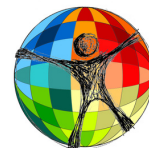


VOL. 11 | NO. 1 | SUMMER 2022

A Critical Legal Analysis of Marital Rape in Uganda

Rebecca Clayton

McGill Centre for
Human Rights
and Legal Pluralism



Centre sur les droits de la
personne et le pluralisme
juridique de McGill



McGill FACULTY OF
Law

ABOUT CHRLP

Established in September 2005, the Centre for Human Rights and Legal Pluralism (CHRLP) was formed to provide students, professors and the larger community with a locus of intellectual and physical resources for engaging critically with the ways in which law affects some of the most compelling social problems of our modern era, most notably human rights issues. Since then, the Centre has distinguished itself by its innovative legal and interdisciplinary approach, and its diverse and vibrant community of scholars, students and practitioners working at the intersection of human rights and legal pluralism.

CHRLP is a focal point for innovative legal and interdisciplinary research, dialogue and outreach on issues of human rights and legal pluralism. The Centre's mission is to provide students, professors and the wider community with a locus of intellectual and physical resources for engaging critically with how law impacts upon some of the compelling social problems of our modern era.

A key objective of the Centre is to deepen transdisciplinary collaboration on the complex social, ethical, political and philosophical dimensions of human rights. The current Centre initiative builds upon the human rights legacy and enormous scholarly engagement found in the Universal Declaration of Human Rights.

ABOUT THE SERIES

The Centre for Human Rights and Legal Pluralism (CHRLP) Working Paper Series enables the dissemination of papers by students who have participated in the Centre's International Human Rights Internship Program (IHRIP). Through the program, students complete placements with NGOs, government institutions, and tribunals where they gain practical work experience in human rights investigation, monitoring, and reporting. Students then write a research paper, supported by a peer review process, while participating in a seminar that critically engages with human rights discourses. In accordance with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded. Therefore, papers in this series may be published in either language.

The papers in this series are distributed free of charge and are available in PDF format on the CHRLP's website. Papers may be downloaded for personal use only. The opinions expressed in these papers remain solely those of the author(s). They should not be attributed to the CHRLP or McGill University. The papers in this series are intended to elicit feedback and to encourage debate on important public policy challenges. Copyright belongs to the author(s).

The WPS aims to meaningfully contribute to human rights discourses and encourage debate on important public policy challenges. To connect with the authors or to provide feedback, please contact human.rights@mcgill.ca.

ABSTRACT

Marital rape - the act of one spouse having sexual intercourse or using any object to intrude the body of their partner without their spouse's consent - is mostly an unrecognized issue in Ugandan law or public discourse. There is deep resistance to acknowledging marital rape as a problem; however, its impact on the health and well-being of victims - usually women - is hard to ignore. In this report, I seek to provide an in-depth overview of the state of marital rape in Uganda, looking first at the social context and then the current legal status, both domestically and internationally. I conclude by outlining some possible legal arguments based on the Ugandan Constitution for its criminalization. Marital rape is a fundamental violation of human rights and needs to be explicitly criminalized. Providing the necessary legal protections, as well as engaging in cultural dialogues and education, will push forward women's rights, their autonomy, and their health in Uganda.

CONTENTS

I. INTRODUCTION	6
II. BACKGROUND AND SOCIAL ANALYSIS ON MARITAL RAPE IN UGANDA	7
III. CURRENT LEGAL STATUS IN UGANDA	19
IV. LEGAL ARGUMENTS FOR THE CRIMINALIZATION OF MARITAL RAPE IN UGANDA	29
V. CONCLUSION	34
BIBLIOGRAPHY	36
APPENDIX – MENTIONED PROVISIONS	41

I. Introduction

This summer, while working for the Centre for Health, Human Rights and Development (CEHURD) in Kampala, I was reviewing parliamentary transcripts for research on a case when a comment made by one of the members of parliament caught me off-guard. He asked a rhetorical question about how absurd it would be for wives in Uganda to be able to accuse their husbands of rape, and in response to this thought, the whole room laughed. That laughter by a room full of law-making men stuck with me all summer, and opened a line of questioning about the legality of marital rape in Uganda – what is its status, what are its impacts, and how might it change?

Rape can be defined as any person having sexual intercourse or using any object to intrude the body of someone else without their consent, and marital rape specifies that the perpetrator of a rape is the victim's spouse.¹ Reasons for marital rape can range from insensitivity to a partner's feelings, belief in patriarchal conceptions of marriage and gender roles, or power exertion, control, and dominance.² For many reasons, marital rape is mostly unrecognized as an issue in Uganda, either in law or in public discourse. There is deep resistance to acknowledging marital rape to be a problem, however the impacts are hard to ignore.

