



East African Journal of Interdisciplinary Studies

eajis.eanso.org

Volume 2, Issue 1, 2020

Print ISSN: 2707-529X | Online ISSN: 2707-5303

Title DOI: <https://doi.org/10.37284/2707-5303>



EAST AFRICAN
NATURE &
SCIENCE
ORGANIZATION

Original Article

Rape is Rape: The Need to Criminalise Marital Rape in Tanzania

Fatuma A. Mgomba^{1*}

¹ Institute of Judicial Administration Lushoto, P. O. Box 20, Lushoto, Tanzania.

* Author for Correspondence Email: mgomba@gmail.com.

* ORCID: <https://orcid.org/0000-0003-3193-1329>.

Article DOI: <https://doi.org/10.37284/eajis.2.1.2252>

Date Published: ABSTRACT

21 October 2020

Keywords:

Marital Rape,
Criminalisation,
Marriage.

It is obvious that marriage in a patriarchal community is the backbone of society on which the whole definition of society lies. The desire to get married and stay married often overrides the risks of gender-based violence a woman faces in the marriage institution. A married woman is instructed to stay married, be obedient to her husband and never say no to his sexual demands regardless of his behaviour. Generally, women are taught to tolerate and accept acts of domestic violence (including marital rape) perpetrated against them. On the other hand, a man's conjugal rights included his right to have sexual intercourse with his wife when he pleased. The equal treatment of women and men under the law is vital to ensuring the recognition of women as full citizens and ensuring their freedom from violence. Therefore, the criminalisation of marital rape in Tanzania constitutes a significant opportunity to enact laws which effectively proscribe marital rape specifically and violence against women generally.

APA CITATION

Mgomba, F. (2020). Rape is Rape: The Need to Criminalise Marital Rape in Tanzania. *East African Journal of Interdisciplinary Studies*, 2(1), 113-123. <https://doi.org/10.37284/eajis.2.1.225>

CHICAGO CITATION

Mgomba, Fatuma. 2020. "Rape is Rape: The Need to Criminalise Marital Rape in Tanzania". *East African Journal of Interdisciplinary Studies* 2 (1), 113-123. <https://doi.org/10.37284/eajis.2.1.225>.

HARVARD CITATION

Mgomba, F. (2020) "Rape is Rape: The Need to Criminalise Marital Rape in Tanzania", *East African Journal of Interdisciplinary Studies*, 2(1), pp. 113-123. doi: 10.37284/eajis.2.1.225.

IEEE CITATION

F. Mgomba, "Rape is Rape: The Need to Criminalise Marital Rape in Tanzania", *EAJIS*, vol. 2, no. 1, pp. 113-123, Oct. 2020.

MLA CITATION

Mgomba, Fatuma. "Rape is Rape: The Need to Criminalise Marital Rape in Tanzania". *East African Journal of Interdisciplinary Studies*, Vol. 2, no. 1, Oct. 2020, pp. 113-123, doi:10.37284/eajis.2.1.225.

INTRODUCTION

The law governing relations within the family-the law of marriage is an area that has an immense impact on the status and welfare of women. The welfare and the rights of women need to be maintained in any country. The need to maintain such rights is based on many reasons. Firstly, women are more vulnerable and susceptible due to biological, economic and cultural reasons than men. Secondly, given the cultural importance of women roles as wives and mothers as well as the economic importance of having an adult male provider, marriage is a highly valued institution. Yet marriage does not guarantee women protection against marital rape as an act of gender-based violence. Traditional marriage is recognised as a social institution of procreation; the wife is responsible for all housework and forbearing and raising children. Since having children is valued within marriage, there is a very strong incentive for women to submit to unwanted sex (Patteson, 2005). But even without the incentive of children, most women have little choice about marital sex. It is the man who dictates how, when, where and under what circumstances sexual intercourse will take place. Lastly, socialisation plays an important role in shaping out the expectations about how man and woman should treat each other in the marriage. Tanzanian female children are taught from a very early age that the man is the head of the household and are advised by their mothers/aunties to remain in complete subjugation to their husbands. Prior to marriage, girls are taught to be ready for sex with their husband whenever they are in need of it and never to refuse his advances. It is obvious that the relationship between men women in their marriages ends on creating marital rape. This study proposes the need for the criminalisation of marital rape in Tanzania.

The general objective of this paper is to evaluate the need to have a law prohibiting marital rape in Tanzania and to explore examples from other African countries that have already criminalised marital rape. By studying countries which have criminalised marital rape in Africa, the intention is

to find out options for reforms that may contribute to advancing women's human rights and their freedom from violence.

