Criminalization of Marital Rape in Kenya

By

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Abstract

Marital rape is not a criminal offence in Kenya. This thesis argues that criminalization of marital rape in Kenya is a necessary but insufficient means of addressing marital rape. I shall analyze the Kenyan legal framework and the international framework. The analysis of the international framework shall be focused on the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). I shall undertake a comparative analysis of how South Africa and Zimbabwe have addressed marital rape. I will examine the benefits and limitations of criminal law in addressing marital rape. I will argue that an examination of the wrongful gender stereotypes of married women is essential to create effective and holistic remedies; that wrongful gender stereotypes of married women violate their rights to equality and non-discrimination and the right to be free from violence.
Acknowledgments

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**Regional and International Treaties:**

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Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Committee on the Elimination of Discrimination against Women, General Recommendations No. 19: Violence against Women

Committee on the Elimination of Discrimination against Women, General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures

Declaration on the Elimination of Violence against Women (DEVAW)

The African Charter on Human and Peoples Rights (“Banjul Charter”)

Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>Banjul Charter</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>DEVAW</td>
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<td>SOA</td>
<td>Sexual Offences Act</td>
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<td>UN</td>
<td>United Nations</td>
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Chapter 1:

1. Introduction:

“Violence against women pervades all social and ethnic groups. It is a societal crisis that requires concerted action to stem its scourge…culture does influence the relationship between the various groups in society and some cultural practices beliefs and traditions have had the tendency to relegate women to second class status in society thereby not only violating their rights as human beings [but] leading to discrimination against women. Some…customs and cultural practices have found their way not only into law but [are used] as justification for violence against women.”

Though overwhelmingly, victims and or survivors of gender based violence are women, sexual violence is experienced across genders at all ages. In 1989, the UN released a report on Violence against women in the Family, which initiated a change in the emphasis in international law from protection of the family to protection of individuals within the family. It showcased that the family was the locus of the harm. In 1990 the UN General Assembly adopted General Resolution 45/114 on domestic violence which noted the serious lack of information and research on domestic violence globally and the need for exchange of information on ways of dealing with this problem. In 2006, the office of former Secretary-General Kofi Annan issued a report classifying violence against women-whether in the home or elsewhere-as a human rights

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1 Kenya Attorney General, Amos Wako, during the 16 Days of Activism against Women, 10 December, 1999.
3 Bonita Meyersfeld, *Domestic Violence International Law*(Oregon: Oxford &Portland, 2010), at 19
4 *Ibid* at 23
The report confirmed that states are obliged by international standards to hold perpetrators to account. Violence against women is one of the widespread violations of human rights which include physical, sexual, psychological and economic abuse.

Violence against women cases have been a widespread problem in Kenya for a long period of time. In 1966, the Kenyan government attempted to address the problem of wife beating by setting up the Commission on Marriage and Divorce. The Commission recommended a proposed bill explicitly outlawing wife beating but when it was taken to Parliament in 1968, all male legislators opposed it arguing that wife battery was a “normal” customary practice and that such a law could amount to undue interference in the domestic affairs of husband and a wife. In the media, cases of domestic violence have also been highlighted. In 1983, a husband gouged out his wife’s eyes for bearing him only female children; in 1998, a highly publicized case where a woman was battered by her husband, a Kenyan police Officer, succumbed to death; in 1999, a woman was slashed on the face, head, and hands after her husband found her singing along to a ‘ndombolo’ song on the radio in front of a guest.

Sexual abuse, while a common form of systemic intimate violence, is rarely reported. The stereotypical image of rape is non-consensual sex with a stranger, occurring in a strange and unsafe location. Because of this perception, a victim or her society may not recognize the crime of rape when her sexual partner of many years demands sex without her consent. Intimate partner violence is often systemic and it may be difficult for the victim to keep track of the

5 Ibid.
6 Tom G. Ondicho, Battered Women: A social-legal Perspective of their Experiences in Nairobi, Center for African Area Studies, Kyoto University at 36
7 Ibid
8 Supra note 3 at 132
9 Ibid
10 Ibid
events and dates when the crimes were committed.\textsuperscript{11} The law on violation of a woman’s integrity takes into consideration all aspects of the abused woman’s life, characterized by threats, assault and mental stress, and has been drawn up so as to facilitate prosecutors of perpetrators who repeatedly have violated the integrity of a woman with whom they are in an intimate relationship.\textsuperscript{12}

Marital rape is not a criminal offence in Kenya. It is therefore difficult to obtain accurate statistics on sexual violence against women in the home. In 2003, the first government survey, Kenyan Demographic and Health Survey, collected data on violence against women and found that 16\% of married and divorced or separated women experienced sexual violence from their husbands,\textsuperscript{13} and reported instances women of being slapped, pushed/shaken/thrown, punched or forced to have intercourse with their husbands.\textsuperscript{14} In the 2008-2009 Kenya Demographic and Health Survey, it was reported that 17\% of ‘ever-married’ women experienced sexual violence by a husband, with 14\% of the cases experienced within the twelve months of the survey.\textsuperscript{15} In the latter report, 14\% of the women interviewed reported that they were forced to have sex with their husbands when they did not want to.\textsuperscript{16}

In this chapter, I shall analyze the legal framework of marital rape in Kenya. I will examine the international framework, the national framework dealing specifically with the issue of sexual violence in Kenya. I will also briefly examine the traditional/cultural framework in Kenya.

\textsuperscript{11} \textit{Ibid} at 160
\textsuperscript{12} \textit{Ibid}
\textsuperscript{13} Central Bureau of Statistics (CBS) [Kenya], Ministry of Health [Kenya] and ORC Macro, 2004, \textit{Kenya Demographic and Health Survey 2003): Key Findings}, Calverton, Maryland, USA at 14
\textsuperscript{14} \textit{Ibid}
\textsuperscript{15} Kenya National Bureau of Statistics (KNBS) and ICF Macro, \textit{Kenya Demographic and Health Survey 2008-2009}, Calverton, Maryland: KNBS and ICF Macro at 275.
\textsuperscript{16} \textit{Ibid}
1.1 International Legal Framework

**Brief Background**

Under the old Kenyan Constitution, Kenya was a dualist system, where treaties that had been ratified by Kenya, would become part of the law, upon their domestication. The lack of national implementing legislation authorizing domestication of international agreements ratified by Kenya was a problem in the implementation of these international agreements. For example, Kenya ratified the Convention on the Elimination of all Forms of Discrimination against Women\(^\text{17}\) (discussed here below), but did not have an implementing legislation to operationalise it. Therefore, CEDAW was not effectively considered to form part of the laws of Kenya. However, the Kenyan Courts, in some instances, used their discretion to defer to the provisions of CEDAW, despite the absence of an implementing law. In *Mary Rono v Jane Rono & William Rono*,\(^\text{18}\) the Court of Appeal considered the applicability of international conventions in determining that it was discriminatory to give lesser acreage of property to the daughters of the deceased based on the fact that they were women and would inherit somewhere else (when married). Justice Philip Wako declared that the Marakwet\(^\text{19}\) customary law was discriminatory in so far as it sought to deny the complainant her right to her father’s estate and affirmed that the law is repugnant to justice and moral good.\(^\text{20}\) Justice Wako observed that “Kenya has ratified CEDAW, the International Covenant on Civil and Political rights, International Covenant on Economic Social and Cultural Rights and the African Charter on Human and People’s Rights and that although the country ascribes to the Common Law theory that international customary and treaty law only forms part of domestic law where it has been specifically incorporated by implementing legislation, the current thinking on the Common Law theory is that both

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\(^{18}\) Civil Appeal 66 of 2002 at Court of Appeal, Eldoret

\(^{19}\) Marakwet refers to one of the forty-two tribes in Kenya.

\(^{20}\) Supra note 18
international customary and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation.\textsuperscript{21}

The dualist system has been changed by the new Kenyan Constitution.\textsuperscript{22} It has changed Kenya from a dualist to a monist system, through article 2(5) which provides that the general rules of international law shall form part of the law of Kenya; and article 2(6) that provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. These Constitutional provisions do not require the enactment of a national legislation to give force to international treaties or conventions and gives all ratified conventions or treaties immediate force of law. Therefore, ratified treaties and conventions, now effectively forms part of the laws of Kenya. Whether or not, the ratified treaties and conventions will be held to have the same force as laws enacted by the Kenyan legislature, remains to be seen over time. The Kenyan government is therefore under an obligation to implement the provisions laid down by CEDAW to eliminate all forms of discrimination against Kenyan women, including sexual violence as it now a part of the Kenyan laws.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)\textsuperscript{23} ratified by Kenya in 1984 is the main convention addressing discrimination against women. The CEDAW text does not address violence against women explicitly. However, the CEDAW Committee General Recommendations have affirmed that the provisions of CEDAW include violence against women. General Recommendation 19\textsuperscript{24} affirms the definition of discrimination under CEDAW to include gender-based violence,\textsuperscript{25} which acts include physical,

\begin{footnotesize}
\begin{enumerate}
\item[21] Ibid.
\item[23] Supra note 17
\item[25] Ibid at Para 6
\end{enumerate}
\end{footnotesize}
mental or sexual harm or suffering, threats of acts, coercion or other deprivations of liberty.\textsuperscript{26} General Recommendation 19 also affirms that family violence is one of the most insidious forms of violence against women, whose forms include battering, rape, other forms of sexual assault, mental and other forms of violence, perpetuated by traditional attitudes.\textsuperscript{27} This recommendation has demonstrated that violence between intimates affects women disproportionately, demarcating women as a group in need of proactive state protection.\textsuperscript{28} CEDAW Committee further obligates State Parties take measures to eliminate discrimination against women by private persons, organizations and enterprises, implying that states may be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence and provide compensation.\textsuperscript{29} The Committee further calls on states parties to take all measures necessary to prevent gender-based violence, such measures would include not only legal measures such as penal sanctions, civil remedies and avenues for compensation, but also preventive measures such as public information and education programmes, and protective measures, including support services for victims of violence.\textsuperscript{30} Kenya is therefore under obligation to protect married women from sexual violence in the home and provide remedies through legal reforms.