Globally, early advocacy work surrounding sexual assault focused on strangers as the perpetrators of rape and abuse, leaving behind the more common perpetrators of sexual assault: spouses and family members. Since then, there have been widespread efforts to refocus on the threat against women as being largely domestic. In fact, 68% of the time a woman experiences sexual violence in Uganda, it is at the hands of a

¹ See Patricia A P'Odong & Barbara L Can, "Combatting Marital Rape: The Law and Criminal Justice System in Uganda" in Ashwanee Budoo-Scholtz and Emma Charlene-Lubaale, eds, *Violence Against Women and Criminal Justice in Africa: Volume II* (Switzerland: Palgrave Macmillan, 2020) 109 at 110–11.

² See *ibid.*

current or former spouse.³ Focusing exclusively on sexual assault at the hands of strangers and acquaintances leaves behind the more common and pressing dangers facing women every day. Without laws to protect them, married women in Uganda face severe risks and are shouldering significant consequences from marital rape.

In this essay, I seek to provide an in-depth overview of the state of marital rape in Uganda, looking first at the social context, and then the current legal status, both domestically and internationally. I then outline some legal arguments based on the Ugandan Constitution for the criminalization of marital rape. My hope is that if CEHURD were to tackle this issue in the future, this essay would help serve as a baseline for research and possible legal arguments. Given the deep impacts being felt by women in this way across Uganda and beyond, I hope that this topic resonates with CEHURD's work.

II. Background and Social Analysis on Marital Rape in Uganda

A. *Socio-Cultural Context*

There are many historical and cultural factors that shape the gender perceptions and legal system in Uganda today. It is important to briefly examine some of these variables to put the legal provisions and potential arguments into perspective when discussing marital rape.

The role of women in Ugandan society has been severely influenced by the history of colonialism. Before colonial contact, and before the British imposition of the separation between public and private spheres, many of the political decisions made across the region which is now Uganda involved women in both formal and informal ways.⁴ Further, the introduction of colonial capitalism changed the way in which labour was distributed.

³ See Ali Roberson, "The Profitability of Ending the Marital Rape Exception: Ugandan Societal Norms Impeding Women's Right to Say No" (2020) 16:2 Loy U Chicago LJ 215 at 216.

⁴ See Sylvia Tamale, *When the Hens Begin to Crow: Gender and Parliamentary Politics in Uganda* (New York: Routledge, 2018) at 4-5.

Marriage before colonialism was conceived of in a more communitarian light, but under capitalism, men were awarded stronger rights to their wives' labour for subsistence, freeing them to produce cash crops under the British empire.⁵ Men were obligated to pay taxes, and Britain imposed their own views of male-dominated decision-making on their colonies. Britain thus forced the lineation between public and private, pushing women solely into the previously ambiguous but now clearly defined realm of private life.

From the 1940s, due to lack of profitability, Britain prepared to grant independence to their colonies and pull out of their occupation in Uganda. In this process, women were largely ignored in negotiations, and were purposefully excluded from political structures, even though they played key roles in nationalist movements and decolonial protests.⁶ By the time Britain departed, though women had lived under the double weight of colonialism and gendered oppression for years, the damage had been done. The colonial political and legal systems had been inherited, and beliefs about gender roles and public and private separation were engrained.⁷ In the decades that followed, through coups and unrest, although excluded from formal politics, women in Uganda continued to organize and advocate for their rights. Today, though there are improvements to celebrate in women's representation in government, there remains a large gender gap and culture of "old boys club" in Parliament.⁸

Meanwhile, in the late 1980s to early 2000s, violent conflict impacted the people of Northern Uganda. The Lord's Resistance Army (LRA) caused countless forms of harm in their reign of terror, murdering and abducting tens of thousands of Ugandans in their reach for regional power.⁹ Beyond pure military strategy, the LRA consistently played a role in stealing young girls and bringing them to camps to act as wives for soldiers. The impact of this

⁵ See *ibid* at 8-9.

⁶ See Aili Mari Tripp, *Women and Politics in Uganda* (Madison: University of Wisconsin Press, 2000) at 37.

⁷ See Tamale, *supra* note 4 at 14.

⁸ See *ibid* at 20.

⁹ See Allen Kiconco, *Gender, Conflict and Reintegration in Uganda: Abducted Girls, Returning Women* (New York: Routledge, 2021) at 7.

A Critical Legal Analysis of Marital Rape in Uganda

phenomenon has been far reaching and the work on this topic goes beyond its brief mention in this paper, but it is important to acknowledge the role that rape, and even marital rape, can play as a war tactic in times of conflict. Coerced marriages and the subsequent forced sexual activity that emerge are a part of war, and women's bodies are a battleground in conflict. It is important to remember that marital rape goes beyond the reach of mere domestic violence and can also be a part of larger systems of torture and war crimes.