Statement of Problem

Sources indicate that domestic violence in Tanzania is prevalent. One of the main forms of violence experiencing women in Tanzania is a marital rape (Immigration and Refugee Board of Canada, 2015). Marital rape stands at the crossroads of the issues arising from both domestic violence and non-marital sexual assault. For centuries, women in marital relationships who suffered from marital rape have had no recourse. The marital rape continues in Tanzania due to the fact that Tanzania's existing laws do not adequately protect women from domestic violence, specifically forced sex within marriages. This study highlights the need to enact laws criminalising marital rape or to amend the existing laws to make forced sex within marriage being a criminal offence.

LITERATURE REVIEW**Marital Rape Defined**

Different scholars have addressed the concept of marital rape. Literally, marital rape refers to a situation whereby a husband forces his wife to have sexual intercourse when his wife does not feel like having sex at all or in a way that she does not want, like having sex without a condom, oral sex, or sex against nature (Bowman and Kuenyehia, 2005, p. 352.). In other words, marital rape is any unwanted sexual act by a spouse or ex-spouse committed without consent and/or against a person's will, obtained by force, or threat of force, intimidation, or when a person is unable to consent. These sexual acts include intercourse, anal or oral sex, forced sexual behaviour with other individuals, and other sexual activities that are considered by the victim as degrading, humiliating, painful, and unwanted.

The Legal Position of Marital Rape

The developed societies consider it a serious crime for a husband to force his wife to engage in sexual

intercourse without her consent. The details of this distinction may vary among different legal jurisdictions. Also, precisely what constitutes effective consent to having sex varies from one society to another depending on its culture, norms and traditions from specific society despite the fact that ends into a frequent debate. Currently, forced sex within marriage is criminalised by different International, Regional and National legal instruments as highlighted below.

International Human Rights

International legal instruments recognise the rights of women and men into equal foothold by providing important criteria for creating harmonies marital relationship. The international laws on human rights require the marriage to be entered with the free consent between the parties who have equal legal rights and responsibilities (Art. 1, 2 and 16 of UDHR¹, Art. 16 of CEDAW² and Art. 6 of African Protocol³). If parties are equal, it means that all decisions (including sexual decision) have to be made in consultation with each other. The equal rights and responsibilities as well have been emphasised by the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (African Protocol) which specifies some of these rights as encompassing the right to decide on the number of children and the spacing of the children (Art. 16(1)(e) of CEDAW and Art. 14 of African Protocol).

The UN General Assembly has specifically identified marital rape as an act of gender-based violence in CEDAW. This means that states parties have an obligation under CEDAW to take steps to protect women against this form of violence, including the passage of laws against it. This position has been made clear by the General Recommendations of the UN Committee which monitors compliance with CEDAW (General recommendation number 12 and Art. 19 of CEDAW). Marital rape is also mentioned

specifically in the Beijing Declaration and Platform for Action⁴ as a form of violence against women. This law requires states to combat marital rape (Strategic Objectives D1 of the Beijing Declaration and Platform for Action).

On June 19, 2008, the UN Security Council declared rape a strategy of war and, therefore, an issue of international security. Resolution 1820⁵ states that sexual violence is used - as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group. Sexual violence in marriage and its sanctioning by the state is also used as a tactic of oppression to humiliate, dominate, and instil fear in women.

These rights will remain in the abstract if not appropriated at the domestic level if the government has ratified CEDAW and African Protocol, but it has not domesticated them. Tanzania legal instruments have not recognised the right of married women into marriage relationship as equal partners in marriages in order to enjoy the same rights as men. To achieve this equality, the government has to eliminate cultural practices that discriminate against women and those that promote the superiority of one sex over another (Art. 5 of CEDAW and Art. 5 of African Protocol).

Given the reservation and silence of most states regarding the express articulation of matters concerning sexuality, it is not surprising that most International Human Rights Instruments, while they formally address rights that cover critical areas of human life, make no explicit commitments to the right to, or protection of, sexual activity, whether of the self or between informed and freely consenting partners.

African States Laws Responding to Marital Rape

There are African states which embrace the idea that marital rape is an offence and criminalised it such as South Africa, Namibia and Zimbabwe. This

¹Universal Declaration of Human Rights of 1948

²The United Nations convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979

³The Protocol of the African Charter on Human and Peoples Rights on the Rights of Women in Africa 1981.

