and historical view of marital rape and the laws governing marital rape both nationally and internationally.

**2.2 Overview of Marital Rape**

According to Sections 43(5) of the sexual offences Act, rape does not apply to a legally married couple.<sup>44</sup> Marital rape has not been seen as an offence even though it violates many individual human rights, international instruments addressing human rights and the Constitution. Marital rape violates the rights of the victim, such rights include; right to dignity, right to family, right to privacy, freedom, and security of a person.<sup>45</sup> Human rights are multiplier rights and interrelated<sup>46</sup> enjoyment of one right depends on the other therefore marital rape should be treated as an offence

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<sup>42</sup> Marriage Act 2014, s 11.

<sup>43</sup> The Constitution of Kenya 2010, Article 45(3).

<sup>44</sup> Sexual Offences Act 2014, s 43 (5).

<sup>45</sup> The Constitution of Kenya, 2010, chapter 4.

<sup>46</sup> *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2015] eKLR.

since it violates individuals' human rights under the Constitution. it violates women's right over their own body and human decency.

Lack of a clear legal framework to deal with marital rape has continued to disadvantage a lot of women because of cultural stereotypes and societal view of marriage. Many states in the United States have criminalized marital rape and made it an offence with a sanction. The main reason why Kenya is still lacking behind beside it being a member of many international instruments on human rights this is because historically in many Kenyan communities women have been considered to be owned by their father, this explains why bride price is always paid to the father. In many communities, after marriage, it is presumed that a woman is owned by the husband and a person cannot commit an offence or be found guilty against his personal property. In ancient days penalty of rape consisted of paying compensation to the victim's father and husband since the wife was considered a property of the husband such community practices have delayed the criminalization of marital rape.<sup>47</sup>

Even in countries where it has been made an offence the entire concept of marital rape has been misused and misunderstood overtime beyond the legislative arm of government. In the case of *United State v Lopez Solis*, the court found a husband guilty for forcefully raping his wife without consent, but his sentencing was reduced from ten to five years because the wife was no stranger to having sexual intercourse with the husband.<sup>48</sup> The court further suggested that it is more depressing to be raped by someone unknown to you than a man you once cared for and trusted from that case, it is clear that the court misinterpreted and took the crime of marital rape casually.<sup>49</sup> In Kenya marital rape has only being used as a ground for divorce and it has been left at the discretion of judges to decide<sup>50</sup> even though it succeeds as a ground for divorce, no criminal charges are imposed on the perpetrator.

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<sup>47</sup> Winfrend Kamau, Patricia Nyaundi and Jane Sarwange, *the legal impunity of marital rape in Kenya, a woman equality issue* (Research paper, University of Nairobi 2013).

<sup>48</sup> *United States v lopez solis* no. 03-10059, [2006].

<sup>49</sup> Kung'u, *Criminalization of Marital Rape in Kenya*, (University of Toronto Publishers, 2011, 2- 3).

<sup>50</sup> *Esther Nangwanaa Nandi v Jones Chewe Bobo* [2006] eKLR.



Within the larger societies, marital rape has been understood to mean any incident that a husband demands sex from his wife and when his wife rejects or fails to consent he forces himself on her. A large number of people in the society have not seen a problem with this because they believe that once a woman is married, she wholly surrenders her rights to her husband.<sup>51</sup> Finkelhor and Yllo categorically identified three types of marital rape sampling from 50 interviews they did, one is situations in which battering of women was not involved but experienced “only as much force as necessary to induce their wives into sex”<sup>52</sup> this was characterized as a force only rape, the second one was battery rape which was forced sex combined with beatings and physical abuse<sup>53</sup> the third category is obsessive rape<sup>54</sup> which is described as a combination of physical force with strange and perverse different authors have termed it as sadistic rape.<sup>55</sup>

The general rule in past ancient days surrounding many marital rape cases was that once a wife said "I do" on the alter she gave up her rights and ability to say “I don’t want”. The rationale behind this rule which was used in many common law jurisdictions was that when a woman consensually agrees to get married she contractually gives up and forfeitures her rights to the husband and denying her husband's sexual intercourse was a breach of that contract since she could not deny him his rights. The rationale has also been used in Kenya.<sup>56</sup> Marriage gave a woman duty, not rights. The rule has been used by judges such as Sir Mathew Hale who stated that matrimonial consent and contract means that, the wife has fully given up on herself to her husband which she cannot retract or not honour her obligation and duty.<sup>57</sup> He also made the following declaration that a husband cannot be guilty of any form of rape committed upon his lawful wife who he has paid for.<sup>58</sup> This was a common rule that was used by many countries that use common law precedence, it has been used as a justification of why marital rape cannot be made an offence and why a husband cannot be held liable for anything he does to his wife. In Kenya, it has been hard to make it an

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<sup>51</sup> Laura Ann Kyallo *legal respond to marital rape* (student paper at Strathmore University).

<sup>52</sup> Finkelhor, David & K Yllo, ‘*License to Rape: Sexual abuse of Wives*’ (New York: Holt, Rinehart and Winston 1985),pg. 38.

<sup>53</sup> Finkelhor, David & K Yllo, ‘*License to Rape: Sexual abuse of Wives*’ (New York: Holt, Rinehart and Winston 1985),pg. 37.

<sup>54</sup> *Ibid*,pg 50.

<sup>55</sup> Grown Nicholas *Men who rape*. (New York: Plenum Press1979).

<sup>56</sup> Emma Nyaboke Nyabicha, *exploring the boundaries of conjugal right; marital rape as a criminal offence in Kenya* (student paper Strathmore University).

<sup>57</sup> Zenaira Khan, *marital rape and the change*. Justis.

<sup>58</sup> Hale M, ‘The History of the Pleas of the Crown’, 629.

offence since a high percentage of legislators are men who still hold the same thought that a husband cannot rape his lawful wife and tradition has socially constructed women to be caregivers and take care of their family. Many women are suffering in silence and fear to report their husbands because of gender stereotypes.

Several cases have been decided using the common law exception example in the case of *R v Clarence* where the defendant had brutally repeatedly raped his wife, the court acquitted him because she had given her husband an implied consent by way of marriage<sup>59</sup> sex in marriage was considered to be a contractual obligation. Other cases have seen marital rape as a violation of women's human rights and have tried to overthrow the old rules and treat marital rape as rape and make it an offence, however, in Kenya we are yet to achieve that since our law excludes marital rape from other forms of rape. Examples of cases that have overturned this decision include the case of *Oliver v United States* in 1874 overruled the decision that a husband had a right to wipe his wife or sexually abuse his wife<sup>60</sup> because such laws in many cases of marital rape have started to be reported and people seeking professional help since earlier laws gave husbands immunity.