The legacy of colonialism and current gender structures have left women in Uganda more economically vulnerable, with lower access to healthcare and education resources than men.¹⁰ Ugandan women's position in society is precarious, and as a result, over half of married women have experienced domestic violence at the hands of their spouse.¹¹ There are few protections by the legal system in cases of abuse, and women are left vulnerable when these systems break down. Access to resources to reach assistance in the face of domestic violence is severely impacted by women's positionality, including their economic status, physical remoteness, education levels, and family support. Poverty is linked to rates of domestic violence, and often inhibits women from being able to seek assistance, as victims of domestic assault are frequently economically reliant on their abuser.¹² Furthermore, the public contributes to the high rates of domestic violence by largely perceiving it as normal, with 70% of even women believing that domestic violence is justified in some circumstances.¹³

Currently, over 80% of the population of Uganda adheres to Christianity as their religion, with most of the remaining population being Muslim.¹⁴ Though there has been progress in the past decade in conversations and education surrounding sexual

¹⁰ See Rochelle Burgess & Catherine Campbell, "Creating social policy to support women's agency in coercive settings: A case study from Uganda" (2016) 11:1-2 *Global Pub Health* 48 at 50.

¹¹ See Roberson, *supra* note 3 at 216.

¹² See Amnesty International, "'I can't afford justice': Time to address violence against women in Uganda" (April 2010) at 5, online (pdf): <amnesty.org> [perma.cc/7P9Z-5RSN].

¹³ See Burgess & Campbell, *supra* note 10 at 50.

¹⁴ See Encyclopaedia Britannica, "Religion of Uganda" (last visited 17 July 2023), online: <britannica.com> [perma.cc/Q88W-PBVY].

health and reproductive rights, there remains a strong effort by religious and cultural leaders to maintain traditional family values. HIV discourse changed the way that Uganda discussed sexuality, but unfortunately not in a positive way.¹⁵ Increased stigmatization surrounding moral acceptability of sex was pushed forward by churches, who successfully gained grounds in political spheres. The Church has pushed heteronormative and reproductive-centric ethical objectives onto sexual relationships, placing responsibility on married couples to uphold the sexual morality of Uganda.¹⁶ Coupled with stifled sexual education and abstinence-only campaigns, there are deep cultural implications surrounding the moral untouchability of sex in marriage. Without education or legal provisions addressing consent, and with the pressure of upholding sexual morality on married couples, sex has become a duty inherent, and thus expected, in marriage.

All of these factors have contributed to the current cultural and legal conceptualizations of marital rape in Uganda. Both understanding the systems that exist and conceptualizing ways to move forward are multifaceted, and it is important to keep these complexities in mind when addressing legal arguments.

B. Global Systems of Power & Cultural Relativism

Before moving into the particulars of marital rape and its impact, it is important first to situate this discussion within broader theoretical considerations that are prevalent in human rights discourse. It is necessary to acknowledge the consistent tensions, particularly when it comes to human rights relating to gender-based topics, between international human rights frameworks and local allowances for cultural differences. For this reason, I will touch briefly on cultural relativism and how it applies to marital rape.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified in 1979

¹⁵ See Barbara Bompani, "'For God and For My Country': Pentecostal-charismatic Churches and the framing of a new political discourse in Uganda" in Adriaan van Klinken & Ezra Chitando, eds, *Public Religion and the Politics of Homosexuality in Africa*, 1st ed (London: Routledge, 2016) 19 at 23.

¹⁶ See *ibid* at 29.

and is often seen as an international bill of rights for women.¹⁷ Through CEDAW came a commitment from states around the world to govern in a way that aims to end discrimination against women in political, social, cultural, and economic realms. With it, however, also came a globalized perspective on what discrimination against women entails. CEDAW provided an important framework with tangible articles, but it also gave opportunity for Western feminists to make links between human rights violations and “harmful cultural practices” rooted in predominantly non-Western countries.¹⁸ Through the lens that structures like CEDAW creates, culture is often seen as an obstacle to achieving human rights standards; an entity that exists in direct opposition to the superior global standards set out by international institutions. Such institutions are undeniably rooted in Western bias, however, and have been continuously critiqued by many scholars for their biased conceptions of morality across varied cultural contexts.¹⁹ Beyond the harmful ways that culture is classified in opposition to human rights, there are also problems with the power dynamics created in this categorization. In his work, Mutua outlines this complex into three parts: victim, savage, and saviour.²⁰ In cases of women’s rights under this structure, women are seen as passive victims. They are robbed of their autonomy and their ability to express consent or exhibit control over their own treatment and positionality. Aside from oversimplifying nuanced power structures, this deprives women of their fundamental rights to dignity. The savage component of the metaphor often refers to the state, but in many of the circumstances where women experience discrimination, the savage can also refer to the faceless force of culture. Cultures, and by extension their peoples, are viewed through this savagery

¹⁷ See UN Women, “Convention on the Elimination of All Forms of Discrimination Against Women: Text of the Convention” (last visited 17 July 2023), online: *United Nations Entity for Gender Equality and the Empowerment of Women* <un.org/womenwatch> [perma.cc/YG76-AFJJ].