CEDAW obligates state parties to pursue all appropriate means and without delay a policy of eliminating discrimination against women by undertaking to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;\textsuperscript{31} and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.\textsuperscript{32} Article 5(a) of CEDAW obligates state parties to take all appropriate measures to modify the social and cultural

\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid at Para 23
\textsuperscript{28} Ibid
\textsuperscript{29} Ibid at para 9
\textsuperscript{30} Ibid at para 20(t)
\textsuperscript{31} Supra note 27 at art 2(e)
\textsuperscript{32} Ibid at art. 2(f)
patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.\textsuperscript{33} CEDAW General Recommendation 25\textsuperscript{34} asserts that State parties have three obligations; to eliminate direct, and indirect discrimination, and to address prevailing gender relations and the persistence of gender-based stereotypes that affect women.\textsuperscript{35} Therefore, if it established that a law, regulation, custom, including gender stereotype constitutes discrimination against women; a State Party has an obligation to modify or abolish the law, regulation or practice.\textsuperscript{36} The treatment of Kenyan married women as the sexual property of their husbands discriminates against them, by treating them as inferior to married men. It is a violation of the rights of married women to equality and non-discrimination. Kenya has an obligation to modify and abolish the laws and customs that perpetuate stereotypical belief that women are the sexual property of their husbands.

CEDAW Committee monitors State Parties implementation through the reporting mechanism. State Parties are required to submit to the United Nations (UN) Secretary General, for consideration by the CEDAW Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of CEDAW, every four years.\textsuperscript{37} This reporting mechanism is important at the national level, in that in allows a State Party to monitor the steps it has taken to eliminate adverse forms of discrimination against women, identify areas of difficulties in the implementation of the Convention. The reporting mechanism also allows the State parties to plan and strategize on the appropriate legal and policy measures it needs to identify to promote non-discrimination of women, and equality. At

\begin{itemize}
  \item[\textsuperscript{33}] \textit{Ibid} at art 5(a)
  \item[\textsuperscript{35}] \textit{Ibid} at paras 6-7
  \item[\textsuperscript{36}] Rebecca J. Cook & Simone Cusack, \textit{Gender Stereotyping: Transnational Legal Perspectives} (Philadelphia: University of Pennsylvania Press, 2010) at 5
  \item[\textsuperscript{37}] \textit{Supra} note 17 at art 18(1)
\end{itemize}
the international level, the reporting mechanism can be viewed as a source for dialogue between the State Parties and CEDAW Committee, to analyze their commitment and progress towards elimination of all forms of discrimination against women. The reporting system makes states accountable by international standards and subjects them to international scrutiny.\textsuperscript{38} The reporting mechanism has been used in identifying and naming underlying gender stereotypes in the laws, policies, and practices of State Parties that perpetuate discrimination against women. In its Concluding Observations to Kenya, the CEDAW Committee expressed its concern over the persistence of cultural norms, practices and traditions as well as patriarchal attitudes regarding the roles, responsibilities and identities of women and men in Kenya, that were reflected in women’s disadvantageous and unequal status in life.\textsuperscript{39} The concluding remarks by the CEDAW Committee would have been more effective if they had identified the specific cultural norms and practices. The CEDAW Committee was further strengthened in its mandate, through the adoption of the Optional Protocol to the Convention on the Elimination of all Forms of Violence against Women.\textsuperscript{40}

The Optional Protocol to CEDAW provides the complaints mechanism under CEDAW. It authorizes the CEDAW Committee, to receive complaint from individuals or groups of individuals or other persons acting on their behalf, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set out under CEDAW.\textsuperscript{41} The Optional Protocol introduced another important mechanism, the inquiry procedure, which enables the CEDAW Committee to undertake inquiries into reliable information concerning grave or systematic violations by a State Party.\textsuperscript{42} The Communications procedure has allowed the Committee to address various issues surrounding the discrimination of women by State Parties.

\textsuperscript{38} Supra note 36 at 133  
\textsuperscript{41} Ibid at arts.2-7.  
\textsuperscript{42} Ibid at arts.8-10
In its most recent communication, *Karen T. Vertido v The Philippines*, the Committee, in finding that the Philippines violated the rights of Karen, has made significant comments on the gender stereotyping of rape victims in the Philippines. The Committee found that the judiciary relied on various wrongful gender stereotypes such as; women should physically resist sexual assault at every opportunity, women are inherently untruthful and therefore likely to fabricate allegations of rape, and that perpetrators of rape are strangers.

Kenya is yet to sign and ratify the Optional Protocol; its compliance to CEDAW is assessed through the State reports submitted before the Committee every four years. In its latest report, the CEDAW Committee lauded Kenya for its adoption of the new Constitution which includes a comprehensive Bill of Rights which enhances protection for women with provisions such as, article 27(4) which prohibits direct or indirect discrimination on the basis of sex, pregnancy and marital status. The Committee urged Kenya to give attention, as a priority, to combating violence against women and girls and adopting comprehensive measures to address such violence, in accordance with its general recommendation No. 19. The Committee called upon Kenya to criminalize marital rape, repeal section 38 of the Sexual Offences Act, enact Family Protection Bill and develop a coherent and multi-sectorial action plan to combat all forms of violence against women.

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44 Ibid at para 3.5.1
45 Ibid at para 3.5.8
46 Ibid at para 3.5.4
47 Supra note 22
48 Supra note 39 at para. 8
49 Ibid at para. 22
50 Sexual Offences Act, 2006, No. 3 of 2006, at s.38, “Section 38 of the Sexual Offences Act provides “any person who makes false allegations against another person to the effect that the person has committed an offence under this Act, is guilty of an offence and shall be liable to punishment equal to that offence complained of.”
51 Supra note 39 para. 22
The adoption of the General Assembly’s Declaration on the Elimination of Violence against Women (DEVAW)\textsuperscript{52} increased the international movement towards establishing measures to prevent violence against women.\textsuperscript{53} DEVAW defines violence against women as “any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”\textsuperscript{54} DEVAW affirmed that violence against women encompassed “physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, \textit{marital rape}, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.\textsuperscript{55}

Article 4 of DEVAW urges the involvement of States to condemn violence against women and not to use culture or traditions to avoid their obligations to prevent and protect women from violence, perpetuated by the State and by private persons. It further urges states to pursue by all appropriate means of eliminating violence against women; through the exercise of due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.\textsuperscript{56}

DEVAW, as a U.N. General Assembly Declaration, does not have the binding legal authority of a convention or treaty. However, it is argued that it is evidence of customary international law, as evidence of a norm, prohibiting violence against women that is binding on states.\textsuperscript{57} DEVAW, is important because it showcases that violence against women in the private sphere is not acceptable and obligates States to prevent, investigate and punish acts of violence against women, whether by the State or by Private persons.

\textsuperscript{53} Supra note 3 at 21
\textsuperscript{54} Supra note 52 at art 1, art. 4
\textsuperscript{55} Idem at art 2(a)
\textsuperscript{56} Idem at art 4
\textsuperscript{57} Supra note 3 at 38
1.2 Regional Framework

The regional framework addressing the rights of women shall be examined under two legal instruments; the African Charter on Human and Peoples’ Rights (Banjul Charter) and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa.

The African Charter on Human and Peoples’ Rights (Banjul Charter) ratified by Kenya on 23 January 1992 does not contain explicit provisions on sexual violence. However, the general provisions of the Banjul Charter may find application in relation to sexual violence. The Banjul charter provides for the right to equality and equal protection of the law; the right to the respect for her life and integrity of her person; right to the respect of the dignity inherent to a human being, prohibiting all forms of exploitation and degradation such a torture, cruel, inhuman and degrading punishment and treatment. The Banjul charter also provides that States have a duty to eliminate all forms of discrimination against women (in the family) and ensure the protection of the woman and the child as stipulated in international declarations and conventions. The African Charter obliges the Kenya State to protect the rights of women to equality and non-discrimination. By failing to criminalize marital rape, the Kenyan government discriminates against married women, based on their sex and marital status and violates their right to equality before the law.

60 Supra note 58
61 Ibid at art 3
62 Ibid at art 4
63 Ibid at art 5
The Protocol to the African Charter provides stronger provisions for the protection of the woman from violence and the State obligations to ensure that the woman’s rights to equality and non-discrimination are achieved. The Protocol on the Rights of Women in Africa was adopted to protect the rights of women to equality and non-discrimination. Kenya has signed but not ratified the Protocol.\textsuperscript{64} The Protocol to the African Charter provides that every woman shall be entitled to respect for her life, and the integrity and security of her person; that all forms of exploitation, cruel, inhuman or degrading punishment or treatment shall be prohibited. It obliges State parties to take appropriate and effective measures to; enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex whether the violence takes place in private or public.\textsuperscript{65} The Protocol to the African Charter also provides that women shall have access to justice and equal protection of the law.\textsuperscript{66} It recognizes the international law, for the woman to be free from domestic violence, and mandates the state to adopt legislative, administrative, social and economic measures, as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women.\textsuperscript{67} Although Kenya is yet to ratify the Protocol to the African Charter, it may apply the provisions of the Protocol and refrain from acting in ways that contravene the intent of the Banjul Charter and its Protocol. Authors to complaints in court may rely on the provisions of the Banjul Charter and its Protocol, and the judiciary may use its discretion to apply the provisions of the Protocol, to protect married women from sexual violence in the home.

1.3 The National Legal Framework

The Kenyan framework shall be examined from the main criminal laws; the Sexual Offences Act and the Penal Code which regulate sexual violence.