In the case of *R v R* which is a landmark case in criminalization of marital rape in the house of the lord overturned the common law rule that a husband cannot be guilty of raping his wife and upheld that the husband, in that case, to be convicted for raping his wife, the facts of the case is that at the time which the rape occurred the parties had separated and there was no legal separation agreement and neither of the party had filed for judicial separation or any divorce proceedings meaning under the law they were legally married. The judge stated that the time had arrived that the law should declare that a rapist remains a rapist regardless of the relationship he has with the victim or the subject, he should also be subjected to criminal law laws governing the issue of rape.<sup>61</sup>

In modern marriages parties to a marriage are seen as equal partners with equal rights when it comes to property, family among other things, therefore, Kenya laws should not exclude rape from legally married couples. Everyone holds their bundle of rights wholly and right to not be sexually abused by a partner in marriage should be upheld. The case of *R v R* was important since it

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<sup>59</sup> *Regina v Clarence* CCCR [1888].

<sup>60</sup> *Oliver v United States*, 466 U.S.170 [1984].

<sup>61</sup> *R v R* [199].

pinpointed social, economic and cultural perceptions and development in terms of how laws treat women in the context of marriage.<sup>62</sup> The judge felt that the old systems were offensive and only favoured one gender and judges had obligation to remove common law doctrine that supported such treatment against women to give rights and equality to married women since they are joined to be partners with equal rights and obligations by the contract of marriage.<sup>63</sup>

Using the contract of marriage as immunity and defence of committing marital rape under the law infringed women's right to dignity and created discrimination. Kenya has also used and upheld the same common law doctrine since it recognizes common law as a source of law<sup>64</sup> it has also incorporated customary law to handle issues relating to marriage. This has continuously placed women in a vulnerable situation because traditional dispute resolution mechanism is largely dominated by men and tradition views a woman as property and once a woman is married she automatically belongs to her husband and a husband has a right to do anything he wishes with her.<sup>65</sup> However customary law created exception and situations in which a husband was not allowed to have sex with his wife, they included during menstruation circle, mourning, when a woman was pregnant and shortly after childbirth.<sup>66</sup> Current laws on marital rape is a reflection of the cultural stereotype surrounding the institution of marriage.

To achieve protection of women against all forms of domestic violence, marital rape and protection of women's human rights the issue surrounding customary law, women rights and equality have to be addressed. For Kenya to make marital rape an offence, all offenders should be subjected to criminal law besides the relationship they have with the subject or the victim, the historical and traditional perception and view of women will have to be changed. Social stereotypes and construction on which gender should perform which role in marriage should have to change because this has been used as a defence in many communities since it is perceived that a woman

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<sup>62</sup> Zenaire khan marital rape and the change R v R 1991 Justis 16<sup>th</sup> June 2016 < <https://www.justis.com/r-v-r-1991-marital-rape-and-the-change>> accessed on 21<sup>st</sup> September.

<sup>63</sup> Ibid.

<sup>64</sup> Judicature Act 1967, s 3.

<sup>65</sup> Fiona Sampson, the legal treatment of marital rape in Canada, Ghana, Malawi and Kenya. A barometer of women's human right in September 2010.pg 25.

<sup>66</sup> Winfred Kamau, Patricia Nyaundi and Jane Sarwange, *the legal impunity of marital rape in Kenya, a woman equality issue* (Research paper, University of Nairobi 2013)

has a role to take care of her husband's needs including sexual need and failure to do so a husband is entailed to demand that from her.

A study by FIDA demonstrated that 74.5% of women have been abused in their homes this increase needs to be addressed. It also showed that marital rape has various adverse effects on women which include a higher risk of HIV infection.<sup>67</sup> In 2006 it was reported that two-thirds of women in Kenya who had experienced sexual and physical abuse identified their spouses as their perpetrators, the report also showed that approximately 16 per cent of women who are married, divorced, judicially separated had experienced sexual assaults from their husbands.<sup>68</sup> This is an indication that marital rape is becoming an epidemic issue in Kenya which needs to be addressed by creating a legal framework and centres where people can report, the government needs also to give the issue some attention since women are suffering from the fatal consequences of marital rape.<sup>69</sup>

There is also need to encourage women to report such cases because many marital rape cases are not reported because women financially dependent on their husband, they are traditionally blamed and seen as the cause and provocation of such abuses since that is their role. Some women fear humiliation shame and the backlash they are going to experience when they report such matters. The stated factors have made women suffer in silence. The decision of Kenyan legal framework to except marital rape is a clear indication of the influence of historical, cultural and old common law doctrine where a husband cannot rape his legally married wife. Such rigid law has denied women the right to sexual autonomy and impaired them to make decisions about their body, sexual orientation and whether they want to engage in sexual activities or not. It has also infringed their right to dignity since it assumed marriage limits your right to dignity, and once you are married you start having a shared dignity. An exception of marital rape from other forms of rape by section 43(5) has also promoted discrimination of women on the bases of their marital status. Kenya should

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<sup>67</sup> African Population and Health Research Centre, "*Marital Rape and its Impacts: A Policy Briefing for Kenyan Members of Parliament.*" <<http://www.aphrc.org/insidepage/?articleid=574>> accessed on 12/4/2019.

<sup>68</sup> UNAIDS, Violence against women and girls in the era of HIV and AIDS a situation and response analysis in Kenya (June 2006).

<sup>69</sup> Winfred Kamau, Patricia Nyaundi and Jane Sarwanga, *the legal impunity of marital rape in Kenya, a woman equality issue* (Research paper, University of Nairobi 2013)

use the current English law and get away with the implied consent doctrine that justifies marital rape.

The only area where marital rape victims can seek a claim under the law is generally reporting their perpetrators under penal code for assault.<sup>70</sup> Family law has also recognized marital rape as a form of extreme cruelty and has been used as a ground for divorce in many cases<sup>71</sup>, even though sexual assault cases such as marital rape have not been recognized as a form of discrimination in Kenya. In the case of *Nandi v Bobo* (2006), the petitioner filed for dissolution of their marriage on grounds of extreme cruelty and adultery after the defendant had sexually abused her in their matrimonial home by forcing her to have sex with him while he was under influence of alcohol. The high court she was able to prove cruelty against her husband, the court therefore dissolved the marriage.<sup>72</sup>

International bodies such as African and Canadian Women's Human Rights Project (ACWHRP) which Kenya is a party to, have been created to push for criminalization of rape in member countries and research on relationships between marital rape and customary law. The body in its research has argued that by state failing to protect victims of marital rape and providing equal treatment of marital rape as a form of rape is a violation of the victim's constitutional right to equal treatment under the law. Law should aim at protecting all citizens in all spheres even though it has been presumed that the state cannot interfere with marriage matters of two individuals and state interference to privacy and dignity should be limited.

### **2.3 Statistics of marital rape in Kenya**

Government statistics given by demographic household survey in 2005, conducted in Nairobi showed that 50 per cent of women living in Nairobi had experienced domestic violence since they were 15 years, in 12 months before the interview was conducted one in five women in Nairobi were found to have experienced domestic violence. Marital rape was the most stated form of violence, 42 per cent of both married and divorced women reported that they has experienced

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<sup>70</sup> The Penal Code 2014, s 250 and 251.

<sup>71</sup> Marriage Act 2014, s 65, 66 and 69.