¹⁸ Chia Longman & Tamsin Bradley, “Interrogating the Concept of ‘Harmful Cultural Practices’” in Chia Longman & Tasmin Bradley, eds, *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion* (New York: Routledge, 2016) 11 at 12.

¹⁹ See e.g. Barbora Bukovská, “Perpetrating Good: Unintended Consequences of International Human Rights Advocacy” (2008) 5:9 *Intl J on HR* 7.

²⁰ See Makau wa Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights” (2001) 42:1 *Harv Intl LJ* 201 at 201–02.

lens that puts women as passive victims to their “backwards” beliefs and practices. This leads to the third character in Mutua’s construction – the saviour. Enforced by states or international institutions, saviours are ultimately a set of cultural norms that adhere to liberal ideology, and whose purpose is to swoop in and rescue the victims of such savagery. Mutua argues that this three-part categorization is far too simple to encompass the complexities at play in global power systems, and moreover actively upholds Eurocentrism and reinforces racial division.²¹

Many theorists have debated the merits and downfalls of human rights, and how much global attention should be paid to the specifics of cultural practices. Universalism is seen in opposition to cultural relativism, and there is much disagreement in human rights scholarship about where the practice of human rights should fall. Human rights critiques are rightly concerned with the harms that are created in the universalization and thus, the simplification, of the plight of women globally. There is also justification in the critiques against Western feminism and its tendency to essentialize and bulldoze the autonomy of women from non-Western cultural backgrounds. But while cultural contexts vary greatly across the world, there are also systems of power that influence and infiltrate cultures globally; systems that are larger than individual circumstances. Most countries in Africa have a colonial history, which has deeply impacted their cultural contexts. Simplifying and homogenizing culture does a disservice to its people, but refusing to acknowledge the context in which culture’s current form has come to exist also does a disservice to its people. Culture is always evolving and cannot accurately be teased out from its historical and systemic context. It also cannot be expected to remain static through time, but rather consistently adapt to change.²² This is not to say that cultural practices are not worth protecting, but that a dynamic understanding of culture is essential in conversations of cultural relativism. It is too simplistic to say that there is only one way in which women are discriminated against under patriarchy, just as it is too simplistic to say that there is no space for cross-cultural criticisms when it comes to the rights of women. Certainly, criticisms should not merely be

²¹ See *ibid* at 205.

²² See Penelope Andrews, *From Cape Town to Kabul: Rethinking Strategies in Pursuing Women’s Human Rights* (New York: Routledge, 2016) at 75.

initiated by Western feminists against other nations and should not place other women in a state of victimhood. Further, it is indisputable that understanding and defining the discrimination experienced by women is best done by women in their own cultural contexts. But even within contexts, there remain systems of power in socio-economic status, educational access, and political representative power. There needs to be an ability for cross-cultural critiques in human rights discourse for global systems to be addressed in local contexts.

Critiques of Western feminism often point out the theft of autonomy that comes with the campaign against “harmful cultural practices.”²³ Though vaguely defined and not included in CEDAW’s text, practices such as Female Genital Mutilation (FGM) have been the subject of countless discussions of the role of the international community in local cultural practices. The debate over cultural practices and women’s autonomy hinges on consent – by either enforcing or completely banning certain practices, women are not dignified with the choice over their own bodies. There is a lack of allowance for women’s autonomy and a lack of nuance in understanding the intersections of cultural practices and identity. Marital rape, however, exists in a different capacity than some of these other cultural practices, because it necessitates a lack of consent for it to exist. Most sexual intercourse within a marriage is consensual, and for the majority of people, changes in the law would have no impact on their marriage. Marital rape dictates that criminal responsibility only takes place when there is a lack of consent. By supporting its criminalization, it does not remove autonomy from women, but rather creates the tools for women to be able to advocate for themselves, or not, if they have been the victim of violence in their household. In this way, it exists in a different category than other hotly debated “harmful cultural practices.” Opposing marital rape means allowing for consent to be central in all sexual relationships, and allowing for spouses, and in particular women, the tools to give and remove consent as they deem fit.

Cultural debates surrounding marital rape often resort to critiques of Western imposition of values into other contexts.²⁴ While it is true that countries being wary of Western moral

²³ *Ibid* at 66.

²⁴ See Godfrey Olukya, “Marital rape bill splits Ugandans”, *The Africa Report* (7 March 2013), online: <theafricareport.com> [perma.cc/L4TL-6HUG].

imperialism is merited given the past couple centuries of history, it is also true that marital rape operates differently than other forms of cultural practices that human rights discourse has critiqued. Believing that women should have the ability to consent or not consent to sexual acts in their own home may be cultural, but allowing for women to exercise rights to their own bodies is what both universalists and cultural relativists seem to seek in their debates. In this way, the criminalization of marital rape does not outlaw cultural practices but supports the exercise of autonomy for women in vulnerable situations, as is the very purpose of human rights.