\textsuperscript{64} Kenya signed the \textit{Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa} on Dec. 17, 2003
\textsuperscript{65} \textit{Supra} note 59 at art 4(b)
\textsuperscript{66} \textit{Ibid} at art. 8
\textsuperscript{67} \textit{Ibid} at art.4(b)
The Sexual Offences Act (2006):

The Sexual Offences Act (SOA) is the primary law regulating sexual offences in Kenya. The adoption of the SOA was marred by intense, polarized debates as it was the first time that the colonial laws on sexual violence under the Penal Code’s offences against morality were being reviewed. The debate was a battle between the traditionalist and the reformists. The traditionalist argued that the bill was ‘Un-African’ and introduced western doctrines; ‘I am saying that when this Bill is referred to the relevant Departmental Committee, make it an African Bill that accommodates all the cultures of Kenya and that improve the atmosphere of marriage between man and woman.’ The Bill was seen as an attack on the traditional marriage system and also on the cultural systems surrounding sexual relationships, marriage and family life. The Sexual Offences Act became more controversial with the adoption of section 38 which provides for the prosecution of any person making false ‘sexual violence’ claims, with punishment equal to that surrounding the false claim.

The SOA strengthened the general provisions of the sexual offences. It expanded the definition of rape by providing that the perpetrator and the victim could be either male or female. Section 3 of SOA provides “A person commits the offence termed rape if he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; the other person does not consent to the penetration; or the consent is obtained by force or by means of threats or intimidation of any kind. This moved away from the now repealed Penal Code

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68 The Penal Code, Kenya, Cap 63, at chap. XV. See “offences against morality”
69 Kenya National Assembly Official Record (Hansard), April 26, 2005 at 756, 759
70 Supra note 50 at s. 3
71 Ibid at s. 3(1)(a)
72 Ibid at s. 3(1)(b)
73 Ibid at s. 3(1)(c)
definition which provided that only a woman or girl could be a victim.\textsuperscript{74} The SOA is further strengthened by its provisions on consent. It provides that a person consents to the act if she or he agrees by choice, and has the freedom and capacity to make that choice.\textsuperscript{75} The SOA provides that the presumption of lack of consent by the complainant, would be conclusively met if it is proved that; any person was at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him/her;\textsuperscript{76} any person was, at the time of the offence or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person.\textsuperscript{77}

Based on the above provisions on rape and consent, a case for marital rape may be sustained as it provides for lack of consent and coerced consent; where it is obtained by force or by means of threats or intimidation. However, Kenyan legislators, determined to provide immunity for married spouses, expressly sought to exempt the provisions of rape from being applied to legally married spouses. Section 43 which defines what constitutes an ‘intentional and unlawful act’ in relation to rape, as acts “committed under coercive circumstances—where there is use of force against the complainant or the property of the complainant, threat of harm against the complainant or against the property of the complainant or that of any other person.” Section 43(5) of SOA then proceeds to exempt the application of section 3 as read with section 43, to include persons who are lawfully married to each other. The effect of section 43(5) is therefore to exempt the enforcement of the rape provision from spouses, thereby denying married spouses protection from rape under the law. The rape provisions of the Sexual Offences Act can only be

\textsuperscript{74} Supra note 68, at s. 139, defined rape as “any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by impersonating her husband is guilty of the felony termed rape

\textsuperscript{75} Supra note 50 at s. 42

\textsuperscript{76} Ibid at s. 44(2)(a)

\textsuperscript{77} Ibid at s. 44(2)(b)
claimed by victims who are not married. This provision exposes and burdens married women to sexual violence.

The effect of the rape exemption implies that both married men and married women cannot bring up allegations of rape, where it is committed by the spouse. The provisions of rape under the Sexual Offences Act and the provisions exempting married persons are couched in gender-neutral terms, implying equality in treatment of victims. Another gender neutral provision is Section 38 of the SOA which provides that “any person, who makes false allegations against another person to the effect that the person has committed an offence under this Act, is guilty of an offence and shall be liable to punishment equal to that offence complained of.” This means that if a person makes an allegation of rape, for instance, that there is a danger that if the accused is acquitted or some inconsistencies found, that the complainant, would if found guilty of making false allegations, be convicted to a term not less than ten years and which could be enhanced to imprisonment for life. I submit that these gender neutral provisions are harmful to married women in Kenya. This is because; the gender-neutral laws ignore the inherent inequality between men and women. It is submitted that discrimination against women may occur when a law, policy, or practice is facially neutral, but has the effect of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of their human rights and fundamental freedoms because it perpetuates a gender stereotype. In the present case, the statistics show that Kenyan women suffer violence, sexual violence disproportionate to the men. The gender neutral provisions do nothing to diminish the power of men sexuality over the women sexuality. Section 38 of the Sexual Offences Act, further harms women, by intimidating women who are victims

\[78\] Ibid at s. 3
\[79\] Ibid at s. 43(5)
\[80\] Ibid at s. 3(3) SOA, “A person guilty of [rape] is liable upon conviction to imprisonment for a term which shall not be less ten years but which may be enhanced to imprisonment for life.
\[81\] Supra note 36 at 105
of sexual violence, from reporting the cases, for fear of being prosecuted themselves. It also
insinuates that women are liars and are therefore likely to bring up false cases of sexual
violence.

To date, no legal challenge has been brought under the Sexual Offences Act, before the Kenyan
courts to address the marital rape exemption. However, courts have addressed issues of
domestic violence, including marital rape, in civil cases, such as divorce and custody cases. In
Esther Nangwanaa Nandi v Jones Chewe Bobo\textsuperscript{82} a divorce cause before the High Court of
Kenya, the Complainant in providing particulars that amounted to cruelty on the part of the
respondent stated that the respondent was physically violent to her, that he would lock her out of
their matrimonial home forcing her to seek alternate shelter at hostels and that he would
unreasonably force her to have sex with him when under the influence of heavy drinks. High
Court Judge, Rawal, as she then was, in finding in favour of the petitioner in granting the
divorce petition affirmed that the respondent was guilty of acts or cruelty and adultery, which
she stated were of a very ‘serious nature and caused danger to her life and health’ and that they
were acts that should not be accepted as a wear and tear of married life and of living together in
thick and thin.\textsuperscript{83} This case goes only as far as to determine that the specific acts suffered by the
petitioner in this case constituted cruelty.

The Sexual Offences Act’s express exemption of marital rape from its application means that
married women cannot file a suit on a charge of marital rape. This burdens married women with
exposure to sexual violence, and denies them the equal protection of the law. Married women,
who are victims of domestic violence, are therefore left with the option of using the assault
provisions provided under the Kenyan Penal Code, which are insufficient.

\textsuperscript{82} Esther Nangwanaa Nandi v Jones Chewe Bobo Divorce Cause 84 of 2005 at High Court of Kenya, Nairobi

\textsuperscript{83} Ibid
The Kenyan Penal Code\textsuperscript{84}:

Before the enactment of the Sexual Offences Act, the Kenyan Penal Code was the main law regulating provisions of sexual violence. With the explicit exemption of rape provision to married spouses under the Sexual Offences Act, victims of rape are left with the option of using assault provisions of the Penal Code to address marital rape. Whether or not these provisions can be sufficiently used by victims of marital rape will be examined below.

Section 234 of the Penal Code provides that any person who unlawfully does grievous harm\textsuperscript{85} to another is guilty of a felony and is liable to imprisonment for life, with or without corporal punishment. Section 250 of the Penal Code provides that ‘any person who unlawfully assaults another is guilty of a misdemeanor and if the assault is not committed in circumstances, for which a greater punishment is provided, is liable to imprisonment for one year. Section 251 of the Penal Code provides that any person who commits an assault occasioning actual bodily harm\textsuperscript{86} is guilty of a misdemeanor and is liable to imprisonment for 5 years, with or without corporal punishment. These provisions have been used by women to file for cases of physical violence in marriage. Their application has however not been effective. In one case, a man was convicted of assault causing actual bodily harm to his wife and fined 10,000 shillings (US$12), or four months’ imprisonment in default, having spent a year in prison on remand.\textsuperscript{87} Evidence was introduced in court that he had pushed the broken legs of a stool into her private parts. The International Federation of Women Lawyers-Kenya later reported that he had again been charged with assault after allegations that he had beaten his wife again and threatened to kill her.

\textsuperscript{84} \textit{Supra} note 68
\textsuperscript{85} \textit{Ibid} at s.4 defines grievous harm as “any harm which amounts to a, maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.
\textsuperscript{86} \textit{Ibid} at s.4 defines harm as “any bodily hurt, disease or disorder whether permanent or temporary”
in reprisal for his imprisonment. In another case, High Court Judge Vitalis Juma, set free the accused, Dickson Chege, who had admitted stabbing to death his wife, because of her alleged infidelity, reasoning that the accused had been highly provoked by his wife’s infidelity.

The assault provisions of the Penal Code are insufficient for addressing marital rape. The requirements of the Penal Code have requirements such as witnesses, which is hard to provide in the case of spousal rape because it occurs in the privacy of the victims and perpetrator’s home. The assault provisions also require physical proof or injury- to distinguish, where there was actual harm, grievous harm, to determine punishment. However, as marital rape mainly constitutes coerced sex, proof of injury may be absent where no physical abuse was meted. The failure of the Penal Code assault provisions also lies in its lack of appreciation for the different dimension of domestic violence, as opposed to assault caused outside a domestic relationship. Spousal violence technically constitutes assault and battery, but because of the complex relationship between the abuser and the victim in this case, the legal categorization of domestic violence is inadequate and inappropriate. It is argued that creating a specific crime (independent of assault and battery) demonstrates the state’s serious approach to preventing and punishing domestic violence. It sends a signal of approbation which changes society’s perception of domestic violence as a “family matter” and places it firmly within the realm of objectionable criminal conduct.