<sup>72</sup> *Nandi v Bobo* [2006] eKLR.

sexual violence from either their current or ex-husbands.<sup>73</sup> The statistic also showed that 15 per cent of current married women reported ever being raped by their current partners who they have not reported them to the authority.<sup>74</sup> Statistics given by Kenya Demographic and Health Survey in 2008 showed that 13 per cent of women raped in marriages reported their husbands as perpetrators.<sup>75</sup> The stated statistic is evidence that marital rape is a big problem that needs to be legally addressed.

## **2.4 Laws addressing marital rape in Kenya**

### **2.4.1 Sexual offence Act**

The primary source of law in Kenya addressing the issue of marital rape is Section 43(5) of Sexual Offence Act of 2006, which states that sexual offences shall not apply to lawfully married people.<sup>76</sup> This section creates marital rape exception and excludes marital rape from criminal offences in Kenya, because of these legislation victims of marital rape cannot place any claim under the Act hence infringing victim's human rights to be free from all form of violence and disadvantaging them legally because they can't seek redress under the law. Laws should also be able to an exclusive deal with marital rape and create equity in dealing with sexual offences the same way they have promoted and dealt with equality in political, cultural and social factors that were creating and promoting discrimination.

### **2.4.2 The Constitution of Kenya 2010**

Marital rape violates several rights stated in the Constitution. One of such rights is the right to human dignity.<sup>77</sup> Every person has the right to the inherent dignity and to have that right respected. Marital rape takes away the right of human dignity of the victim since it's an act that puts shame on the victim. Another right that is violated by marital rape is right to privacy.<sup>78</sup> Marital rape victims do not enjoy this right in that the perpetrator forces themselves on the victims' body denying them the right to choose whether to indulge in the act or not. It also violates jus cogens norm such as the prohibition against torture and the right to liberty since one is held against their

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<sup>73</sup> The Kenya Demographic and Health Survey (2003) pg. 243.

<sup>74</sup> *Domestic Violence in Kenya: Report of a Baseline Survey Among Women of Nairobi*, Nairobi: (FIDA 2002)

<sup>75</sup> The Kenya Demographic and Health Survey - Preliminary Report (2008-2009).

<sup>76</sup> Sexual Offence Act 2006.

<sup>77</sup> The constitution of Kenya 2010, article 28.

<sup>78</sup> The constitution of Kenya 2010, article 31.

will. Under article 27 of the Kenya Constitution every individual before the law has a right to be protected and equally benefit from laws enacted by the government, both women and men also have equal opportunities and treatment politically, socially, economically and culturally.

The state has a positive duty to not discriminate directly or indirectly against any person.<sup>79</sup> Individuals also have the right dignity and equal rights during the marriage regardless of gender. Therefore, by enacting an act that makes marital rape acceptable is a violation of women's right to choose and have a say over their autonomy. The Constitution further guarantees the right to freedom of security of every person which includes not to be subjected to any form of violence both in the private and public sphere.<sup>80</sup> Since the Constitution is the supreme law of the country marital rape should be made an offence since it is a form of violence and the Constitution protects individuals from all forms of violence. Marital rape exception should not be used as a justification of why marital rape should be a criminal offence because all parties have the same rights and obligations in a marriage, a woman should not be perceived as property. Marriage should also not be seen as a form of implied consent.

#### **2.4.4 Evidence Act**

Section 124 of the Evidence Act provides for corroboration of evidence before the conviction of an accused person. However, in cases of sexual offences, if the only evidence available is that of the alleged victim of the offence, the court can receive that evidence and proceed to convict the accused person once satisfied the alleged victim is telling the truth. This provision is relevant when dealing with marital rape in Kenya in that the only person who can be a witness and give evidence during trial is the alleged victim since it happens privately. Therefore applying section 124 of the evidence act in determining whether the evidentiary burden of marital rape has been properly discharged or proved by the prosecution makes it easy for the alleged victims to get justice.<sup>81</sup> The court should take the victim's evidence as conclusive and should not require any corroboration. By applying this section to cases of marital rape victims will be able to prove cases of marital rape easily.

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<sup>79</sup> The Constitution of Kenya 2010, article 27.

<sup>80</sup> Ibid article 29.

<sup>81</sup> Evidence Act 2014, s 124.

#### **2.4.5 Protection Against Domestic Violence Act.**

The Act was enacted in 2015 to protect victims of domestic violence after a high report of domestic violence-related cases. Under section 3 of the Act, violence is defined to mean abuse that includes sexual violence within marriage.<sup>82</sup> This is the only piece of legislation that has recognised sexual violence does exist within marriages in Kenya. The Act also introduced applications for protection orders whereby, a person who is in a domestic relationship with another person may apply for the protection order in court concerning the other person<sup>83</sup> this has enabled victims who can nor seek court intervention in court under sexual offence Act to seek restraining orders against the perpetrators. It has also prevented the reoccurrence of the same violence since the couple does not have access to each other. The Act further goes ahead to state that violence under the Act also includes sexual violence within marriage.

The Act just mentions marital rape as a form of domestic violence it does not give any remedy or create a tribunal that can listen and determine such matters. The Act further states that the court might further recommend counselling to the parties depending on circumstances of the domestic violence<sup>84</sup> and the counselling should aim at creating a favourable protective environment for the family and victims<sup>85</sup> it should also be aimed at ensuring that the parties respect and abide by laws prohibiting domestic violence. The counselling has offered help to victims of marital rape and enabled them to deal with the traumatising events. The Act has given the resident magistrate court the jurisdiction to listen and determine all proceedings relating to domestic violence.<sup>86</sup> Even though the Act has recognised sexual violence with marriage as violence under the Act marital rape claims have not been successful because of section 43(5) Sexual Offence Act. The two laws create a contradiction. Even though the protection against domestic violence was enacted to address several ills in the society like marital rape, it is difficult since marital rape is not a criminal offence recognised by law in Kenya making it hard to deal with it decisively. Victims have to be able to report marital rape cases and get justice since it causes them a lot of trauma and depression.

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<sup>82</sup> Protection against Domestic Violence Act 2015, s 3.

<sup>83</sup> Protection against Domestic Violence Act 2015, s 8(1).

<sup>84</sup> Protection against Domestic Violence Act 2015, s 14 (1).

<sup>85</sup> Ibid.

<sup>86</sup> Ibid s 24.



## **2.5 Conclusion**

Marital rape is a crime that has continuously infringed upon the constitutional rights of the victims herein being legally married couples. Marital rape exception doctrine is still being used to justify why marital rape should not be made an offence. The society view and social construction of gender roles have encouraged the spread of marital rape. Kenya should, therefore, find it necessary to make marital rape an offence because the law is supposed to protect all citizens against any form of discrimination and violence. A married couple should not be excluded from people who can be raped because this promotes discrimination. The current victims also have no places where they can seek redress, justice or any intervention of the law it therefore important to enact laws that protect all individuals from inhuman and degrading treatment. The current legal regime is not helping the situation with only protection against domestic violence act being the only law that recognizes violence within marriage although it does not criminalize or offer punitive punishment to the perpetrators.