C. Health Impacts of Marital Rape

Marital rape causes a variety of impacts in Uganda. Many of these impacts center around health, as sexual violence causes numerous negative health outcomes. Given CEHURD's focus on the right to health, the health risks of marital rape are worth noting before looking at legal arguments.

i) HIV and Other Sexually Transmitted Diseases

HIV rates in Uganda, as well as many other countries, pose a serious public health risk that governments have prioritized addressing in their health policies. Currently, rates of HIV infection remain high in Uganda, particularly among women, who are infected at higher rates than men.²⁵ There are multiple reasons why this may be, one of which is the relationship between intimate partner violence and HIV infection rates. Increasingly, research points to a correlation between physical assault, forcing sex on a spouse, and HIV infection rates.²⁶ Particularly, married women who have experienced sexual and emotional abuse are more likely to test positively for HIV compared to those who are not

²⁵ See Ministry of Gender, Labour and Social Development, "Combined 4th, 5th, 6th & 7th Periodic Report on the Implementation of CEDAW in Uganda", Report to Committee on the Elimination of Discrimination Against Women (2009) at para 156.

²⁶ See Charles AS Karamagi et al, "Intimate partner violence against women in eastern Uganda: implications for HIV prevention" (2006) 6:284 BMC Pub Health 1 at 10.

abused.²⁷ Wives in abusive relationships are at risk of being forced to have sex with unfaithful husbands who could be carrying HIV or other STDs, putting their health in danger. Further, many women in abusive marriages have expressed that their husbands react violently if they seek HIV testing or request usage of condoms,²⁸ putting them at greater risk of not being permitted to advocate for their sexual health in their home. Women who do not experience sexual violence are able to use condoms more easily, even if they are married.²⁹ Without any legal concept of consent within a marriage, a husband who refuses to use a condom and infects his wife with HIV has not committed a crime. This gap in the law has significant impacts on women's health.

ii) Marital Rape and Its Connection to Early Marriage

For many young women in Uganda, marrying while their bodies are still developing is a very real possibility. For young teenaged wives, forced sex can go as far as to rupture organs or cause tearing that leads to infections and lasting damage.³⁰ Having no right to refuse sexual contact means that young women can be forced to experience sex painfully and frequently, even if it is causing harm to their bodies. Further, young women can be expected to become pregnant early on in their marriage, enduring frequent unprotected sex and the effects of pregnancy on their developing bodies. Not only does this expose them to higher risks of HIV and other STIs, as they are likely to be married to husbands that are older than them and have had multiple sexual partners,³¹ but pregnancy at a young age poses major health risks. Some studies have found that girls under 15 who become pregnant have an odds ratio for maternal death that is four times higher than women who become pregnant between the

²⁷ See Annie M Dude, "Spousal Intimate Partner Violence is Associated with HIV and Other STIs Among Married Rwandan Women" (2011) 15:1 AIDS and Behavior 142 at 145.

²⁸ See *ibid* at 148.

²⁹ See Cecilia Mengo et al, "Marital Rape and HIV Risk in Uganda: The Impact of Women's Empowerment Factors" (2019) 25:15 Violence Against Women 1783 at 1790.

³⁰ See Esther Nanfuka et al, "Leaving a Violent Child Marriage: Experiences of Adult Survivors in Uganda" (2020) 9:172 Soc Sciences 1 at 6.

³¹ See Shelley Clark, Judith Bruce & Annie Dude, "Protecting Young Women from HIV/AIDS: The Case Against Child and Adolescent Marriage" (2006) 32:2 Intl Fam Plan Persp 79 at 80.

age of 20-24.³² Adolescent mothers aged 10-19 also face heightened risks of eclampsia, puerperal endometritis, and systemic infections compared to mothers aged 20-24.³³ The health impacts that connect adolescent marriage and marital rape are severe.

iii) Physical and Mental Health

Beyond the previously listed health risks for women associated with marital rape, there are also the expected physical and mental impacts of forced sexual intercourse. Vaginal bleeding, irritation, UTIs, fibroids, infections, and pain are all physical symptoms reported by victims of marital rape.³⁴ Further, forced sexual activity in an intimate partner relationship can have severe impacts on the mental well-being of a woman. A lack of security in the home, feelings of isolation, and the violation of trust from a spouse can traumatize a woman more deeply than other sources of assault.³⁵ Marital rape can lead to disordered eating, anxiety, post-traumatic stress disorder, flashbacks, depression, and suicidal ideations amongst women.³⁶ Husbands being permitted to legally force wives to have sex – particularly without the use of contraceptives – can also lead to unwanted pregnancies. In a country with criminalized abortion and high rates of maternal mortality, this is also a severe risk to women's health and safety. Finally, there is also a safety risk for new mothers with bodies healing from childbirth being forced into sexual activity. Many women in this circumstance have been hospitalized, and some have even died from complications.³⁷ Women lacking the

³² See Sarah Neal et al, "Childbearing in adolescents aged 12–15 years in low resource countries: a neglected issue. New estimates from demographic and household surveys in 42 countries" (2012) 91:9 *Acta Obstetrica et Gynecologica Scandinavica* 1114 at 1115.