1.4 The Traditional/Cultural Framework:

Marital rape in Kenya may also be analyzed from the cultural/traditional perspective. Violence in the home, whether physical or sexual, has found acceptance and tolerance in some of the

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88 Ibid
89 Ibid at 21
90 Ibid at 21
91 Supra note 3 at 161
92 Ibid
traditional practices in Kenya. Blind adherence to traditional practices and State inaction with regard to these customs and traditions has made possible large-scale violence against women.\(^9^3\) I argue that an examination of the Kenyan traditions, in relation to violence against women, and treatment of the woman in marriage is necessary to identifying and reshaping the base of shared understanding, on which desirable change or progress can build.\(^9^4\) In Kenya, the customary and religious laws and practices interact with the national and international laws. The Kenyan Constitution in its preamble recognizes this spirit by declaring “we, the people of Kenya, proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation.” The Constitution further recognizes “culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.”\(^9^5\)

Kenya comprises of at least 42 ethnic tribes, grouped into three subgroups: the Bantus, the Nilotes and the Cushites. Each tribe has its own identity, realized through its culture and tradition. Though there are some common practices shared among the Kenyan tribes, each tribe has its own unique beliefs captured in Customary Laws. Before its colonization by the British, the Kenyan was organized by their various traditions and customs; in all areas of the life of a community, particularly in the family unit. Kenya is a paternalistic society with traditions that affirm the position of the man as superior to the woman. Some of the customs that we practiced were discriminatory to women and persist today advancing a tolerance for violence against women. It must be noted that not all customs are discriminatory towards women as shall be discussed below. Some of the cultures and traditions that entrench discrimination and violence against women include wife inheritance, bride price/dowry practice, forced marriages and female genital mutilation.

Wife inheritance, practiced mainly by the Nilotes, for example the members of the Luo tribe, provides that on the death of her husband, a woman is “inherited” by his brother or close

\(^{93}\) Supra note 87 at 13  
\(^{95}\) Supra note 22 at art. 11(1)
relative. The widow’s consent to the new ‘marriage’ or to sexual relations with her new ‘husband’ is not sought.\textsuperscript{96} In some cases, Amnesty International reports that children will marry off their mothers, usually to the [dead husband’s] elder brother, but the children cannot do any cultivation on the land until the elder brother has had sexual intercourse with his new wife. The children cannot cultivate or build a permanent house, for the elder brother determines everything, otherwise there is \textit{chira} (negative consequences for the family).\textsuperscript{97} This cultural practice perpetuates the sexual violence meted out on a widow upon the death of her husband. It shows the inferior status of the woman to the men, treating the woman as one without a right to her husband’s property, or to her personal dignity. This culture exposes women to sexual, physical violence and further exposes her to other harms such as exposure to sexually transmitted diseases.

Another custom widely used as justification of the treatment of married women is the practice of dowry payment/bride price. It is a common practice within the Kenya tribes, such as the Kikuyu, members of the Bantu tribe. According to the Kikuyu, the tradition of bride price was to join two families together, with the woman leaving her parents home to join and form a new clan. Once the dowry has been paid, it signifies the completion of the marriage contract and the man acquires sole right to sexual intercourse with the woman or women whom he marries.\textsuperscript{98} The marriage ceases to be a personal matter as the contract binds the groom, the bride and also their kinsfolk.\textsuperscript{99} The dowry tradition was traditionally not intended as purchase of the woman, but rather as a symbol of appreciation joining two families. However, the dowry practice sealed the contract of marriage and if the wife committed a wrong, she could be sent back to her father and

\textsuperscript{96} Supra note 83 at 12
\textsuperscript{97} Supra note 87 at 12
\textsuperscript{99} Ibid
the husband had the right to demand the dowry that he paid. This emphasizes the inferior position of the woman with respect to a man- that a woman, a wife, to a man-the husband. The dowry tradition also offered justification for men to treat their wives as they pleased, within reason, as she was now counted as part of his property. Dowry tradition has been used as justification for wife battery, couched in terms of disciplining the wife. Though the Constitution provides for equality within the marriage, the dowry practice and the subordinate status of the woman is still maintained to date. During the debate of the Sexual Offences Bill, one of the legislators arguing against marital rape used the dowry practice to assert that rape within marriage is not possible. “I have paid dowry for my wife and we are formally married. I cannot rape her by any chance. You can see the damage that western indoctrination has done to us. I cannot rape my wife! I don’t think there is one man who can rape his wife…you can rape someone else.” The culture of dowry justifies and tolerates the violence against women at home.

Another culture that perpetuates subordinate status of women and a culture of tolerance towards violence against women is the practice of female genital mutilation. Female Genital Mutilation (FGM) is exercised by Kenya communities. Traditionally, circumcision of boys and circumcision of girls was a set rite of passage. To the Kikuyu, circumcision and FGM (referred to as irua) were the initiation processes that gave a boy, manhood and a girl, womanhood. The ‘surgery’ itself was the last process after the teachings of what was expected of womanhood and manhood, to the initiates. In the matrimonial relation, no ‘proper’ Kikuyu would dream of marrying a girl who has not been circumcised, and vice versa. In addition to being a rite of passage, female circumcision was also a way with which the sexual desires of women were tamed. This asserts the subordinate status of the woman. FGM is now outlawed in Kenya under

[100] Ibid
[101] Kenya National Assembly Official Record (Hansard), Second Reading of the Sexual Offences Bill, April 27, 2006 at 780
[102] Supra note 98 at 134, “Circumcision, or trimming the genital organs of both sexes”
[103] Ibid
[104] Ibid at 132
the Children’s Act\textsuperscript{105}, but continues to persist in the country because people still believe in the value of circumcision as a rite of passage and as a way of controlling women’s sexuality. Some communities, in addressing the problem of FGM, have maintained the aspect of the teaching girls who have come of age of what is required of them as they move into adulthood. The girls have a ‘graduation ceremony that is symbolic of the rite of passage from childhood to adulthood. Male circumcision on the other hand, is still practiced and encouraged.

The above traditions, as explained have been used to the detriment of women, emphasizing the subordinate status of women, despite the equality provisions in the Constitution. These traditions have exposed women to physical and sexual violence, exposure to disease and discrimination and unequal treatment before the law. As explained, Kenyan customary laws inter-relate with the national and international laws in Kenya-and this has worked to the detriment of women in some instances, such as property inheritance. In \textit{Mwathi v Mwathi and Anor},\textsuperscript{106} the Court of Appeal applied the Kikuyu Customary Law in relation to the estate of an intestate, despite the fact that the Law of Succession Act\textsuperscript{107} was in force to find that Kikuyu unmarried girls cannot inherit their father’s property. In the \textit{Estate of Njeru Kamanga (dcd)}\textsuperscript{108} the daughters of the deceased were disinherited by the magistrate who felt that the daughters had no right of inheritance to their father’s property because they were married.

On a positive note, some courts have found customary laws to be discriminatory to women, justifying the unequal treatment of women. In \textit{Mary Rono v Jane Rono and William Rono}\textsuperscript{109} the court, in granting that it was discriminatory to give less acreage to the daughters because they were women and would have a chance to inherit elsewhere when they got married, asserted that the current thinking of Common Law theory is that in both international customary law and

\textsuperscript{105} \textit{The Children Act}, (Kenya) 2001, No. 8 of 2001
\textsuperscript{106} 1995-1998) 1 EA 229
\textsuperscript{107} \textit{The Law of Succession Act}(Kenya) Cap 160
\textsuperscript{108} \textit{In the Matter of the Estate of Njeru Kamangu}
\textsuperscript{109} \textit{Supra} note 18
treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation.

As discussed above, some traditional customs are effectively undermining the equal treatment of women, further exposing them to such adverse effects as physical violence, sexual rape-marital rape and exposure to diseases. However, it must be noted that not all traditions are discriminatory towards women. We can draw from some of the traditions to address some of the current problems. One such tradition is the use of a council of elders that would hear disputes between husbands and wives. The use of the council allowed the hearing and determination of disputes that did not discriminate against who brought the matter to the council of elders. The law must therefore, come from an understanding of the role of traditions in relation to the treatment of married women, to find effective solutions.

**Conclusion**

The analysis of the Kenyan Legal framework has highlighted the gaps that exist in protecting married women from marital rape. Married women are exposed to sexual violence in the home, which is justified under the law and also under the tradition of dowry/bride price. It is important to analyze and examine the role of traditions in the treatment of married women, in order to identify holistic solutions. A multi-sectoral approach is necessary to ensure the protection of women from sexual violence within marriage. It is imperative that a thorough legal reform be undertaken, which I argue must begin with the criminalization of marital rape in Kenya.
Chapter two:

Criminalization of Marital Rape: Benefits and Weaknesses

2.1 Introduction

The law needs to come to the rescue of married women from sexual violence in their relationships with their spouses. Several states in Africa and internationally have criminalized marital rape. My thesis is that the first step must be the criminalization of marital rape to protect victims of marital rape by providing criminal sanctions. Then, additional means must be used to provide effective protection and remedies for married women against spousal rape. We shall examine why criminalization of marital rape is a necessary but not sufficient means of addressing marital rape in Kenya.

2.2 Necessity of Criminal Law in addressing Spousal Rape:

One purpose of the law is to maintain social order and well-being of individuals in the society. Criminal Law has a role to play to protect individuals against harms they may suffer individually, but also the danger of which is primarily regarded as threatening the wellbeing of the society at large. Rape, for instance, is a grave wrong to the victim who suffers it, but society at large is outraged when the person and integrity of any one of its members is so violated, and when any one of its members commits this outrage against another person. Therefore, provision of a private remedy only is not considered sufficient to satisfy the society’s

\[\text{Rwanda criminalised marital rape in 2009, South Africa enacted the Domestic Violence Act of , and Zimbabwe enacted the Domestic Violence Act}\]


\[\text{Ibid}\]
need for protection and deterrence, therefore enforcement of criminal law and punishment must be ensured for the public sense of justice to be satisfied. Historically, marital rape was not considered an offence and the law granted husbands immunity from prosecution. In all African jurisdictions, colonial rape laws granted immunity to husbands against prosecution for raping their wives based on the legal fiction of treating marriage as implied perpetual consent to sexual intercourse. This exemption was based solely on the theory of irrevocable consent to sexual activity in marriage. The Common Law doctrine declared by the then Chief Justice-Sir Mathew Hale, provided that “But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” The post-colonial era norm in African jurisdictions, has been to retain this immunity.