## CHAPTER THREE

### COMPARATIVE ANALYSIS OF THE REPUBLIC OF INDIA AND THE UNITED KINGDOM

#### 3.1 Introduction

Over the years the sexual violence against women has become a global issue that needs to be addressed. Many countries have made marital rape an offence while other countries are still holding the traditional and old view given by Judge Mathew Hale in 1971 that a man cannot be guilty of a rape committed by himself upon his lawful wife, because of their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.<sup>87</sup> Report given by UN women in 2011 shows that 52 countries out of 179 countries had amended their legislation to make marital rape a criminal offence.<sup>88</sup> The statistic shows that many countries are not yet convinced that a man can rape his wife. Factors such as the traditional view of the institution of marriage as a contract between families for purpose of companionship and reproduction, where the husband has an upper hand and more powers in a marriage have made it hard to criminalize marital rape in many African countries.

The societal conceptualization of women and their duties in marriage has put women in venerable place since people do not see them as individuals with integrity and dignity. In the US until 1993 rape laws excluded legally married couples and husband could not be prosecuted for rape against his wife.<sup>89</sup> In UK marital rape was not an offence until 1991 when the marital rape exception was overruled. This is an indication that marital rape is a global problem that has taken nations time before recognizing that marriage does not guarantee consent. Countries that have not made it criminal offences have argued that they want to protect marriage institution and enactment of such laws will lead to abuse of marriage and the law without accessing the impact that marital rape causes to women.

The chapter, therefore, looks at the issues of marital rape in Republic of India and the United Kingdom, and how those jurisdictions have legally addressed the issue surrounding marital rape

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<sup>87</sup> *R v R* [1992]1AC 599.

<sup>88</sup> UN Women justice report; *get the data* (2011).

<sup>89</sup> Kerstil yallo *marital rape in a global context from the 17<sup>th</sup> century to today* (New York: Holt, Rinehart and Winston 2017).

exception, the traditional view of marital rape and the statistics registered by victims of marital rape in India and UK. The chapter also compares those jurisdictions with Kenya legal framework. The reason why the chapter is using the UK is that Kenya was a colony of British and is still bound to common law precedent up to date. UK laws that have prohibited and abolished marital rape exception offer steps and measures that Kenya can adopt and use them to protect and bring justice to victims of marital rape. The choice of India is because India experiences the same economic and social challenges as Kenya. India has been ranked as a third world country just like Kenya in terms of economic development and even after been recognized for having a democratic system of government it has not entertained the idea of criminalizing marital rape. India is also a colony of British and bound to common law just like Kenya. India is a cultural and religious state that views the institution of marriage the same as Kenya. Kenyan and Indian traditional view of women and the social construction of gender roles is the same. India illiteracy level, poverty and financial dependency of women to men is almost the same as Kenya.

### **3.2 Marital rape in the Republic of India**

India is a country in South Asia and according to the World Bank, it has a population of 1.339 million people making it second populous country in the world. India was a British colony just like Kenya during the 19<sup>th</sup> century. India experiences the same economic, social, cultural and political challenges as Kenya. All the laws drafted by India during the 19 century were influenced by English law which was influenced by patriarchal norms that did not recognize women as a legal identity with rights to own property individually they were only allowed to own property through their husband.<sup>90</sup> India as a colony of Britain ought to have criminalized marital rape because of the influence they get from England laws.

#### **3.2.1 Statistics of marital rape in India**

The statistic given by National Family Health Survey (NFS) shows that 18 out of every 100 men across India believe that a husband has a right to be agitated demand sex from his wife if she refuses since that is her duty<sup>91</sup> 9 out of 100 men across India also agreed that a husband is allowed and

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<sup>90</sup> Serthark makkar marital rape a non-criminalized crime in India, Harvard human right journal (1st January 2019).

<sup>91</sup> National Family Health Survey, database India (2018).

justified to beat his wife if she denies him sex.<sup>92</sup> In India, 2.5% of women reported that their husbands physically forced them to perform any other sexual activity which they didn't consent to.<sup>93</sup> The survey also reported that 83% of women who have encountered sexual violence between<sup>94</sup> ages of 15-49 stated their husband as the perpetrators. This attracted public attention among women rights groups and lawmakers advocating for criminalization of marital rape. The high statistic registered is an indication that marital rape is an offence that needs to be addressed and the legal framework should treat it like any other form of rape because penetration without consent is rape regardless the circumstances which it occurred.

### **3.2.2 Laws governing marital rape in India**

#### **3.2.2.1 Indian Penal Code**

Rape in India has been defined under section 375 of the penal code of India as all form of sexual assault with a woman without her consent or will<sup>95</sup> however the above section does not apply to Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.<sup>96</sup> The code gives husband immunity and therefore they cannot be prosecuted for the offence of marital rape under the law. The law still presumed and hold the same view that consent is automatically given under marriage. The exception has encouraged the husband to sexual abuse their wives since there is no law or sanction to hold them accountable. India penal code reflects Kenya Sexual Offence Act<sup>97</sup> which makes all form of sexual assault offences a crime but exempts marital rape from other forms of rape.

In India, both High Court and Supreme Court have been flooded with petitions challenging the Constitutionality of marital rape the exception, however, the only remedy that they have obtained from the Supreme Court is the criminalization of nonconsensual sexual contract of a wife who is between fifteen and eighteen years<sup>98</sup> the ruling has offered a remedy to those girls above 15years but below 18years and they are married since the penal code only excepts those below 15 years

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<sup>92</sup> Ibid.

<sup>93</sup> Kamar Rejesh, *Data on sexual violence in marriage shows why India should progress in the criminalization of marital rape* (24<sup>th</sup> February 2018).

<sup>94</sup> National Family Health Survey, database India (2018).

<sup>95</sup> India penal code 1860, s 375.

<sup>96</sup> Indian penal code 1860, s 375.

<sup>97</sup> Sexual Offence Act 2006, s 43(5).

<sup>98</sup> *Independent Thought v. Union of India*, [2013]382 SCC [2017].

only. The court was, however, reluctant to apply the same in adult cases. The exception created under the Penal Code has been seen to violate the following Articles of the Indian Constitution, article 14 which guarantees all citizens equity and protection before the law regardless of gender<sup>99</sup>this is because of its focus on protecting only the married girls who are below 15 years leaving the majority women out hence creating discrimination. The exception denies married women protection from rape by offering immunity against their perpetrators, it also creates discrimination against women since married women are fully protected by law will those that are married are not.<sup>100</sup>

Marital rape infringes article 21 of the Constitution of India which guarantees the protection of life and liberty <sup>101</sup>those rights have been interpreted to include the right to health, dignity and safe living conditions<sup>102</sup> marital rape exception in India has been viewed to violate the right to dignity, the right to choose what can be done to your body. Marital rape also makes the living condition of the victims unbearable since they continue living with the perpetrators. Courts have interpreted marital rape exception differently some judges have viewed it as a violation of women autonomy and rights example in the case of *The State of Karnataka v. Krishnappa*, the court held that sexual violence is a dehumanizing act that violates women right to privacy and dignity.<sup>103</sup> An individual should be given the right to make decisions regarding their intimate live privately. Kenyan courts should follow this interpretation and protect the rights of women where it is convinced that they were violated.