³³ See World Health Organization, "Adolescent Pregnancy" (15 September 2022), online: *World Health Organization Newsroom* <who.int/news-room/fact-sheets/detail/adolescent-pregnancy> [perma.cc/7D6C-QREH].

³⁴ See P'Odong & Can, *supra* note 1 at 110.

³⁵ See *ibid* at 126.

³⁶ See Michelle J Anderson, "Marital Rape Laws Globally" in Kersti Yllö and Gabriela Torres, eds, *Marital Rape: Consent, Marriage, and Social Change in Global Context* (Online: Oxford Academic, 2016) 177 at 183.

³⁷ See Burgess & Campbell, *supra* note 10.

required protections to refuse sexual advances, even for their own health, can have catastrophic impacts.

D. Barriers to Criminalization

There are many reasons why marital rape continues to go largely unacknowledged in Uganda and is dismissed when legal reform is considered, and there would be multiple roadblocks on the route to its criminalization.

i) Government Involvement in Private Affairs

One of the common issues that arise in policy discussions about marital rape is the role of the government in private affairs. Many argue that there should not be laws governing a husband and a wife's bedroom; that this falls outside the scope of what should be permitted for government involvement.³⁸ It is worthwhile noting, however, that other forms of domestic violence are prohibited and regulated by the government, showing a willingness to engage on some level in regulating private affairs. Moving from interfering with the home to interfering with the bedroom, however, is a step that many government officials claim to be resistant to take.

ii) Cultural Resistance to Marital Rape

Discourse around the criminalization of marital rape can often lead to a similar place – that it is an imposition of international or Western values and goes against African values and definitions of marriage. Though there is not extensive research about Ugandan public opinion specifically, there have been reviews of perceptions in other African countries finding, even amongst educated groups such as university students, a resistance from the majority to criminalize marital rape.³⁹ These perspectives are not simply amongst men – women also believe at the same rates (or even higher rates than men) that domestic

³⁸ See Christine Wanjala, "Marital rape: Is it a crime or a conjugal right?", *Monitor Uganda* (15 March 2013), online: <monitor.co.ug> [perma.cc/LZ7D-97QX].

³⁹ See Mensah Adinkrah, "Criminalizing Marital Rape: Perspectives of Ghanaian University Students" (2011) 55:6 *Intl J Off Ther & Comp Crim* 982 at 994.

violence, including forced sex, is necessary.⁴⁰ Further, there are larger cultural values about sex in Ugandan culture, where commonly, it is expected that men initiate and women are taught to be more demure about sexual advances.⁴¹ This dynamic adds complexity to understandings of consent, influencing public views on the existence and validity of marital rape. It is also worth noting that the majority of members of Parliament are men in Uganda and are the ones who hold the power to block bills addressing marital rape. This power has led to many bills addressing domestic and sexual violence dying a slow death before ever becoming law.⁴²

iii) Public Awareness and Underreporting

Unsurprisingly, there is a wide phenomenon of underreporting in cases of marital rape, not only in Uganda, but globally. Some of the reasons for this underreporting include fear of retribution (from the abuser or from one's own family), shame, guilt, or loyalty to the perpetrator.⁴³ Without a realistic idea of how prevalent marital rape is, it is challenging to know the extent of the damage that it causes in the health of women. Symptoms may be attributed to other causes, particularly as there is such a high rate of comorbidity with other forms of domestic violence. With marital rape often deemed an oxymoron in a cultural context, another likely reason for underreporting is a lack of identification with the issue for victims who may define and experience consent differently. Even if it were to be criminalized, rates of underreporting would likely remain high.

iv) Difficulties Providing Evidence

⁴⁰ See Ilene S Speizer, "Intimate Partner Violence Attitudes and Experience Among Women and Men in Uganda" (2010) 25:7 J Interpersonal Violence 1224 at 1236.

⁴¹ See Wanjala, *supra* note 38.

⁴² See Winnie Brenda Watera, "Comment: Marital rape controversy", *The Independent Uganda* (28 November 2016), online: <independent.co.ug> [perma.cc/G23R-WWRA].

⁴³ See Monica McWilliams, "Human Rights Meets Intimate Partner Sexual Violence" in Kersti Yllö and Gabriela Torres, eds, *Marital Rape: Consent, Marriage, and Social Change in Global Context* (Online: Oxford Academic, 2016) at 198.