The criminalization of marital rape has been addressed in view of harms accruing to women being treated as the property of their husbands. In a House of Lords decision in *R v R* Lord Hale stated “the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the criminal law.” The international call to criminalize spousal/marital rape supports the assertion that the society must not continue to condone sexual violence meted against women. The CEDAW Committee expressed its concern at the high prevalence of sexual violence including rape in the public and private spheres in Kenya and also expressed its concern over the culture of silence and impunity over sexual violence and the lack of criminalization of marital

113 *Ibid* at 145.
114 *Supra* note 2 at 168
115 History of the Pleas of the crown, Hale 1736, Vol 1. Ch.58 p.629
116 *Supra* note 2 at 168
117 [1992] 1 A.C. 579 at 610
118 *Supra* note 39
rape in the Kenyan law. The Committee urged Kenya to give priority attention to combating violence in accordance with its General Recommendation 19 by taking measures such as criminalizing marital rape. Kenya is therefore an obligation to criminalize marital rape as it violates the rights of married women to be treated equally before the law and to have the equal protection of the law.

Criminal Law can also be used as a means of preventing or remedying the enactment of stigma as [sexual] violence, discrimination or other harms. The deterrent quality of criminal law using criminal sanctions is meant to act as prevention measure by criminals, by assigning criminal punishments of a magnitude sufficient to deter a thinking individual from committing a crime. Sanctions while not necessarily correcting a wrong that was committed; they provide deterrents to its repetition or its continuation. The assumption in this case is that criminal law and its sanctions will positively affect the behaviours of aspiring perpetrators and deter repeat offenders. Criminalizing marital rape aims to deter any husband, who has been or is intending to coerce his wife into sexual relations without her consent. For the married woman, the recognition of the offence provides her with options of seeking justice for a wrong that harms her and violates her right to equal protection of the law, to non-discrimination and her right to be protected from violence. Where a husband is found guilty after the conduct of a criminal trial, the sentence or imprisonment that he receives, serves as a way of compensating the wife for the harm that she suffered and as a form of deterrence on the part of the husband.

Criminal law can also be used as a medium through which stigma is created, enforced or disputed. Burris argues that there is a need to understand the expressive role of law as it applies in the development of or undermining of stigma at the social level. He argues that the law is

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119 Ibid
120 Ibid para 22
121 Scott Burris, Stigma and the Law (Lancet, 2006) vol 367, 529-531 at 529
123 Ibid
clearly a medium to define and protect social status and can be used to deliberately assert low
status. The Kenyan Sexual Offences Act, marital exemption and the lack of any other laws or
provisions criminalizing marital rape protects the status of men in marriage and their power in
the treatment of their wives. It also prioritizes men’s sexuality over the woman’s. The lack of a
law criminalizing marital rape in Kenya, also asserts a lower status of married women, by
failing to recognize their sexual autonomy within marriage and legitimizing their unequal
treatment within the marriage and in society at large. It also violates the rights of married
women to be free from violence of any kind as provided under the Kenyan Constitution. Therefore, the law in this case is being used to assert the low and unequal status asserted to
married woman; and asserting the protection and superior status of the husband, which is
discriminatory. Criminalization of marital rape will lift the status of married women, by
providing an avenue for them to seek justice. Kenya needs to make changes in its laws with
regards to sexual violence to undermine any stigma or discrimination that is expressed on
women. Kenya needs to criminalize marital rape explicitly, to promote the status of married
women as equal to that of their husbands. The affirmation by criminal law, that married women
must be protected by the law, will have the effect of acknowledging Kenya’s obligations of
protecting married women from sexual violence and their right to equality and non-
discrimination.

2.3 Limitations of criminal law in addressing marital rape:

One of the limitations of criminal law is that it does not take into account the complex nature of
the relationship between the victim and perpetrator. Bonita correctly affirms that, the victim’s
emotional commitment to her abuser may deter her from taking such a drastic step as having

\[^{124} \text{Ibid} \]
\[^{125} \text{Supra note 22.} \]
him arrested.\textsuperscript{126} She may want the violence to stop but may not necessarily want her partner to be imprisoned which is exacerbated if the abuser is the primary or only earner in the home.\textsuperscript{127} A balance need to be struck, and it makes sense to have an interactive process between the abused and the official legal services.\textsuperscript{128} Some states require the victim to consent to criminal proceedings. Ideally, the prosecution authorities should only pursue a complaint with the support and consent of the victim. However, the prosecutor should retain a discretionary power to continue with or instigate criminal proceedings even if the complaint is withdrawn where certain factors pertain.\textsuperscript{129}

Criminal law is limited in that it addresses the behaviour but does not necessarily change the attitudes that produce the behaviour, or the attitudes towards the harm itself. This means that the law may be explicit in its prohibition and consequences, but as long as the people themselves do not perceive marital rape to be harm, the law will not be effective.\textsuperscript{130} Another limitation of criminal law is in its failure to provide urgent response that victims need. Criminal matters are time consuming and do not provide the urgent response that victims often need.\textsuperscript{131} A criminal matter brought before the Kenyan Courts can take from six months to 18 months before it is determined. Domestic violence cases, and sexual violence cases in particular, require expediency, so as not to re-victimize the victim and also so that effective remedies may be obtained for the protection of the victim. Another limitation of the law is with regards to the remedy that it offers. The legal remedies provided under criminal law are often not substantial or certain enough to deter the enactment of stigma, or to reassure persons with stigmatized conditions that run the risk of going public or openly resisting the stigma.\textsuperscript{132} This limitation is very evident in Kenya. When the Sexual Offences Act became law, there was expectation that

\textsuperscript{126} Supra note 3 at 162
\textsuperscript{127} Ibid
\textsuperscript{128} Ibid
\textsuperscript{129} Ibid
\textsuperscript{130} Ibid
\textsuperscript{131} Ibid
\textsuperscript{132} Supra note 3 at 530
sexual violence in Kenya would reduce. However, the reverse occurred. Cases of sexual violence seem to be on the increase, despite the criminalization of various sexual offences such as rape, defilement and incest and the stiffer penalties provided. This has encouraged the culture of silence, where victims of sexual violence are not reporting cases of violence because reporting abuse is not bearing the fruits expressed by the law.

The law can play a role in structuring individual resistance to stigma. How the law affects the day-to-day experience of stigma at the individual level, assessing whether these individuals accept or resist a “spoiled identity”, and the ways they can resist. It is necessary for the law to come in and take measures to reduce discrimination, unequal treatment of people, such as married women in the case of spousal rape. The act of criminalization theoretically shifts the stigma and discrimination suffered by married women, as the victims. However, whether or not, married women come forth to bring their complaints for prosecution against their husbands for raping them is a concern. Criminalization of marital rape, may bring with it additional burdens and exposure that either brings in some new form of discrimination, or reinforces the existing stereotypes. For instance, the Sexual Offences Act of Kenya criminalizes rape and further removed the requirement for corroboration because it discriminated against women. However, the Sexual Offences Act, in section 38, which deals with false allegations- brings with it additional burdens on women victims-of discrimination and intimidation. Section 30 of the Sexual Offences Act reads “Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.” Based on the fact that most cases of sexual violence are against women, this provision seeks to intimidate women who have been sexually abused and further, perpetuates a wrongful perception that women are likely to bring false allegations of abuse. Women, who are victims of sexual violence, though aware of their rights to report a sexual offence against them, may refuse to do so in fear that they may

133 *Ibid*
134 *Ibid*
instead end up being prosecuted. Criminalization of marital rape is a necessary step, but the criminal law alone, cannot address the social issues surrounding it.

Finally, the use of criminal law is also limited by the lack of proper legal systems that enforce the criminal law provisions. The lack of a judiciary that handles sexual violence cases expeditiously, a corrupt judiciary, an expensive trial process in terms of money and time, results in the failure of the criminal law system, meant to protect married women from marital rape. Burris notes that even where a legal system works, marginalized populations often do not regard the legal system as a source of protection and many are priced out of the system, even when they have a meritorious claim.\(^{135}\) The judiciary must be a system willing to use its discretion to alleviate adverse effects of the laws, particularly on gender-based violence. For instance, the South African Constitutional Court in \textit{S v Baloyi}\(^{136}\) recognized that domestic violence is a unique criminal offence due to its hidden repetitive nature and its impact on victims and families and stated that the state had an obligation to address the problem as the Constitution provides every person the right to freedom of the person, which includes the right to be free from all forms of violence from either public or private persons.” This means that for the law to be effective as well it needs a well functioning judiciary and without it, the law may not have an impact.

\section*{2.4 Techniques of criminalizing marital rape:}

The criminalization of marital rape can be addressed in various ways; first, eliminating the spousal rape exemption, without adding any other language; second replacing exclusionary language with text specifying that marriage to the victim is not a defense and third, enacting

\begin{footnotesize}
\footnotesize\begin{itemize}
  \item \textit{Ibid}
  \item South Africa, Constitutional Court[2000] SA 425, Case No. 29/99
\end{itemize}\end{footnotesize}
additional laws or provisions creating a separate offence of marital rape.\textsuperscript{137} The effect of these techniques is to remove the prosecution immunity for husbands who rape their wives.