⁴Beijing Declaration and Platform for Action of 1995

⁵UN Security Council Resolution 1820 on Women, Peace and Security 2008

has become evident from the enactment of the law which contains provisions that penalise marital rape.

In South Africa, for instance, Sec. 65 of the Criminal Law (Codification and Reform) Act⁶ gives room to women to consent marital sex. The provision confers power to women over when and how to have sex. This connotes that, South Africa has made positive steps in the protection of women from domestic violence including marital rape (Sec. 5 of the South African Prevention of Family Violence Act) with the relevant provision stating:

“notwithstanding anything contrary contained in any law, or in common law, a husband may be convicted of the rape of his wife”⁷.

This Act accords the international standard as this law removed the immunity placed on husbands against prosecutions for sexual violence.

South Africa, in its efforts to protect women from marital rape, in 1998 enacted the Domestic Violence Act⁸, which enhanced the protection provided for victims of domestic violence. The Act covers spousal rape as it defines domestic violence to include physical abuse, sexual abuse and emotional, verbal and psychological abuse (Sec. 1 (viii) (a), (b), & (c) of Act No.116 of 1998⁹). South African Criminal Laws, therefore, has taken a rigid measure which as well protects women who are sexually abused in their marriage/ matrimonial life.

Zimbabwe as well is an African state that has taken a step to criminalise forced sex within marriage by removing the marital rape prosecution immunity for husbands. Sec. 68 (a) of The Zimbabwean Criminal Law Act provides that¹⁰:

“it shall not be a defence 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”.

Through the above provision, the man, despite being the husband of the woman, has to seek free consent from his wife for sexual intercourse, failure of which warrants the criminal prosecution against him.

Zimbabwe did not only enact the law that protects women from unwanted marital sexual intercourse but also enacted domestic violence legislation which provides the right to a spouse to complain where there is marital sexual abuse. Sec. 3(1)(a) and (b) of the Domestic Violence Act of 2006¹¹ defines a complainant of the domestic violence to include “a current, former or estranged spouse of respondent and any person who is or has been in an intimate relationship with the respondent”. The Act also recognises 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 security for victims of domestic violence. Sec. 1 of the Zimbabwean Domestic Violence Act defines 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”.

Thus, Zimbabwean Laws are criminalising all forms of domestic violence including marital rape.

Namibia is another African state that has taken positive measures to guarantee women equality within marriage. Art. 124 of the Namibian Constitution¹² states that: “men and women are entitled to equal rights as to marriage, during the marriage, and at its dissolution.” Although the Namibian Constitution necessitating equality within marriage connotes that the women in

⁶The Criminal Law (Codification and Reform) Act [Chapter 9:23] Act 23/2004

⁷The South African Prevention of Family Violence Act (No 133 of 1993)

⁸Domestic Violence Act, Act No. 116 of 1998

⁹ Ibid

¹⁰Zimbabwean Criminal Law (Codification and Reform) Act of 2004(Zimbabwean Criminal (Codification and Reform) Act [Chapter 9:23], Act 23/2004. It repealed the Sexual Offences Act 8/2001 on 1 July 2006.)

¹¹The Zimbabwean Domestic Violence Act, No. 24 of 2006.

¹²The Zimbabwean Domestic Violence Act, No. 24 of 2006.

Namibia have the right to determine the fate of sex into their hands. The Constitution also eradicates men/husbands who are usually physically stronger partners; to force sexual intercourse to their wives. This promotes equality in marriage. The Constitution also limits persons to discriminate others on the grounds of sex or social status. This means that a married woman has the same right to freedom of choice and bodily integrity as an unmarried woman, or a man. Furthermore, the Namibian Constitution guarantee dignity to all, a principle which is completely promotes the institution of marriage by empowering women to have an equal voice on matters of sexual activity.

Tanzania Legal Position on Marital Rape

Despite the fact that Tanzania is the signatory to a different international and regional legal instrument of protecting women's rights still, there are various national law provisions which facilitate marital rape. The provisions of law inhibit the women and Human Rights instruments on forced sex within marriage as elaborated below. The application of all laws in Tanzania is governed and regulated by the Constitution of the United Republic of Tanzania, 1977. Thus, the Constitution is the mother law of the land. That being the case, all Tanzanian laws should conform to the provision of the Constitution. And if it happens, there is any law/provision of law which contradict with it the said law/provision is null and void by virtue of Art. 64(5).