### **3.2.2.2 Protection of Women from Domestic Violence Act**

In 2005 India enacted the Protection of Women from Domestic Violence Act whose aim was to protect the rights of women<sup>104</sup> the Act has defined domestic violence to include economic, verbal, emotional, physical and sexual abuse<sup>105</sup>sexual abuse includes any act of sexual nature that humiliates, devalues and violates women dignity. The Act gives immunity and protection to any

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<sup>99</sup> The Constitution of India 2018, article 14.

<sup>100</sup> Serthark makkar *marital rape a non-criminalized crime in India*, Harvard human right journal [1<sup>st</sup> January 2019].

<sup>101</sup> The Constitution of India 2018, article 21.

<sup>102</sup> Serthark makkar *marital rape a non-criminalized crime in India*, Harvard human right journal [1<sup>st</sup> January 2019].

<sup>103</sup> *The State of Karnataka v. Krishnappa*, [2000] 4 SCC 75.

<sup>104</sup> Protection of Women from Domestic Violence Act 2005.

<sup>105</sup> *Ibid* s 3.

informant who reports an act of domestic violence or its likeness to happen, it excludes such informant from any criminal or civil liability.<sup>106</sup> This is a provision that the Kenyan Act should adopt to encourage people to report marital rape cases. This has encouraged citizens to report cases of domestic violence and prevent them from occurring since if in good faith they believe someone is doing any act of domestic violence they can report.

The Act also provides and imposes duties on shelter homes which are made for protection and housing of victims of domestic violence this has enabled victims to be in a good environment until the matter is addressed. The Act also imposes medical facilities with an obligation to aid aggrieved person this has enabled victims to get the medical help this has enabled victims to prevent unwanted pregnancies and sexually transmitted diseases. This is a measure that the Kenyan government should adopt to protect all women who experience marital rape and have no financial means to get medical care. The government is also given a duty to appoint protection officers in each district the duties of those officers is to make sure shelter homes are available, victims get a medical examination, legal aid and counselling.<sup>107</sup> This has enabled victims of marital rape who cannot get any remedy and justice from the Indian Penal Code to get protection and help.

The Protection of Women from Domestic Violence Act provides various redress for women victims experiencing domestic violence they include monetary relief of the victims, the perpetrators are required to meet all expenses incurred and losses suffered by the victim, this has encouraged victims of marital rape to seek cost incurred when seeking treatment. Victims can also apply for a protection order, compensation order, custody order, residence order, interim and ex-parte.<sup>108</sup> For implementation, the Act has given the both central and state government the duty to make sure it takes measure to give the Act wide publicity through public media, members of the public and judiciary to be given awareness training on the issue addressed by the Act.<sup>109</sup> Those steps have led to reduction of marital rape cases and victims have felt free to report matters concerning any domestic violence since there is a system supporting that. The monetary remedy

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<sup>106</sup> Ibid s 4.

<sup>107</sup> Protection of Women from Domestic Violence Act 2005, s 4-9.

<sup>108</sup> Canada: Immigration and Refugee Board of Canada, *India: Domestic violence, including legislation*, <<https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/04/IND103450>.> Accessed on May 2019.

<sup>109</sup> Protection of Women from Domestic Violence Act 2005, s11.

has also enabled women who fully depend on their husband for economic survival to quit the marriages because the children will still be taken care of. Indian feminist, women human rights groups, civil societies and some lawmakers are still advocating from the abolishment of section 375 of Indian Penal Code that exempts marital rape from other forms of sexual assault. The patriarchal structure of India has however made it difficult to such legislation to be passed since for them customary law still supersedes common law.

### **3.2.3 Reasons why India has not criminalized marital rape**

Judges and lawmakers have argued that criminalization of marital rape would destabilize the institution of marriage and will be used as a tool by wives to harass husbands, it will also destroy the entire aspect of a family system.<sup>110</sup> This is the same view that religious leaders and community leaders have held in Kenya, the concept of marriage will never be the same again if marital rape is made an offence. India cannot apply or transplant the conceptualization of marital rape as other international jurisdictions due to the following factors; the level of education, poverty, social norms, traditional customs, religious beliefs and view of marriage. India views the institution of marriage as sacred in which the husband is the head of the family and a wife should obey her husband demands. Human rights group and some lawmakers have however argued that the India traditional practices are very oppressive to women and they put them in very tormenting situations.

The only piece of legislation that has been enacted to redress women and victims of domestic violence in both countries is the Protection of Women from Domestic Violence Act. Victims of marital rape have been able to seek court protection orders and counselling. The Kenya Domestic Violence Act does not offer monetary relief, compensation order, custody order, residence order, interim and ex-parte. Kenya should adopt such reliefs to make sure the victims are protected. The Kenyan Act should also offer immunity, protection and exclude informants who in good faith share information relating to marital rape and other forms of domestic violence from criminal and civil liability. The exception created by Indian Penal Code and Sexual Offence Act violates the constitution of both countries and the state should aim at making sure women rights are fully protected by law and that the existing written laws are equal, fair and non-discriminatory.

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<sup>110</sup> Parliamentary Standing Committee on Home Affairs 167<sup>th</sup> report on 1<sup>st</sup> march (2013) the criminal law amendment bill (2012).pg. 27.

Marital rape, therefore, violates women dignity and freedom to choose what can be done to their own body it is important to make it an offence.

### **3.2.4 Conclusion**

In India when the bill to make marital rape an offence was introduced in parliament it was turned down by the parliament, most parliamentary argued that it was going to destroy the institution of marriage which is sacred and highly valued by the Indians, some argued that Indians should be proud of their heritage and culture because India is one of the nations with low rates of divorce<sup>111</sup> such beliefs have delayed the criminalization of marital rape in India. India experiences the same challenges as Kenya in the journey of trying to make marital rape an offence. Both countries experience the same cultural and social challenges where the society has socially constructed women to believe that once they get married they surrender their rights husband have been made to believe that there is an implied consent given by women once they legally get married.

Issues of conjugal rights and denial of such rights have been used as grounds for divorce in Kenya and India. Women have continued to suffer in silence because laws are unjust and discriminatory, the society has also failed to understand that most marriages survive because women suffer in silence because of the fear of what society will say and the monetary support they obtain with the relationship. Conditions of poverty, illiteracy, religion, social customs and traditional beliefs adopted in both countries have made it difficult to criminalize marital rape because they believe in the institution of marriage. Patriarchal view of women has also delayed the criminalization of marital rape, as men in both nations have argued that women are misusing the domestic violence laws to punish their innocent spouses and in India, women are abusing and misusing the concept of dowry.