Another challenge in the criminalization of marital rape is the assertion that evidence is difficult to acquire. This line of argumentation states that without a solid system for evidence of marital rape, wives will be able to accuse their husbands at will, putting them at risk of arbitrary criminal charges. However, requiring physical evidence (for example, bruises or torn garments)⁴⁴ could be a challenge for wives if the forced sex was not violent or did not leave any traces. In countries where marital rape is criminalized, there remains conversations and challenges for how to address evidence. Rooted in a distrust of women as victims, certain countries have shortened the statute of limitation for reporting marital rape or require demonstrated force.⁴⁵ Consent will always be a challenging factor to prove, but it is possible to look to other legal systems that criminalize marital rape for ideas of how to navigate the complexities of presenting evidence in intimate partner violence.

III. Current Legal Status in Uganda

In this section, I will review some of the relevant provisions that shape the current legal landscape of marital rape in Uganda, beginning with an overview of domestic law, followed by a brief look at the history of marital rape under the common law, and then looking at some of the international human rights authorities.

A. Domestic Law

i) Penal Code

The Penal Code of Uganda was originally adopted under the *Penal Code Act of 1950*. It outlines the criminal provisions surrounding rape in Chapter XIV – “Offences Against Morality.” The relevant provisions include Section 123, which defines rape as “unlawful carnal knowledge of a woman or girl, without her consent.”⁴⁶ The definition goes on to clarify that consent obtained either by force, threats of bodily harm, or false representations

⁴⁴ See Wanjala, *supra* note 38.

⁴⁵ See Lisa R Eskow, “The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution” (1996) 48:3 *Stan L Rev* 677 at 694.

⁴⁶ Uganda, *The Penal Code Act*, c 120 (15 June 1950), s 123.

("in the case of a married woman, by personating her husband") is still categorized as rape. Aside from the obvious assertion that only women (and not men or boys) can be raped under Ugandan criminal law, there is the definition of consent being diluted through the idea that consent is possible to be obtained, but is merely tainted, by force or threat. This contrasts with many definitions of consent in sexual interactions across different country contexts. Under Section 124, the punishment for conviction of rape is liable to be death,⁴⁷ and attempt to commit rape has a maximum sentence of life imprisonment under Section 125.⁴⁸ The following sections outline abduction⁴⁹ and elopement with a married person,⁵⁰ criminalizing anyone who detains someone with the intent to marry or have sexual intercourse with them or entices a married person to elope with them. Under Section 128, the Penal Code outlines the punishment for Indecent Assault without a clear definition of what it entails.⁵¹

Sections 129 and 130 outline the criminality of sexual assault of underaged girls, as well as girls with mental disabilities ("idiots or imbeciles").⁵² In 2007, under the *Penal Code Amendment Act*, Section 129 was replaced with a more detailed overview of the criminality of defilement, including the terms of aggravated defilement and child-to-child sexual intercourse.⁵³ This is relevant to marital rape considering the frequency in which women are married below the age of 18, particularly in rural contexts across Uganda. It also acknowledges the role that HIV plays in adding harm to sexual violence by including HIV infection as one of the terms for aggravated defilement.

In the Penal Code, the mention of the marital exception is not explicit, however, it is implied in the language of these provisions. The insinuation of these laws is that sex is inherently tied to marriage, therefore misleading or abducting a woman into

⁴⁷ See *ibid*, s 124.

⁴⁸ See *ibid*, s 125.

⁴⁹ See *ibid*, s 126.

⁵⁰ See *ibid*, s 127.

⁵¹ See *ibid*, s 128.

⁵² *Ibid*, s 130.

⁵³ See *ibid*, at s 129.

marriage or into believing that you are her husband qualifies as rape, because the sexual aspect of the crime is inferred. This lack of separation between false representations or forced marriage and sexual violence confounds different crimes by folding sexual violence into marital violence.

ii) Legislation

There have been various bills introduced to Parliament in the past few decades aiming to update the laws surrounding marriage and family life in Uganda. The *Domestic Relations Bill, 2003* was introduced to address a wide range of topics and included specific provisions about when a spouse has a right to deny sexual intercourse.⁵⁴ It also created criminal and civil liability for the violation of this law.⁵⁵ In 2005, the Committee on Legal and Parliamentary Affairs published their response and recommendations, calling for any mention of marital rape to be removed from the bill.⁵⁶ Parliament's answer was to split the original bill into three different bills: the *Muslim Personal Bill* (which was never introduced), the *Sexual Offences Bill*, and the *Marriage and Divorce Bill*.

The *Marriage and Divorce Bill, 2009* was proposed and then suspended for further consultations. A different bill with some overlapping content was later introduced, called the *Marriage Bill, 2017*. Outlined in this bill were conjugal rights, however, there were listed limitations to those rights, including poor health, surgery, childbirth, or reasonable fear that sexual intercourse is likely to cause harm.⁵⁷ Though this has the potential to offer some protections against marital rape in Uganda, there are many shortcomings in outlining only a few exceptions to a general rule of conjugal rights.