Moreover, the Constitution provides different principles governing human rights protection, including equality between the people, non-discrimination, human dignity, principles of fairness and justice. The wording of Art. 12 of the Constitution states that; "all human beings are born free and are all equal". Also Art. 13(1) and (6) of the Constitution states that "no person may be discriminated against on the grounds of sex". It has been noted that the Constitution of Tanzania protects people from discrimination and affords the people of Tanzania freedom and equality. Despite such efforts of the Constitution of Tanzania, still, it is not enough for the state Constitution to provide for equality and non-discrimination based on sex without providing protection for the said rights of

women. Women's human rights should be protected under the Constitution as provided under the International and Regional Human Rights Instruments to which Tanzania has signed. The protection of human dignity and principles of fairness and justice are also important for the promotion of women's rights generally.

The Penal Code

The Penal Code (Cap. 16) is the only state law which criminalises rape and sexual violence in its all forms in Tanzania. Marital rape has continued to be excluded from the definition of rape despite the fact that in 1998 rape was redefined. The penal code recognises rape for legally separated couples only. The said Act further provides circumstances which may lead in the commission of the offence of rape. Among other circumstances has been highlighted under Sec. 130(2) of the Penal Code are: a male person commits the offence of rape if he has sexual intercourse with a girl or a woman; - not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse. Sec. 130 (2) (a) of the Penal Code, did emphasise that a husband cannot rape his wife during the marriage time unless there is separation decree of the competent court. Therefore, in Tanzania, a husband cannot rape his wife in anyhow. The wording and the concept provided above on the definition of rape it appears that the Penal Code excludes the notion of non-consensual sex in marriage. If anything, it suggests that a married man could, if he so wishes, use threats or intimidation to induce his wife to have intercourse with him and this would be within the law (Banda,2005). Despite the fact that the Penal Code criminalises various forms of Gender-Based Violence (GBV), including rape, sexual assault, harassment, female genital mutilation (for girls ages 18 years and younger) and sex trafficking but, it does not recognise marital rape.

The Law of Marriage Act, 1971(RE 2002)

The *Law of Marriage Act* of 1971¹³ regulates all matters arising out of marriages in Tanzania. It recognises conjugal rights within the marriage institution. Law of marriage also provides a wife's duty to consummate but completely overlooks the

¹³Law of Marriage Act, of 1971 (RE 2019)

need to protect the spouses, especially women, from unconsented sexual intercourse within marriage. The Law of Marriage Act has got no single provision relating to forced sexual intercourse within marriage for both women and men rather it contains a provision which provides that, it is illegal to assault one's spouse (Sec. 66 of LMA).

Marriage under the Act defined as the voluntary union of a man and a woman, intended to last for their joint lives spouse (Sec. 9 of LMA). Thus, for the union of man and woman to be marriage, free consent is a vital condition among the parties. Sec. 16 of LMA emphasises that; "No marriage shall be contracted except with the consent, freely and voluntarily given, by each of the parties thereto". This provision entails that, the right to consent to marriage is solely vested to parties to the marriage. This is a very progressive provision of the law which conform with the provisions of the Human Rights Instruments guaranteeing girl's right to consent to the marriage. However, on another side, the LMA has taken a different position by allowing the third parties and the court of law to consent for marriage as the supplement to girls' consent for marriage (Sec. 17 of LMA). This provision among others grabs the right of the girl to consent by recognising consent of the father, mother or guardian for the marriage of girls under 18 years old and consent of a court of law for a girl below 14 years. It is surprising to note that this law goes further to recognise the court's consent to a marriage of a girl of less than 18 years where there is no parents'/guardians' consent. This meant that consent is an irrevocable part of a marriage contract. It should be noted that consenting to marriage does not mean necessarily be consenting to sexual intercourse for the duration of the marriage. Consent for sexual intercourse as per international standard has to be sort at any time where is about to be done. It is so sad to note that marital rape is not covered in the Act and thus is not recognised as an illegal act. As a result, failure for the LMA to recognise marital rape is the abuse of human right and allows men to abuse women without legal recourse.

The HIV and AIDS Prevention and Control Act of 2008¹⁴ regulates the relationship between wife and husband, where one of them is suffering from a sexually transmitted disease such as HIV-AIDS. The Act permits a wife to refuse to have sexual intercourse with her husband if he is suffering from a sexually transmitted disease (Sec. 21 of the HIV and AIDS Prevention and Control Act of 2008). This Sec. may be construed to mean that if it is not established, the husband is suffering from the sexual transmissible disease (HIV/AIDS), a wife cannot refuse sexual Act. Reading between the lines the provisions of the said Act it is plainly shown that, it was enacted to prevent a Tanzanian married woman from HIV-AIDS infection and not protected from various forms of Gender-Based Violence.