### **3.2 Marital rape in the United Kingdom**

Before 1991 marital rape was not a crime in the United Kingdom. England laws were using the marital rape doctrine created by Lord Mathew Hale who stated that a husband cannot be liable or guilty for any rape committed by him against his legal wife because marriage requires wife to

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<sup>111</sup> Shalu Nigam, the social and legal paradox relating to marital rape in India, addressing structural inequality, (2015) 1(1) SSRN<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2613447](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613447)> accessed 2 June 2015.



consent to sexual relations with the husband and she cannot retract, he also made a declaration that a husband cannot be guilty of any form of rape committed upon his lawful wife who he has paid for.<sup>112</sup> This exception violated women rights up to the late 1990s. In marriage matrimonial consent has been interpreted to mean that the wife has fully given up on herself to her husband which she cannot rebut.<sup>113</sup> Consent to a sexual relationship was not necessary during married, it was only important at the time of marriage because it determined whether marital rape exception was applicable but once the marriage was consummated she became property, and a husband cannot be guilty of using his property.

In 1991 through the case of **R v R** the House of Lord overturned and abolished the common law rule that a husband cannot be guilty of raping his wife and upheld the decision of Lord Lane that the husband, in that case, to be convicted for raping his wife, the facts of the case are that at the time which the rape occurred the parties had separated and there was no legal separation agreement and neither of the party had filed for judicial separation or any divorce proceedings meaning under the law they were legally married. The judge stated that the time had arrived that the law should declare that a rapist remains a rapist regardless of the relationship he has with the victim or the subject, he should also be subjected to criminal law laws governing the issue of rape.<sup>114</sup> This case made forced sexual activities in marriage illegal. Therefore, the judges in Kenya can overrule the marital rape exception, declare it unconstitutional and require legislation to amend section 43(5) Sexual Offence Act. Before the abolishment of marital rape exception, the law commission of England and Wales in 1990 has published a working paper rape within marriage and advocated for the abolishment of marital<sup>115</sup> which bared fruits in 1991.

Several cases have been decided to uphold the decision of Lord Lane<sup>116</sup> example the case of **SW v United Kingdom (1995)**. The applicant had married his wife in 1984, however, 5 years later the wife decided to leave their matrimonial home because of family problems and returned to live with her parents. The wife via her attorney had issued the applicant divorce letter but she had not

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<sup>112</sup> Hale Mathew, *The History of the Pleas of the Crown*, 629.

<sup>113</sup> Zenaira Khan, *marital rape and the change*.

<sup>114</sup> *R v R* [1991].

<sup>115</sup> Jeniffer Temkin, *International review of victimology law commission report, rape within marriage* [September 1<sup>st</sup> 1993].

<sup>116</sup> *R v R* [1991].

initiated the divorce proceedings few days after she had left her matrimonial home the applicant broke into her wife's parents home and physically assaulted her, attempting to rape her. He was later charged with attempted rape during the proceedings he claimed that he had immunity and could not be prosecuted for rape because he was still legally married to the victim. The court found him guilty because the law that prohibited marital rape was not to be treated as retrospective despite a common law change.<sup>117</sup> This is a landmark case that ended the marital rape exception doctrine in the United Kingdom and insisted that any non-consensual sexual activity in marriage is rape.

### **3.2.1 Statistic of marital rape in the United Kingdom**

A survey published by End of Violence against Women Coalition on views and attitude towards rape and sexual violence in the UK, the study was to examine why even after common law abolished all form of marital rape it was still difficult to legally deal with the issue of rape. 3922 people were asked questions regarding rape. The survey revealed the following that 33% of the people in Britain believed that rape cannot occur where a woman is pressured to have sex and no force or physical violence is used<sup>118</sup> a third of men also believed that a woman cannot change her mind once she has started having sex, 24% of the people also believed that sex without consent in a long term relationship cannot be termed as rape, therefore in marriage there is no rape since both parties are sexually used to each other.<sup>119</sup> The finding demonstrated a lot of ignorance and lack of knowledge on what constitutes marital rape and rape in general and who should be held responsible for such sexual assault. The statistics show that making marital rape an offence is not enough public awareness and education has to be done to inform people what constitutes marital rape and the effects it has on women.

### **3.2.2. Laws governing marital rape in the United Kingdom**

#### **3.2.2.1. Sexual offence Act of 2003**

For a husband to be convicted for marital rape UK the complainant must prove that the accused penetrated the vagina, anus or mouth of the complainant with a penis. The accused intention penetration. The complainant did not consent to the act. The accused did not believe that the

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<sup>117</sup> *SW v The United Kingdom; Cr V United Kingdom*: ECHR 22 November [1995].

<sup>118</sup> Robert Franklin, end of Violence against Women Coalition survey, many people unclear of what rape is *BCC news* 6<sup>th</sup> December 2018.

<sup>119</sup> *Ibid.*

complainant consented.<sup>120</sup> This is the same approach taken in all rape cases in Kenya where the person making the allegations has to prove that she did not consent to the act and penetration occurred. To prove that consent did not occur in marriage will be difficult because it is assumed that once people get married there is implied consent in the union.

The Act provides the following remedies to the victims a Notification Requirement where offenders of sexual offences are required to provide key information about themselves to their police in their local area within 3 days.<sup>121</sup> If a person is found guilty of rape cases and has served his sentence or he has been released on parole he is included in the sexual offenders register<sup>122</sup>this measure is designed to allow government authorities to keep track of all activities of sex offenders and places where they visit. This is a measure that Kenya Sexual Offence Act lacks because the government does not track sex offenders in Kenya even those who have been realized on bond or bail and have direct access to the victim. Personal information about sex offenders is also never disclosed. This a positive measure that Kenya can adopt to protect victims and the members of the public.

The Act has provided for a sexual prevention order, which is given by magistrate court to a person who the court believes that they pose a risk or sexual threat to the public or individuals, it is made to people who have committed rape and sexual assault.<sup>123</sup> The order lasts for a minimum period of five years. If Kenya adopts such measure it can be helpful to the victims and the general public. This measure will prevent a husband from getting closer to his wife after the wife has filed a marital rape case hence giving her enough time to mentally heal and protect her kids. It will also prevent reoccurrence of the event again.

### **3.2.2.2. Crimes Amendment Act of 2005**

Section 128 of the Crime Amendment Act defines sexual violation as an act of a person who rapes another person or is unlawfully sexually connected with another person subsection 4 further states

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<sup>120</sup> UK Sexual Offence Act 2003, s 1 (1).

<sup>121</sup> UK Sexual Offence Act 2003, s 80.

<sup>122</sup> Nick Titchener, what is the sexual offender register in UK law (2018) 1(1) lawtonslaw <<https://www.lawtonslaw.co.uk/resources/what-is-the-sex-offenders-register>> accessed 29 January 2018.

<sup>123</sup> UK Sexual Offence Act 2003, s104.

that a person may be convicted of sexual violation of another person notwithstanding the time when they were married.<sup>124</sup> The Act recognizes marital rape and that any sexual act that a wife does not consent is rape. The Act abolishes the marital rape exception in the Crime Act in 1961 which offered immunity to men who committed marital rape because they believed that in marriage there was implied consent. The Act has ensured that women rights are protected and ensured that forced penetration without consent is termed as rape regardless of the circumstance. Marriage should not be used as an avenue where women can be raped and no sanctions are imposed on the perpetrator.