South Africa is one of the African States that has criminalized marital rape. South Africa has made positive strides in the protection of women from domestic violence including spousal rape. The South African Prevention of Family Violence Act\textsuperscript{138} provided “notwithstanding anything contrary contained in any law, or in common law, a husband may be convicted of the rape of his wife.”\textsuperscript{139} This Act removed the immunity placed on husbands against prosecutions of sexual violence. Later, South Africa enacted the Domestic Violence Act\textsuperscript{140} which enhanced the protection provided for victims of domestic violence. The Domestic Violence Act definition of ‘domestic relationship’ includes a relationship where the complainant and respondent are or were married to each other, including marriage according to any law, religion or custom.\textsuperscript{141} This provision recognizes the complex relationship between spouses who are married or who have separated and shields them with the law. The Act covers spousal rape as it defines domestic violence to include physical abuse,\textsuperscript{142} sexual abuse,\textsuperscript{143} and emotional, verbal and psychological abuse.\textsuperscript{144} South African criminal laws therefore provide protection for women sexually abused in their domestic relationship. Kenya can borrow a leaf from this approach by removing the marital rape exemption under the Sexual Violence Act and enacting specific legislation protecting married women.

Zimbabwe is another African State that has also taken measures to criminalize marital rape in its laws to remove the marital rape prosecution immunity for husbands. The Zimbabwean Criminal

\textsuperscript{137} Dawn D. Mathews, , “Domestic Violence Sourcebook, second edition” 2004 at 128,
\textsuperscript{138} No 133 of 1993 at s. 5
\textsuperscript{139} Ibid at s.5
\textsuperscript{140} Domestic Violence Act, 1998, Act 116 of 1998
\textsuperscript{141} Ibid at s. 1(vii)(a)
\textsuperscript{142} Ibid at s. 1(viii)(a)
\textsuperscript{143} Ibid at s. 1(viii)(b)
\textsuperscript{144} Ibid at s. 1(viii)(c)
Law (Codification and Reform) Act of 2004\textsuperscript{145} provides that ‘it shall not be a defense to a charge of rape, aggravated indecent assault or indecent assault that the female person was the spouse of the accused person at the time of any sexual intercourse or other act that forms the subject of the charge.’\textsuperscript{146} Zimbabwe further enacted a domestic violence legislation that further provides protection for victims of domestic violence. The Zimbabwean Domestic Violence Act\textsuperscript{147} defines domestic violence as “any unlawful act, omission or behaviour which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes- physical abuse, sexual abuse and emotional, verbal and psychological abuse.”\textsuperscript{148} The Zimbabwe Domestic violence Act also defines a complainant to include ‘a current, former or estranged spouse of respondent\textsuperscript{149} and any person who is or has been in an intimate relationship with the respondent.\textsuperscript{150} The Act also recognizes abuse that is derived from cultural or customary rites and practices that discriminate against or degrade women such as female genital mutilation, forced virginity testing, forced marriage, forced wife inheritance, among others.\textsuperscript{151}

The Kenyan Sexual Offences Act, exempts people who are married to each other from filing rape charges. The Kenyan legislators can repeal section 43(5), without adding any other language to the law. The effect would be that spousal rape and rape by stranger will be treated the same. The concept of rape in intimate relationships remain highly problematic but increasing number of countries are removing exemptions for rape within an intimate relationship from their Penal Codes.

\textsuperscript{146} Ibid at s. 68(a)
\textsuperscript{147} Domestic Violence Act, (Zim) 2006, No. 24 of 2006
\textsuperscript{148} Ibid at s. 1
\textsuperscript{149} Ibid at s. 3(1)(a)
\textsuperscript{150} Ibid at s.3(1)(b)
\textsuperscript{151} Ibid at s. 1
Conclusion

The role of criminal law in impacting the treatment of marital rape and protecting married women is essential and should therefore be used positively towards the protection of the victims of marital rape. It is a positive step towards the protection of the personal integrity of the woman, her right to be treated equal before the law. It is necessary to address the underlying issues that enable the persistence of domestic violence in Kenya. Chapter three examines complementary means of addressing marital/spousal rape.
Chapter Three

Alternatives to Criminalization

3.1 Introduction:

Criminalization of marital rape is essential to addressing the sexual violence that married women face. However, on its own, criminalization is not sufficient to address marital/spousal rape. Supplementary measures must be taken to provide a holistic approach to the treatment of violence against women, particularly marital rape. One of the supplementary measures includes the analysis of the wrongful gender stereotypes perpetuating discriminatory treatment of married women. Gender stereotyping has been identified as one of the root causes of ongoing discrimination and inequality against men and women. Another means of addressing marital rape is analyzing Kenya’s positive obligations to protect women from violence. Kenya has obligations under the Constitution and international conventions such as CEDAW, to protect women from domestic violence. These obligations can be enforced and monitored through various systems, including the judiciary or through CEDAW state reporting mechanism. It is also important to appreciate the practices that are followed by some countries, particularly African countries, taking into account customs and traditions. We shall examine the Zimbabwean system which provides for a council of adjudicators.

3.2 Wrongful gender stereotyping of married women violates their rights to equality and non-discrimination and freedom from violence

Gender stereotyping is a form of discrimination and state parties are under an obligation to eliminate all forms of discrimination against women, including those rooted in gender stereotype. Gender stereotype is a term that refers to a generalized view or preconception of
attributes or characteristics possessed by, or the roles that are or should be performed by, men and women respectively.\textsuperscript{152} Gender stereotypes are concerned with the social and cultural constructions of men and women, due to their different physical, biological, sexual and social functions.\textsuperscript{153} Gender stereotype encompasses sex,\textsuperscript{154} sex-role,\textsuperscript{155} sexual,\textsuperscript{156} compounded\textsuperscript{157} and other stereotypes. Sexual stereotypes center on the sexual interaction of men and women.\textsuperscript{158}

CEDAW obligates state parties to eliminate those forms of gender stereotyping that result in the discriminatory treatment of women. Article 1 of CEDAW defines discrimination against women as” any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field. Article 2(f) of CEDAW requires State Parties to take “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” Article 5(a) CEDAW requires the modification of “social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.” CEDAW further obligates state to “eliminate all forms of discrimination against women with a view of achieving \textit{dejure} and \textit{defacto} equality with men in the enjoyment of their human rights and fundamental freedoms. CEDAW places a positive duty on State Parties to protect women from all forms of discrimination.

\begin{flushleft}
\textsuperscript{152} \textit{Supra} note 36 \\
\textsuperscript{153} \textit{Ibid} at 20 \\
\textsuperscript{154} \textit{Ibid}, see “Sex stereotype focus on the physical and biological differences between men and women”. \\
\textsuperscript{155} \textit{Ibid}, see “Sex role stereotypes are the roles and behaviours that are ascribed to and expected of men and women because of their physical, social and cultural constructions.” \\
\textsuperscript{156} \textit{Ibid}, see “Sexual stereotypes center on the sexual interaction of men and women.” \\
\textsuperscript{157} Compounded stereotypes are gender stereotypes that interact with other stereotypes, which ascribe attributes or roles to different sub-group of women. \\
\textsuperscript{158} \textit{Supra} note 36
\end{flushleft}
Cook and Cusack\textsuperscript{159} identified a model to determine whether the application of gender stereotypes is discriminatory, which I shall adopt here. To eliminate discriminatory forms of gender stereotyping, we need to identify the operative gender stereotype and their forms, identify the harms and determine state’s obligation to eliminate the wrongful stereotyping. Once identified, I shall then determine whether the application, enforcement or perpetuation of the operative gender stereotype in laws, policies or practices in Kenya constitutes a form of discrimination against women.\textsuperscript{160}

\section*{3.3 Identification of the operative gender stereotype:}

Naming the operative gender stereotype and identifying its harm is essential to the eradication of the wrongful stereotype. It is important because it is publicly identified as a wrong, in need of legal and other forms redress and subsequent prevention.\textsuperscript{161} In a recent CEDAW Committee communication \textit{Karen Tayag Vertido v The Philippines}\textsuperscript{162} analyzed the wrongful stereotypes concerning rape victims. The author focused on a particular form of gender stereotyping, namely sexual stereotyping.\textsuperscript{163} Some of the sexual stereotypes she relied on were the, sexual stereotype that a rape victim’s character must physically attempt to escape the attack,\textsuperscript{164} that a rape victim must be timid or easily cowed,\textsuperscript{165} that sex between acquaintances (more than nodding acquaintances) is always consensual.\textsuperscript{166}

The operative gender stereotype in the application of marital rape is the sexual stereotype of married women. Kenya is perpetuating the sexual stereotype of married women as the sexual

\begin{itemize}
\item \textsuperscript{159} \textit{Supra} note 36
\item \textsuperscript{160} \textit{Ibid} at 106
\item \textsuperscript{161} \textit{Ibid} at 39
\item \textsuperscript{162} \textit{Supra} note 43
\item \textsuperscript{163} \textit{Supra} note 36 at 27
\item \textsuperscript{164} \textit{Supra} note 43 at para 3.5.1.
\item \textsuperscript{165} \textit{Ibid}
\item \textsuperscript{166} \textit{Ibid} at para 3.5.4.
\end{itemize}
property of their husbands, with no sexual autonomy in the relationship. Sexual stereotypes endow men and/or women with specific sexual characteristics or qualities that play a role in sexual attraction and desire, sexual initiation and intercourse, sexual intimacy, sexual possession, sexual assault, transactional sex (sexual intimacy in exchange for gifts, opportunities or money) and sexual objectification and exploitation. In *R v Ewanchuk*, the Supreme Court of Canada addressed the issue of consent as defense to the charge of sexual assault. Justice L’Heureux Dube asserted that the case was not about consent as none was given, but rather about stereotypes and myths concerning the sexuality of men and women, specifically how sexual stereotype of men and women enabled and justified the sexual assault of the complainant. She argued that the question of implied consent should not have arisen because the complainant had said ‘no’ on three occasions and was afraid and that the finding by the lower court that the complainant implicitly consented was based on sexual stereotypes and myths. Justice L’Heureux Dube argued that these sexual stereotype and myth denied women’s sexual autonomy and implied that women were in a state of constant consent to sexual activity.