The Customary Law, this law originates from the customs, norms and tradition of different communities in Tanzania. It varies from one community to the other depending on the nature of the societies (either matrilineal or patrilineal societies). In patrilineal societies, all issues relating to marriage are governed and regulated by the Local Customary Law Declaration Order GN 279 of 1963. The Local Customary Law Declaration Order, among other things, allows payment and return of bride price (First schedule of The Local Customary Law Declaration Order, GN 279 of 1963). Payment of bride price is said to have multiple functions, including creating friendship and the binding together of two families. Also, it is said to transfer the labour value of the woman from her family of origin to the husband's family. It is believed that upon payment of the bride price, the wife becomes submissive to the husband and husband's family.

On matters of marriage sexual intercourse, the wife has no right and justification to denial her husband sexual intercourse advances likewise to complain about it. This is because, when the wife complains about unwanted sexual advances, she lay open to divorce. Most women are not willing/eager to be divorced because they avoid the risk of losing their children. There is also the issue of family pressures to be married and stay/remain married. (Because customary divorce has among other effects/implication of returns of bride price). Some

¹⁴HIV and AIDS Prevention and Control Act of 2008

feminists link payment of bride price and women's subordination with lack of strong voice within marriage. They believe that to continue with this customary practice is to perpetuate and encourage the subjugation of women (Banda, 2005). Thus, in one way or the other, the customary law facilitates and uphold man right to dictates how, when, where and under what circumstances intercourse will take place within marriage.

METHODOLOGY

The study method adopted in this work is the documentary review. Different literature materials including legal instruments from both local, regional and international sources on marital rape were consulted. The reports, journals, books and research papers were analysed to get the gist of the situation of marital rape in Tanzania, South Africa, Namibia, and Zimbabwe. This method was adopted among others to realise the need to criminalise marital rape by affording women international and regional standards of protection at the local level on issues of consent to marital sexual intercourse.

DISCUSSION

Women who are victims of marital rape have great complexity in defining it as such. The traditional idea that it is impossible for a man to rape his wife contravenes international standards. The traditional idea on marriage vows as have abdicated any women say over their own body and sexuality. Principally, it denies women the right to say 'no' to sexual intercourse advance the fact which still prevalent amongst wives as much as amongst their husbands.

A wife being raped often question her right to refuse intercourse with her husband. In the circumstances realises that legally it constitutes rape still arises reasons which prevent her from perceiving it. The woman sees it as an act for which the man is not fully responsible for rape due to his nature, she may see it as a misunderstanding, and she may have religious issues which question her right to refuse intercourse. Basically, women as wives being raped by their husbands, they look for every reason, every excuse to deny it. This is because wives they do not want to accept the alternative: it is rape, he is hurting and humiliating

them with intent, wives can no longer trust their husband, turn to him in comfort, gain reassurance and protection from his company and their home are no longer safe.

The traditional African idea of married women giving blanket consent on marriage has as well backed by England scholar- Sir Matthew Hale's (1736) views that spousal rape could not be recognised since the wife "hath given up herself in this kind unto her husband, which she cannot retract (Marital rape in Africa: the right to say no: published June 11 in the Globe and Mail). The interpretation of views of Sir Matthew Hale's is that the consent to which the married woman is making for marriage means has consented for sexual intercourse at any time to which the husband needs. This position is generally not correct as it contravenes the international standards which need the man to sort for consent at any time of desire for sexual intercourse.

Rape is rape, regardless of the relationship between the rapist and the victim. It can be a total stranger; someone you recognise by sight but has never really communicated with; someone you know superficially, a neighbour or a colleague; a friend, a boyfriend or a former boyfriend; a live-in partner, or a former partner; someone you are married to or have been married to in the past. The main difference between rape and marital rape is that wives suffer additional feelings of betrayal, inability to trust and isolation. Rape in any context must be legally prohibited: otherwise, it creates freedom in which silence and state acquiescence expedite the violence (Russell, 1990).