### **3.2.3. Conclusion**

Kenya needs to learn and emulate United Kingdom laws in making marital rape an offence. The Kenya law should stop creating immunity and Legal Avenue that protect men from marital rape convictions this is because such immunity under law continuously violates women constitutional human rights. Discriminatory and unfair laws such as section 43(5) of the Sexual Offence Act have degraded and devalued women autonomy and their right to choose and consent to what can be done to their body. In Kenya, a study by FIDA demonstrated that 74.5% of women have been abused in their homes this increase needs to be addressed. It also showed that marital rape has various adverse effects on women which include a higher risk of HIV infection.<sup>125</sup> In 2006 it was reported that two-thirds of women in Kenya who had experienced sexual and physical abuse identified their spouses as their perpetrators, the report also showed that approximately 16 per cent of women who are married, divorced, judicially separated had experienced sexual assaults from their husbands.<sup>126</sup> The high statistics of rape in both India and Kenya is a clear indication that we need to make marital rape an offence because many women are suffering in their marriages. The government also needs to create an avenue where victims of marital rape can seek remedies.

Kenya also needs to adopt sufficient laws to protect women who encounter marital rape, Kenya can adopt India method of protecting victims of marital rape by introducing monetary relief,

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<sup>124</sup> Crime amendment Act 2005 s128. African Population and Health Research Centre.

<sup>125</sup>Crichton, J., Musembi C.N, "Marital Rape and its Impacts: A Policy Briefing for Kenyan Members of Parliament."(2010) 1(1) APHRC < <http://www.aphrc.org/insidepage/?articleid=574>> accessed on 12/4/2019.

<sup>126</sup> UNAIDS, Violence against women and girls in the era of HIV and AIDS a situation and response analysis in Kenya (June 2006).

compensation order, custody order, residence order, interim and ex-parte to help victims of marital rape who financially depend on their husband for survival. The Kenyan government can also amend the Sexual Offence Act 2006 and introduce measures such as the inclusion of sex offenders in Sexual Offender registry which can be accessed by the general public. It is therefore important for Kenya to abolish marital rape exception created by section 43(5) of the Sexual Offence Act and make marital rape an offence because this law has made women suffer in silence. The exception created by section 43(5) has also violated women Constitutional right, degrades and devalues women autonomy. Marital rape also violates women dignity and freedom to choose what can be done to their own body it is therefore important to make it an offence.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

#### 4.1 Conclusions

This research paper started with the assertion that the Sexual Offence Act is unconstitutional, discriminatory and unjust. The Act has loopholes in dealing with marital rape. The discussion in chapter two revealed that marital rape exception violates several provisions of the Constitution. The chapter further discussed the statistics of marital rape given by demographic household survey in 2005, which was conducted in Nairobi, which revealed that 50 per cent of women living in Nairobi had experienced domestic violence since they were 15 years, in a period of 12 months before the interview was conducted, one in five women in Nairobi were found to have experienced domestic violence. Marital rape was the most stated form of violence, 42 per cent of both married and divorced women reported that they have experienced sexual violence from either their current or ex-husbands.<sup>127</sup> The statistic also showed that 15 per cent of current married women reported ever being raped by their current partners who they have not reported them to the authority.<sup>128</sup> Another statistics given by the Kenya Demographic and Health Survey in 2008 showed that 13 per cent of women raped in marriages reported their husbands as perpetrators.<sup>129</sup> The stated statistic is evidence that marital rape is a big problem that needs to be legally addressed.

Chapter two further discussed the overview of marital rape, the historical and traditional perception of rape in marriages. The chapter further established that marital rape violates women human rights, the forced sexual act violates right to liberty, right to health and reproduction because of the infections and physical injuries that an individual might endure after marital rape has occurred. Marital rape also violates the right to privacy and personal security, the right to choose and be free from sexual violence and causes cruelty and torture. The chapter concluded that marital rape is an inhuman act that devalues and degrades women. Chapter three focused on comparative analysis of Kenya, India and United Kingdom which revealed that Rape in marriage is a global problem and over years, governments, civil societies and non-governmental organizations have done research, surveys and reports recommending for the criminalization of marital rape across the globe but even

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<sup>127</sup> The *Kenya Demographic and Health Survey* (2003). pg. 243

<sup>128</sup> *Domestic Violence in Kenya: Report of a Baseline Survey among Women of Nairobi*, Nairobi: (FIDA 2002).

<sup>129</sup> The *Kenya Demographic and Health Survey - Preliminary Report* (2008-2009).

after the push only 52 countries out of 179 countries have amended their legislation to make marital rape a criminal offence.<sup>130</sup>

Chapter four further revealed that the only piece of legislation in India and Kenya that has been enacted to redress women and victims of domestic violence is the Protection of Women from Domestic Violence Act. However, in India victims of marital rape have been able to seek court protection orders and counselling. The Kenya Domestic against Domestic Violence Act does not offer monetary relief, compensation order, custody order, residence order, interim and ex-parte hearings like the Indian Act. Chapter three ruled out that the Kenyan Act should also offer immunity, protection and exclude informants who in good faith share information relating to marital rape and other forms of domestic violence from criminal and civil liability.

Chapter three also establishes that in Kenya marital rape is under-reported compared to other forms of rape because national laws have not created any remedies or avenue to tolerate such cases. Many women also prefer to suffer in silence because they financially depend on their husband for economic survival and children upkeep, victims are afraid to speak up because of humiliation and the mockery they are going to get from family members, church leaders, community elders and friends.<sup>131</sup> The chapter further revealed that in dealing with marital rape Kenya needs to learn and emulate United Kingdom laws in making marital rape an offence. The Kenya legal system should stop creating immunity and Legal Avenue that protect men from marital rape convictions this is because such immunity under law continuously violates women constitutional human rights, degrades and devalued women autonomy and their right to choose and consent to what can be done to their body.

From the discussed chapters, the following conclusions can be made:

1. Society has normalized marital rape. The societal conceptualization of women and their duties in marriage has put women in venerable place since people do not see them as

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<sup>130</sup> UN Women justice report; *get the data* (2011).

<sup>131</sup> APHRC marital rape and its impact, a policy briefing for Kenyan members of parliament, policy brief No.13 of (2010).

individuals with integrity and dignity. The social construction of gender roles has also encouraged marital rape.