Where the married women are stereotyped as the sexual property of their husbands or spouse, it privileges male sexuality and enables sexual exploitation of women through sexual assault and violence. It denies married women sexual autonomy and implies that married women have given perpetual consent to sexual relations with their husbands. In Kenya, married women are stereotyped as the sexual property of their husbands. This stereotype is perpetuated by several factors such as traditions, the law and statements by legislators. The traditional Kenyan practice of dowry/bride price perpetuates the treatment of married women as the sexual property of their husbands.

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167 Supra note 36 at 42  
168 Supra note 36 at 27  
169 (1999) 1 S.C.R  
170 Ibid  
171 Ibid  
172 Ibid at 27
husbands, with no autonomy over their sexual relationship, exposing them to physical and sexual abuse. Once dowry is completed, sealing the marriage contract, the woman is treated as the property of the husband and is considered to have provided perpetual consent to sexual intercourse with her husband. The Kenyan Sexual Offences Act also perpetuates the sexual stereotype of married women, through the marital rape exemption under section 43(5)-which states that the provisions on the offence of rape shall not apply to persons who are married to each other. The stereotype of married women as the sexual property of their husbands not only minimizes women’s agency and their right to bodily integrity, but also entrench stereotypical notions of male sexual power over women. The declarations made by some Kenyan legislators in the relation to this sexual stereotype show the persistent and perverse entrenchment of this sexual stereotype; “I have paid dowry for my wife and we are formally married. I cannot rape her by any chance...I cannot rape my wife...you can rape someone else.”

By stereotyping married women as the sexual property of their husbands, Kenya is diminishing their capacity as women as they do not have any autonomy over sexual relations with their husbands. By refusing to address the problem of marital rape, the Kenyan state, has effectively burdened married women not only with sexual violence, but also the burden of diseases and infections that affect their sexual and reproductive health. Marital rape was cited as one of the most common forms of abuse resulting in Sexual and Reproductive Health problems in Kenya. Many of those affected describe forced sex as one of the main problems relating to the violent relationships, because of its psychological impacts, pain and violence that accompanies it, and because of the ongoing exposure to the risk of HIV and other STIs.

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173 Supra note 101
175 Ibid
3.4 Kenyan Laws and practices discriminate married women as the sexual property of their husbands

State parties to CEDAW have an obligation to eliminate all forms of discrimination against women. Kenya therefore has an obligation to eliminate customs and traditions that discriminate against women under CEDAW articles 2(f) and 5(a) which obligate each state party to take appropriate measures to modify or abolish existing laws and regulations and practices that constitute discrimination against women. CEDAW also obligates State Parties ensure formal and substantive equality.\(^{176}\) To determine that Kenya’s laws, policies and practices amount to discrimination, it must be shown that a law, policy, or practice make a difference in treatment of men and women which may take the form of any distinction, between men and women, any exclusion of women, or any restrictions of the women’s human rights and fundamental freedoms.\(^{177}\) It must also be shown that the difference in treatment is based on a gender stereotype.\(^{178}\)

The Kenyan laws and practice make a difference in the treatment of married men and women on the basis of the wrongful gender stereotype that married women are the sexual property of their husbands. The marital rape exemption under section 43(5) of the Sexual Offences Act creates a distinction between the treatment of married women and married men as married women are viewed to have given perpetual consent to sexual relations with their husbands. It also treats married women differently from unmarried women, as married women have no recourse to justice when they are sexually violated by their partners, while unmarried women can apply the rape provisions of rape under the SOA. Further, the dowry and wife inheritance tradition emphasize the inferior position of the woman, based on her lack of sexual autonomy. Kenyan married women therefore have no power over sexual relations in their union; they are burdened

\(^{176}\) Supra note 34 at para 8  
\(^{177}\) Supra note 36 at 106  
\(^{178}\) Ibid at 107
with the expose to violence, and suffer as they do not have the equal protection of the law. Kenyan men are not stereotyped under this law, as the practice and policy is that the man has autonomy over the woman in marriage.

Discrimination in a law or practice may also occur where the law, policy or practice is facially neutral, but has the effect of impairing or nullifying the recognition, enjoyment or exercise of their human rights and fundamental freedoms, despite their marital status. Though section 43(5) of the Sexual Offences Act exempting spouses from being prosecuted on rape charges is gender-neutral on its face, it is discriminatory towards married women, as it ignores the facts that sexual violence in Kenya disproportionately affects women and further perpetuates the gender stereotype of married women as the sexual property of their husbands. In *Nevada Department of Human Resources v Hibbs*, where Chief Justice Rehnquist, finding in favour of Gibbs, affirmed that the infrequent provision of family care leave to fathers relied on sex-role stereotype of women as primarily care givers and the sex-role stereotype proof men as primary breadwinners which reinforced unequal distribution of labour in marriage and family relations.

The stereotype of married women as the sexual property of their husbands is perpetuated through the Kenyan laws and practices. Section 43(5) of the SOA which exempts marital rape in Kenya, and section 38 of SOA which provides for the prosecution of persons who make false allegations of sexual offences, perpetuates the sexual stereotype of married women as the sexual property of their husbands and the myth that women are likely to lie in court about sexual offences. The perpetuation of the stereotype of married women as the sexual property of their husbands can also be found in the public utterances of public officials including legislators as to the position of the married woman once dowry is paid. The Kenyan laws and practices are therefore discriminatory, in violation of art.2 (f) of CEDAW which requires each state party to all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. CEDAW Committee in

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Vertido found in favour of the author, that the Philippines had violated their its obligations under articles 2(f) and 5(a) of CEDAW to eliminate wrongful gender stereotyping; and also that her rights to a just and fair trial were violated. In Morales de Sierra case, the Commission determined that the provisions of Guatemala’s Civil Code were discriminatory on the ground that they enforced sex-role stereotypes in marriage, in violation of the American Convention. The Guatemala Civil Code therefore prevented the complainant from exercising her rights, on a basis of equality. In its General Recommendation No. 19 (violence against women), the CEDAW Committee explained that “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion. Such prejudices and practices may justify gender-based violence as a form of protection or control of women.” The Committee further explained that “within family relationships women of all ages are subjected to violence of all kind, perpetuated by traditional attitudes.” In response to Kenya’s seventh periodic report to the CEDAW Committee, the Committee expressed its concerns noted the role of harmful stereotypes in perpetuating violence against women:

“The Committee reiterates its concern at the persistence of adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life. The Committee is concerned that such customs and practices perpetuate discrimination against women, and are reflected in women’s disadvantageous and unequal status in many areas, including in public life and decision-making and in marriage and family relations. The Committee notes that such stereotypes also contribute to the persistence of violence against women as well as harmful practices, including female genital mutilation (FGM), polygamy,

180 Supra note 43
182 Ibid at para22
bride price and wife inheritance; and expresses its concern that despite such negative impacts on women, the State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and harmful practices.”

Kenya therefore needs to address the discriminatory laws and practices that allow an atmosphere of tolerance and impunity surrounding marital rape. Kenya must address the underlying wrongful stereotype of married women as the sexual property of their husbands, treating women as inferior to the men and denying them access to justice.

### 3.5 Kenya’s obligation to protect women from Violence

The Sexual Offences Act of Kenya exempts the marital rape from its application, and as I have argued, this violates the rights of the married woman to equality before the law, non-discrimination and exposes them to sexual violence. The Kenyan Constitution provides that all persons shall are equal before the law and have the right to the protection of the law. Article 27(3) provides that the State shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status. Article 29(c) of the Constitution provides that every person has the right to freedom and security of the person which includes the right not to be subjected to any form of violence from either the public or private sources. The provisions of the Kenyan Constitution place a positive obligation on the Kenyan government to protect married women from violence of any kind-whether at home or in public, whether by private individuals or by state officials. The existence of the marital rape exemption under the Sexual Offences Act, the silence and tolerance of traditional practices such as bride price, wife inheritance and FGM, which perpetuate the treatment of women as subordinate to men, must be addressed. Married women can seek civil remedies

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183 Supra note 39 at para 17.
from the state for its failure to protect them from violence. Married women need to seek compensation and other remedies against the government for its failure to reform laws that are discriminatory towards married women, laws and practices that expose them to sexual violence and harms that affect their reproductive and sexual health. The judiciary has a role to play in asserting the rights of married women against spousal rape- declaring the Sexual Offences Act to be unconstitutional. In *Mukungu v Republic*, the Court of Appeal found that the requirement for corroboration in cases of sexual offence for adult women was unconstitutional as it discriminated against women. The Court of appeal argued that there was no basis to treat the evidence of women differently than that of men and that it was against their right to equality. Therefore, married women can pursue a declaration by the court that the provisions of the Sexual Offences Act, are unconstitutional as they treat married women differently that women who are not married and further expose them to violence, which the state is obligated to prevent. The Kenyan judiciary has a role to play, in ensuring that the laws and current practices in Kenya do not go against internationally recognized human rights of married women. The judiciary has a role to place in eliminating the pervasive gender stereotypes of married women as the sexual property of their husbands, both under the Constitution and under the provisions of CEDAW, which now have the force of law. The Constitutional Court of South Africa, found the state to be liable in failing to protect a victim of sexual violence due to the states repeated failure to take effective measures to stop the perpetrator of these offences. This was in the case of *Carmichael v Minister of Safety and Security and Another* where the author sued the state arguing that the police had failed in their duty to prevent crime, investigate the offences and maintain law and order as was mandated under the Constitution. The Constitutional Court asserted that the courts have a duty to develop the Common Law so as to ensure that the law is in line with the requirements of the Constitution, its spirit and purpose, particularly in relation to the

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184 (2003) EA

185 2001 (4) SA 938 (Constitutional Court of South Africa)
states positive duty to take all appropriate measures to protect individuals from violence. The Kenyan judiciary can follow suit in declaring that the current laws regarding sexual violence—particularly marital rape, need to be reformed to protect women and further that the Kenyan State has the responsibility to take all appropriate measures to protect married women from violence. It must however, be appreciated that the discretion of the courts is limited as it is not their mandate to undertake legal reforms. That is the role of the legislature.