Some of the African countries still condone marital rape. The commonly-cited reason for this exception of marital rape from the general crime of rape concerns the nature of marriage. The theory is that upon marriage, a woman gives blanket consent to sexual intercourse with her husband for the duration of the marriage. But it is obviously absurd to interpret the marriage vows as an agreement to sexual intercourse at any time, under any circumstances, for years to come regardless of whether the husband is drunk, dirty, violent, or abusive. Another reason for the marital rape exclusion is that to allow a wife to charge her husband with rape would wreck the marital

relationship as if allowing the husband to rape his wife with impunity will do the relationship no harm. It is important to point here that, non-criminalisation of marital rape really does to reinforce the view that wives are the property of their husbands.

The existing laws of Tanzania do not acknowledge that women, married or single, have the right to make choices about their actions and about their bodies. The law as it stands turns marriage into a power relationship which gives the husband the right to force his wife to submit to him, at any time, regardless of her wishes. It should be noted that marriage is supposed to be a safe place free from the violence and subordination. However, this is not the case in Tanzania.

Marriage should no longer mean forced sexual submission. It is believed that marriage is a valuable institution thus, should aim towards making it a just, equal and rewarding partnership in all ways, rather than a means of subordinating one person's will to that of another". It is of no doubt that marital rape is one of the most serious violations of a woman's bodily integrity.

The Law of Marriage Act and Penal Code have "little impact" to the promotion of women's rights in Tanzania because they do not protect married women from marital rape. Besides, criminalisation of marital forced sex without knowing the causal factors it also may be worthless. To achieve full protection for women from the violence of marital rape, and to achieve the promotion of women's human rights generally, not only criminalisation of marital rape is needed but also the factors facilitating marital rape must be addressed and understood in terms of both their origins and consequences. Hereunder are explanations of some factors facilitating marital rape in Africa and Tanzanian in particular.

Factors Facilitating Marital Rape in Tanzania

Social-cultural construction of women's sexuality was based on control of women and their sexuality (Masculinity Sexual Behaviour) is said to be one factor (Pinal and Susie, 2007) among various factors which facilitate a husband to force his wife to have sex. The conceptual idea that a wife can be raped by her husband does not even exist because

all sex within marriage is considered consensual whether or not the woman consents. In the African context, there is ambiguity and conflict over the issue of marital rape because culturally a wife is expected to have sex with her husband at any time and she is not expected to deny her husband's sexual advances (Bowman and Kuenyehia, 2005). This shows quite clearly that some men still hold on to the notion that "when a woman says no, she really means yes, or at least maybe" (Banda, 2005).

Stereotyped gender roles in relation to sexuality may be the most important factor contributing to marital rape. Several studies have revealed that the expectation of some form of exchange in the relationships between men and women plays a significant role in sexual coercion and rape (Mzinga, 2002). Ideals that men should be macho and sexually active can mean that sexual violence is expected rather than condemned (Pinal and Susie, 2007). This is one of the many ways we are reminded of the stereotyped unreliable woman. Sir Matthew Hale's opinion that:

".... 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" (Hale, Wilson & Emlyn, 1778, p. 629).

Power imbalance, research conducted worldwide have identified the different ways in which the imbalance in power between women and men within marriage curtails women's sexual autonomy and expands male sexual freedom (Gupta, 2000). This is also supported by feminists' views that the double standard is an important element in the sexual exploitation of women (Mendus and Rendall, 1989). Power is fundamental to both sexuality and gender. The unequal power balance in gender relations that favours men translates into an unequal power balance in heterosexual interactions, in which male pleasure supersedes female pleasure and men have greater control than women over when, where, and how sex takes place may also facilitate marital rape in Tanzania.

An understanding of individual sexual behaviour, male or female, thus, necessitates an understanding of gender and sexuality as constructed by a complex interplay of social, cultural, and economic forces

that determine the distribution of power. As pointed out “in countries across the world, sexual activity is framed by intensely patriarchal social, cultural and religious norms that result in women having little or no say over sexual relations” (Albertyn, 2000). The African culture as it stands turns marriage into a power relationship which gives the husband the right to force his wife to submit to him, at any time, regardless of her wishes (i.e. forced sex within marriage or marital rape as it is legally termed).

Another factor is the African cultural practice of payment of bride price/dowry. The practice is common in most patrilineal societies in sub-Saharan Africa (Tanzania inclusive), even some matrilineal societies which did not have the practice originally have now adopted it (Mvududu, 2002). Bride price is one of the practices that underpin the ideologies regarding the inequalities between women and men and denies women any decision-making power over their lives. Banda F. laments, “The payment of bride price transfers genetically and uxorial rights from the family of the woman to that of the man. It includes the man’s expectation that he will enjoy exclusive sexual rights to the woman payment of bride price are some of those practices which perpetuate male dominance in sexual relations and decisions on the number and spacing of children (Banda, 2005). Majority of African men and Tanzanian specifically, force women to have sex after having incurred some expenses such as the payment of bride price, as William explain:

“...[a]s an outdated practice that turns women from human beings into property. Some men abuse their wives physically or emotionally because they feel that they (wives) are purchased commodities: like cows or cars ...” (BBC News, 2004).