2. The patriarchal structure of Kenya has however made it difficult to make marital rape an offence or pass laws that protect women in marriage against their husband because they believe that customary law should supersede common law and as Africans, we should uphold our cultural beliefs without being westernized in how we deal with matters of marriage.
3. The statistics exhibited by Kenya, India and UK show that making marital rape an offence is not enough, public awareness and education have to be done to inform people what constitutes marital rape and the effects it has on women. The finding also demonstrated a lot of ignorance and lack of knowledge on what constitutes marital rape and who should be held responsible for such sexual assault.
4. The exception created by the Sexual Offence Act is unconstitutional and discriminatory, it should be abolished or amended to make sure married women rights are protected. The Act has a lot of loopholes. The protection of women against domestic violence which is the only law addressing marital rape in Kenya is not conclusive in addressing how victims of marital rape should be protected. Therefore, there is a need to create a legal framework that protects victims of marital rape from such inhuman and degrading act.
5. The marital rape exemption gives legal immunity to men who have committed the act of sexually assaulting their wives forcefully. While the marital rape exemption protects the interests of the husband, the wife is left to deal with harsher physical, emotional and consequences. Marital rape immunity causes pain, health problem and traumatization to its victims.
6. The societal view of marriage in Kenya has to change to make marital rape an offence that is punishable in a court of law. Because women have to be educated that it is not their duty to perform sexual acts to their husband without consent and they have a right to say refuse any act that violates their rights as individuals.



## **4.2 Recommendations**

About the above conclusions, the following recommendations are made with the expectation that they will address the issue of marital rape in Kenya entirely. The recommendations made are closely related to the criminalization of marital rape and amendment of the Sexual Offence Act. This is because marital rape devalues and degrades women autonomy, forceful penetration without consent should be declared rape regardless of the circumstances it occurred. Nonetheless, no one recommendation is important than the other. All recommendations should be adopted together because they are all interrelated. Making marital rape an offence without carrying out public participation, public awareness and giving public education will make it difficult to implement the recommendation because the society approach and perception of marital rape has to change, they have to understand that marital rape is not acceptable and it infringes women human rights.

### **4.2.1 Repeal of section 43(5) of Sexual Offence Act and criminalizing marital rape.**

The primary source of law in Kenya addressing the issue of marital rape is Section 43(5) of Sexual Offence Act of 2006, which states that sexual offences shall not apply to lawfully married people.<sup>132</sup> This section creates marital rape exception and excludes marital rape from criminal offences in Kenya, because of these legislation victims of marital rape cannot place any claim under the Act hence infringing victim's human rights to be free from all form of violence. This section has disadvantaging women from seeking redress under the law. Kenya parliament needs to abolish section 43(5) that creates marital rape exception to protect women without discrimination and end the impunity caused by this section.

The National Assembly needs to criminalize marital rape and create a sanction where offenders can be punished like other forms of rape. This is because criminal law serves a very important role in society it established standards, maintains order within society and protects liberties and rights of individuals.<sup>133</sup> By criminalizing marital rape Kenya will create a guidepost for minimally acceptable behaviour in society because victims will be able to seek justice under the law and those who disobey the law will be sanctioned. The criminalization of marital rape can either be done

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<sup>132</sup> Sexual Offence Act 2006.

<sup>133</sup> Winifred Kamau, Patricia Nyaundi and Jane Sarwange, the legal impunity of marital rape in Kenya, a woman equality issue (Research paper, University of Nairobi 2013).

through abolishing or repealing the marital rape exception without making any amendment or additional context. This will enable marital rape to be treated like other forms of rape despite the circumstances and place where it occurred the punishment will also be the same as the other form of rape. It can also be done through amending the Sexual Offence Act to define marital rape in section 2 and amend section 43(5) to specifically include that a husband can be held liable for rape and marriage cannot be used as a defence in marital rape cases.

#### **4.2.3 Amendment of the Protection against Domestic Violence Act**

The Act was enacted in 2015 to protect victims of domestic violence after a high report of domestic violence-related cases. Under section 3 of the Act, violence is defined to mean abuse that includes sexual violence within marriage.<sup>134</sup> This is the only piece of legislation that has recognised sexual violence does exist within marriages in Kenya, however, it does not provide any remedy to victims or any sanctions to perpetrators. The Act only offers protection order and counselling. The Act needs to be modified and borrow some relief from the Indian Protection against Domestic Violence Act. The Kenya Protection Against Domestic Violence Act can amend the definition of domestic violence to include economic, verbal, emotional, physical and sexual abuse,<sup>135</sup> sexual abuse includes any act of sexual nature that humiliates, devalues and violates women dignity. The Kenya Act can be amended to give immunity and protection to any informant who reports an act of domestic violence or its likeness to happen, this excludes such informant from any criminal or civil liability<sup>136</sup> to encourage people to report marital rape cases.

The Kenya Act needs to provide shelter homes and impose duties on them, shelter homes are made for protection and housing of victims of domestic violence this will enable victims to be in a good environment until the matter is addressed. The Protection Against Domestic Violence Act can also impose medical facilities with a mandatory obligation to aid an aggrieved person who has experienced marital rape this will enable victims to get the medical help hence preventing unwanted pregnancies and sexually transmitted diseases. The Kenya Act need to impose the government with a duty to appoint protection officers in each county, the duties of those officers

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<sup>134</sup> Protection against Domestic Violence Act 2015, s 3.

<sup>135</sup> Ibid s 3.

<sup>136</sup> Ibid s 4.

is to make sure shelter homes are available, victims get a medical examination, legal aid and counselling.<sup>137</sup> This will enable victims of marital rape who cannot get any remedy and justice from the court to get protection and help. The Kenyan Protection of Women from Domestic Violence Act should also be modified to provide various redress to victims of marital rape such as monetary relief of the victims, the perpetrators are required to meet all expenses incurred and losses suffered by the victim, and this will encourage victims of marital rape to seek cost incurred when seeking treatment. Victims can also apply for a protection order, compensation order, custody order, residence order, interim and ex-parte.

#### **4.2.4 Education and public awareness**

Making marital rape an offence is not enough, public awareness and education have to be done to inform people what constitutes marital rape and the effects it has on women. The government in partnership with, donors and non-governmental organizations should launch a public awareness campaign which can be through the use of social media influencers, local musicians and local radio and television. The National Assembly should appoint a committee to do outreaches in collaboration with local leaders. Women have to be informed that there are avenues where they can seek redress and help. Public participation has to be done as well. This has been demonstrated by high statistics registered by the UK even after abolishing marital rape exception in 1991. In Britain statistics shows that 24% of the people believe that sex without consent in a long term relationship cannot be termed as rape, therefore in marriage, there is no rape since both parties are sexually used to each other.<sup>138</sup>

The finding demonstrated a lot of ignorance and lack of knowledge on what constitutes marital rape and rape in general and who should be held responsible for such sexual assault. It is therefore important to educate all citizens about marital rape and the effects it has on women before criminalizing it. It is also important to involve community leaders such as chiefs and traditional justice structure in the campaign for awareness because they hold a high influence in communities, and a positive view about women rights in marriage from them has a positive impact on the communities and families. For implementation, the Act has given the both central and state

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<sup>137</sup> Protection of Women from Domestic Violence Act 2005, s 4-9.

<sup>138</sup> Ibid.

government the duty to make sure it takes measure to give the Act wide publicity through public media, members of the public and judiciary to be given awareness training on the issue addressed by the Act.

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