



CRIMINALIZING MARITAL RAPE IN KENYA: THE LAWS, THE MYTHS & THE REALITY

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Abstract

Marital rape, also known as spousal rape or intimate partner rape is any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the spouse is unable to consent^[1]. Estimates of the prevalence of marital rape suggest that 10 to 25 per cent of women are victims of rape or attempted rape by a current or former spouse.^[2] From these estimates, it is apparent that spousal exemption laws affect a significant number of women. Within marriage, if a woman gives consent to sexual intercourse because of a threat of injury to the children or herself, depriving the woman of the right to stay in the house or receive maintenance, it is not a valid consent and it is still rape whether it is stranger, date or marital rape.^[3]

The Sexual Offences Act does not prohibit or criminalize forced sex within marriage. Spousal rape has been explicitly exempted in section 43 (5) which provide 'with regards to claims of sexual abuse such as rape it shall not apply in respect of persons who are lawful married to each other.' This exemption clause tends to legalize rape within marriage. The lack of laws criminalizing marital rape creates an assumption that the wife is an exclusive property of the husband. It also asserts a lower status of married women. Marital rape is a form of domestic violence which reinforces women's equality in institution of marriage and in the greater society.^[4] The research focuses on marital rape as a form of domestic violence often overlooked by the society because of patriarchal ideologies that emphasize male superiority in marriage and myths justifying marital rape. It provides arguments and reasons necessitating criminalization of rape within marriage.

The research is structured as follows: first, it analyzes the legal framework governing marital rape in Kenya; it also outlines the factors that hinder criminalization of spousal rape and finally proposes reforms in the law. The first section of the research analyzes the literature and gives a brief overview of the history of marital rape. It also analyzes arguments between theorists justifying its exemptions in law, and theorists supporting its prohibition. The research methodology comprises an analysis of secondary data, which includes articles, journals, internet searches, Acts and Conventions.

^[1] R. K Bergen, *Wife Rape: Understanding the Response of Survivors and Service Providers* (Thousand Oaks, CASage 1996).

^[2] Finkelhor, David & K Yllo, 'License to Rape: Sexual abuse of Wives' (New York: Holt, Rinehart and Winston 1985).

^[3] R. K Bergen, 'Wife Rape: Understanding the Response of Survivors and Service Providers' (Thousand Oaks, CASage 1996)



[4] F Sampson, 'The Legal Treatment of Marital Rape in Canada, Ghana , Kenya and Malawi : A Barometer of Women's Rights' (2010)

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