Bride price compounds a woman’s already complicated situation because the husband has marital power, which was described by Armstrong and Nhlapo as:

“the power or control over his wife that a husband enjoys during the subsistence of the marriage; more specifically, the husband’s control over his wife’s person...the husband’s power as head of the family with the decisive

say in matters concerning the common life of spouses” (Armstrong and Nhlapo, 1985).

The above statements reflect the issue of unequal power dynamics between the two parties within a marriage and the fact that the man pays bride price further strengthens his dominance over her. The man, who has exclusive sexual possession and rights of a ‘sexual object’, enjoys more sexual rights than the woman and fails to respect her sexual rights. Therefore, the above discussion reveals that the common causal factor of marital rape is the cultural practice of treatment of women as property in Tanzania, particularly and Africa in general. The cultural construct of women as sexual properties reinforces the power and control men exercise over women and is the primary rationale justifying marital rape. Hence culture is a critical part of the marital rape puzzle.

The Need for Law Reform

Marital rape adversely affects the lives of all women; non-criminalisation of marital rape has an enormous impact on women. Non-criminalisation of marital rape means that men can rape their wives without facing legal prosecution. Women are treated as chattels, leaving them vulnerable to other kinds of violence. Treating married women as chattel under the law reinforces their treatment as chattel in other contexts, outside of marriage. When women are treated as non-persons in marriage and are not protected against rape, it results in devaluation that leaves them vulnerable to rape in other contexts. When married women are treated as property under the law, it creates a climate of state-endorsed violence. Marital rape promotes a culture in which violence against women is state-endorsed or at least quietly accepted. This fosters a broader social acceptance of violence against women and legitimises sexual assault as a form of political violence or social punishment.

Some of the realities of marital rape as it affects women include: Women receive unequal treatment in the legal system based on sex; inequalities based on race, culture, class, age, urban/ rural status, original status, immigration/refugee status, and disability compound the unequal treatment women receive by and within the legal system once they have experienced rape and women’s vulnerability

to violence such as marital rape; discriminatory myths about sexual violence and about women's sexuality continue to shape the social attitudes and values which produce violence against women and which deprive women of their guaranteed human rights to equal protection and benefit of criminal and family law and, therefore to full equality and marital rape contributes to and results from women's inequality; Marital rape reflects and reinforces women's social, economic and political inequality. Married women are suffered a lot only because no specific law which criminalises marital rape.

CONCLUSION

Tanzanian culture, tradition and customs are very important to build up a good family, clan, society and nation at large. However, it can be a source of inequality. From the foregoing discussions, it is clearly shown that social culturally constructed roles of men and women bring about power imbalance in sexuality. The stereotyped gender roles in relation to sexuality may be the most important factor facilitating power imbalance within marriage. Female norms of sexual innocence, ignorance and passivity don't exist in isolation. They go hand in hand with male norms dictating sexual desire, aggression and dominance. Despite the dramatic rise of international and national legal instruments which provides for women sexual rights and protects women sexuality, most of the women in many regions are still forced to have sex within marriages. Besides, most Tanzanian women are not aware of their rights under the laws, culture and customs which reinforce stereotypes of male dominance and female submission in families and so perpetuate the equality of women. Women are socialised to believe men are superior to them. It will be very difficult to change both men and women attitudes on their sexuality.

Although marital rape is rampant, yet there is an existence of a culture of silence. It is very difficult to get the true picture of its extent and magnitude as it always happens in the private confines of the home where women are supposed to faithfully fulfil their conjugal roles whether they want to or not and whether it is safe or not. To make matters worse, women survivors of marital rape hide even the

visible tell-tale marks of abuse; thus, it remains grossly under-reported. Men, as a way of controlling women, often use culture, tradition and religion to physically, psychologically and sexually subjugate women and girls.

Generally, laws or legal reforms in themselves are not sufficient to make women's sexual equality a reality. Human rights activists and feminists in Africa generally and Tanzania, in particular, have been struggling to advocate for the adoption of women's human rights and legal reforms against all existing laws which are against women's sexual right. However, their efforts were watered down by the concept of culture because women inequality is based on culture.