Kenya has an obligation to eliminate all forms of discrimination against women under CEDAW Convention. As explained in Chapter One, Kenya is yet to ratify the Optional Protocol to CEDAW and therefore, individuals cannot make complaints before the CEDAW Committee. Therefore, the State reporting procedure under CEDAW is the main source of communication. State Parties are required to submit to the United Nations (UN) Secretary General, for consideration by the CEDAW Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of CEDAW, every four years. To strengthen this reporting mechanism, Kenya needs to be more thorough in its reporting to the CEDAW Committee and non-governmental bodies can also use this procedure to underscore Kenya’s failure in fulfilling its obligation to protect married women from sexual violence. The reporting procedure needs to provide updated statistical data on cases of marital rape; it must also state clearly what measures the Kenyan government is taking to eliminate the cultural practices and beliefs that perpetuate the wrongful stereotype of married women as the sexual property of their husbands.

3.6 Alternative Methods

i. Adopting Informal Reconciliation Models

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186 Supra note 17 at art 18(1)
Criminal Law, as discussed in Chapter two fails to take into account the complex relationship of individuals engaged in domestic violence, be it physical or sexual or emotional. Kenya should enact its Family Protection (Domestic) Violence Bill, but include in it the following innovative provisions:

As noted earlier, victims of domestic violence have a complex relationship with the perpetrator in most cases being a spouse or former spouse, and feel that their imprisonment is not the remedy they are seeking. With provisions only of criminal sanctions, the victim does not have options. Making provisions for counseling or the Zimbabwean Domestic Violence Act, has a provision for Anti-domestic violence counselors\(^{187}\) whose role includes

“(a) advising, counseling and mediating the solution of any problems in personal relationships that are likely to lead or have led to the use of domestic violence; and

(b) Carrying out, upon the instruction of a court, investigations in relation to the financial status of complainants and respondents; and

(c) Carrying out investigations and making arrangements for the accommodation of the complainants prior to the issue of an interim protection order or protection order; and

(d) making immediate arrangements for the medical or other examination of a child where there is a reasonable suspicion that he or she is a complainant; and

(e) Providing counseling to complainants and respondents”\(^{187}\)

\(^{187}\) Supra note 147 at s. 15
This is an innovative system that gives the victim the option of remedies. The availability of counseling provides married women who do not want to file criminal suits, to seek advice and counseling, which is also offered to the perpetrator.

**Conclusion:**

It has been argued that the Sexual Offences Act and the traditional customs of dowry/bride price, wife inheritance perpetuate the discrimination of women. Kenya needs to eliminate the wrongful stereotype that women are the sexual property of their husbands, for any effective remedies to ensure. It has also argued that the Kenyan state has an obligation to protect married women from sexual violence. In the next Chapter, we shall identify how CEDAW reporting mechanism can be used and also offer final recommendations on how Kenya can address marital rape.
Chapter Four

4.1 Conclusions and Recommendations

Chapter One examined the national legal framework, the international legal framework and the cultural framework on the treatment of marital rape in Kenya. In addressing marital rape, Kenya must criminalize marital rape, either by removing the marital exemption in the Sexual Offences Law, or adding a provision within the law proscribing marital rape, or through the enactment of an additional law, such as the Domestic Violence Act, criminalizing marital rape. Further, Kenya must fulfill its responsibility to protect women from gender-based violence, including marital rape. These recommendations can be achieved by Kenya mainly through domestic legislation or domestic interventions. However, the fact that Kenya’s responsibility to protect women from violence is also an international obligation, it is important to ensure that those mechanisms are strong. In addressing Kenya’s responsibility to protect women from violence, this chapter seeks to address the obligations that the Kenyan State has under the reporting mechanism under CEDAW. I will also offer conclusions and recommendations on how Kenya should address Marital Rape.

i. Obligations of Kenya to eliminate discrimination of married women

Kenya has an obligation to protect women from all forms of discrimination. Kenya has an obligation under art.2 (f) of CEDAW to undertake all appropriate Article 2(f) becomes applicable if it established that a law, regulation, custom or practice, including gender stereotype constitutes discrimination against women. 188 Article 5(a) obligates state parties to take all

188 Supra note 36 at 5
appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superioriity of either of the sexes or on stereotyped roles for men and women.\textsuperscript{189}

Kenya, a party to the CEDAW Convention which provides for the elimination of all forms of discrimination against women must utilize the reporting mechanism under CEDAW to enhance the protection for married women. The Committee to CEDAW was established to monitor States Parties’ compliance through the reporting procedure under which state parties are required to submit periodic reports every four years, “on the legislative, judicial, administrative or other measures” adopted to give effect to the Convention, as well as “on the progress made in this respect.”\textsuperscript{190} To date, Kenya has deposited seven periodic reports to the CEDAW Committee in compliance with the reporting requirements under CEDAW. Kenya has stated the measures that it has taken to ensure the elimination of all forms of discrimination against women in Kenya. There have also been reports submitted to the Committee by Kenyan non-governmental organizations, stating the government’s efforts or lack thereof in the elimination of discrimination against women. The reporting procedure is the main means of constructive dialogue between Kenya and the CEDAW Committee.

In reporting on marital rape, the Kenyan state or non-governmental organizations must provide statistics on marital rape cases, identifying areas where is prevalent. It must also be specific on the traditions perpetuating the tolerance and acceptance of marital rape-such dowry/bride price and wife inheritance. Kenya must also emphasize the role of the Kenyan legislature in eliminating the wrongful stereotype of married women, through legal reform and adoption of multi-sectoral approaches.

\textsuperscript{189} Supra note 17 at art. 5(a)  
\textsuperscript{190} Supra note 3 at 131
ii. Legal Reforms

The law should be one that balances criminal sanctions with civil sanctions, and offer more options to victims. The criminal process should recognize the victim’s role and her needs, including the needs of her children, if any.\textsuperscript{191}

The Sexual Offences Act which governs the applications of sexual offences. It is imperative that the marital rape exemption under section 43(5) be repealed. This will remove the immunity against the prosecution of married spouses, thereby offering women access to justice. There is a need to also repeal section 38 of the Sexual Offences Act which perpetuates the treatment of women victims as liars, and acts o intimidate victims from reporting sexual offences.

There is a need to enact a specific law that will address domestic violence-including sexual violence within marriages and provide other individual remedies such as interim protective orders-granted to provide emergency protection, pending full determination. The current Family Protection Bill (2007) needs to be re-evaluated to provide for the offence of marital rape.

iii. Addressing Stereotypes and Harmful Practices

As discussed in chapter three, the sexual stereotype of married women as the property of their husbands violates their right to non-discrimination and equality before the law. This stereotype is perpetuated by several factors such as traditions, the law and statements by legislators. The traditional Kenyan practice of dowry/bride price perpetuates the treatment of married women as the sexual property of their husbands, with no autonomy over their sexual relationship, exposing them to physical and sexual abuse. Once dowry is completed, sealing the marriage contract, the woman is treated as the property of the husband and is considered to have provided perpetual consent to sexual intercourse with her husband. It is important that we have trainings for public

\textsuperscript{191} Supra note 3 at 169
and state officials on the harms that accrue to married women because of the cultural stereotyping of women.

In enacting new laws, the Kenyan state must be mindful of the underlying gender stereotypes and ensure that the laws are accompanied by implementation. The enactment of gender-neutral laws, as discussed, does not mean that there will be no indirect discrimination. Therefore, the legislators must be keen to the fact that gender-neutral laws, may further discriminate against married women.

iv. The Role of the Judiciary

In Kenya’s seventh periodic report\textsuperscript{192}, Kenya highlighted the fact that some courts had expressly applied the provisions of CEDAW to protect the rights of women from discrimination, in the case \textit{Mary Rono vs. Jane Rono}.\textsuperscript{193} The Court of Appeal in this case cited Kenya’s obligations under various international human rights treaties, including CEDAW, to determine that the then Law of Succession that deferred questions concerning customary land ownership to discriminatory traditional customs, was not sufficient to determine the case as it was discriminatory towards women and girls, and therefore relied on the international provisions. This case was cited as the guiding principle in determining matters that involving customary land, until the Law of Succession was amended by legislature. As seen in this case, the Judiciary took a step in quashing a tradition that was discriminatory to women, and used the international law to enhance the right to equality and non-discrimination. The Judiciary needs to be at the forefront in the fight to eliminate myths and stereotypes of married women as the property of their husbands, and the fiction of perpetual consent by married women to sexual relations with their husbands.

\textsuperscript{192} Supra note 39 at para 23
\textsuperscript{193} Supra note 18
4.2 Conclusion

This thesis has analyzed the treatment of marital rape in Kenya, arguing for its criminalization and application of additional measures to effectively protect married women from spousal rape. In Chapter One, it addressed the legal position of marital rape in Kenya, arguing that married women are not protected under the laws and customs. It emphasized the fact that married women are therefore burdened with exposure to violence and disease because of the discrimination of Kenya’s Laws and Practices. Chapter two made argument that criminalization of marital rape is a necessary but not sufficient means to address marital rape. It is emphasized that marital rape must be criminalized for there t be some progress in protecting married women in Kenya from the sexual violence. Chapter Three analyzed some of the alternative means that Kenya needs to take, in order to effectively address marital rape concerns. An examination of the underlying wrongful stereotype of married women as the sexual property of their husbands is one way of effectively addressing the problem. The traditions and laws perpetuating the tolerance and impunity of marital rape can best be addressed from the understanding of the specific stereotype. It also analyzed Kenya’s obligations to protect married women as another alternative and the use of reconciliation models to encourage dialogue and accommodate the special relationship between the victim-married woman and her abuser-husband. Chapter four has provided a brief look at how Kenya can eliminate discrimination against married women by eliminating laws and practices that perpetuate the wrongful gender stereotype of married women.
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Secondary Materials:


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