This vagueness of the notion of culture provides a convenient scapegoat for government institutions and obscures the state responsibility on redressing women's sexual inequality. A government can easily avoid addressing inequalities by claiming that it is powerless to alter social structures within the cultural sphere. However, due to social, economic development and women rights advocacy, some women are aware of their sexual rights, and most of them want their rights to be maintained. Married women, when forced to sex with their husbands, they feel that their bodily integrity is injured and recognise that Act as rape but they fail to enforce it legally because there is no domestic law which criminalises the said Act. Although the experience of other countries suggests that proving rape in the context of marriage is often difficult, nevertheless, making this form of rape clearly illegal sends out an important message to society.

RECOMMENDATIONS

Tanzania laws have to accord the international and regional standards in the protection of married women from forced sex. In establishing this standard, the following are the recommendations:

There is a need for including a provision in Tanzanian Constitution which prohibit laws, cultures, customs, or traditions which are against the dignity, welfare or interest of women or which undermine their status as the Namibian and the South African Constitutions do.

Likewise, the Law of Marriage Act of Tanzania has to incorporate provisions which establish an equitable relationship of wife and husband in the matrimonial home by prohibiting forced sex within marriage and criminalising it.

Marital rape should be made an offence. Whether one is married or not, a woman should be able to control her sexuality. The current law Penal Code excludes the offence of marital rape. This is a violation of the fundamental human rights of women. Aids pandemic makes it even more urgent that marital rape exemption be removed. The Penal Code should establish the offence of marital rape. It should highlight ingredients of the offence and the circumstances through which may be committed.

We must understand that even the best of laws cannot operate unless the will of the people and their attitude support this law. Gender sensitisation and awareness programs should be enhanced to educate the public on the moral values that are quickly being eroded. Public education on the subject of sexuality, morality, human rights and dignity are necessary. Legal awareness programmes should be designed and used to educate people on the provisions of the law and sensitise them on the illegality of marital rape. As Schuler rightfully states, women should be empowered in order to know their rights and how to access them.

REFERENCES

- Albertyn, C. (2000, November). Prevention, treatment and care in the context of human rights. In *UN Expert Group Meeting on Gender and HIV/AIDS, Windhoek, Namibia* (pp. 13-17).
- Armstrong, A. K. & Nhlapo, R. T. (1985). *Law and the Other Sex: The Legal Position of Women in Swaziland*. Mbabane: Webster
- Banda, F. (2005). *Women, Law and Human Rights: An African Perspective*. Portland: Hart Publishing
- BBC News. (2004, Aug 30). Bride price: an insult to women, a burden to men? Retrieved from BBC News, available at <http://news.bbc.co.uk/2/hi/africa/3604892.stm>.
- Bowman, C. G., & Kuenyehia, A. (2005). *Women and law in sub-Saharan Africa*. Accra, Ghana: SEDCO.
- Gupta, G. R. (2000). Gender, sexuality, and HIV/AIDS: The what, the why, and the how. *Can HIV AIDS Policy Law Rev*, 5(4), 86-93?
- Hale, M., Wilson, G., & Emlyn, S. (1778). *The History of the Pleas of the Crown* (Vol. 1). T. Payne and others.
- Immigration and Refugee Board of Canada (IRBC). (2015). *Tanzania: Situation of female victims of domestic violence, including legislation and availability of state protection and support services (2012- July 2015)*. TZA105300.EF. Canada: Immigration and Refugee Board of Canada
- Mendus, S., & Rendall, J. (Eds.). (2002). *Sexuality and subordination: interdisciplinary studies of gender in the nineteenth century*. Routledge.
- Mvududu, S. C. (2002). *Lobola: its implications for women's reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia, and Zimbabwe*. Harare: Weaver Press
- Mzinga, J. (2002). *Changing Gender Roles in Tanzania*. Tanzania Gender Networking Programme.
- Patterson, A. S. (Ed.). (2018). *The African state and the AIDS crisis*. Routledge.
- Pinal, L. & Susie, J. (2007). *Gender and Sexuality: Overview Report*. Brighton, UK: Institute of Development Studies, University of Sussex.
- Russell, D. H. (1990). *Rape in Marriage*, Indianapolis, Indiana Press.
- Schuler, M. A. (Ed.). (1995). *From basic needs to basic rights: Women's claim to human rights*. Institute for Women, Law and Development.