In May 2021, Parliament passed the *Sexual Offences Bill, 2019*. The bill aimed to update some of the outdated concepts of rape in Uganda, as well as expand the culpable types of sexual crimes that have been developing in recent years (for example,

⁵⁴ See Uganda, *The Domestic Relations Bill, 2003* (2 January 2003), s 60(2).

⁵⁵ See *ibid*, s 61.

⁵⁶ See Uganda, Committee on Legal and Parliamentary Affairs, "Report of the Committee on Legal and Parliamentary Affairs on the Domestic Relations Bill, 2003", Legislative Comment, (2005) at Recommendation 8.

⁵⁷ See Uganda, *The Marriage and Divorce Bill, 2017* (2017), s 17.

sex tourism and child marriage).⁵⁸ Though there were important new and expanded provisions in this bill, there remained a gap in addressing marital rape explicitly. The original bill (*Sexual Offences Bill, 2015*) included provisions banning marital rape, but after being met with fierce opposition, the new bill (*Sexual Offences Bill, 2019*) was proposed instead without mention of marital rape. In August 2021, President Yoweri Museveni rejected the bill, returning it to Parliament for consideration. He claimed that the new provisions were redundant with the existing Penal Code provisions, and that the Uganda Law Reform Commission was conducting a more comprehensive review of the Penal Code. He wanted reforms to the Penal Code to be comprehensive instead of piecemeal updates.⁵⁹

Another recent law passed by Parliament was the *Domestic Violence Act, 2010*. This Act prohibits domestic violence, which in its definition, explicitly mentions sexual abuse.⁶⁰ Under the Act, “any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of another person” is considered sexual abuse, and this falls under domestic violence.⁶¹ Although this is a broad definition of sexual abuse, it could be seen to include marital rape, even if this was not the intention of legislators in its creation.

Finally, of note, there is the *Prevention and Prohibition of Torture Act, 2012*, which explicitly names rape and sexual assault as a form torture,⁶² as well as outlines some aggravating factors including the victim becoming pregnant or acquiring HIV.⁶³ Repeated instances of sexual assault within the home are likely not easily seen as torture in the Ugandan context, but in international conventions, the right to be free from cruel,

⁵⁸ See Uganda, *The Sexual Offences Bill, 2019*, Bill No. 32 (18 October 2019) at 2.

⁵⁹ See Elizabeth Kamurungi & Arthur Arnold Wadero, “Museveni rejects sexual offences and succession Bills”, *Monitor Uganda* (18 August 2021) online: <monitor.co.ug> [perma.cc/4AN7-EBK3].

⁶⁰ See Uganda, *Domestic Violence Act, 2010*, Act No. 3 (9 April 2010), 2(a).

⁶¹ *Ibid*, 2.

⁶² See Uganda, *Prevention and Prohibition of Torture Act, 2012*, Act No. 3 (27 July 2012), s 3(1)(g).

⁶³ See *ibid*, s 1(5)(g).

degrading, and inhuman treatment includes the right to be free from domestic violence and marital rape.⁶⁴

iii) Constitution of Uganda

The Constitution of Uganda was adopted in 1995 and has been amended multiple times since that point. It is divided into National Objectives and Directive Principles of State Policy, and then Constitutional Provisions. The National Objectives section is aspirational in nature, providing an overview of the principles and values to guide governance decisions. Though important, it is separate from the Constitutional Provisions later covered. Some of the National Objectives relevant to marital rape include Objective 14, which ensures maximum social and cultural well-being of all people,⁶⁵ and Objective 19, which acknowledges the family as the basic unit of society and entitles them to protection from the state.⁶⁶

Much like many of the relevant legal bodies, the Constitution of Uganda does not explicitly discuss marital rape or sexual violence at large. Instead, it lists many provisions that are interconnected with how marital rape functions in Ugandan society. Most of these provisions are found under Chapter 4, Protection and Promotion of Fundamental Human Rights and Freedoms. Article 21 outlines the right to freedom from discrimination, asserting that a person “shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, or disability.”⁶⁷ Articles 22 and 23 protect the right to life,⁶⁸ and personal liberty.⁶⁹ Under Article 24 and 44, Ugandans are protected from cruel, inhuman or degrading treatment.⁷⁰ Article 32 addresses affirmative action, with 33(2) explicitly prohibiting any laws, cultures, customs and traditions against the

⁶⁴ See Melanie Randall & Vasanthi Venkatesh, “The Right to No: The Crime of Marital Rape, Women’s Human Rights and International Law” (2015) 41:1 Brook J Intl L 153 at 179.

⁶⁵ See Uganda, *Constitution of the Republic of Uganda*, rev. 2017 (22 September 1995), National Objective XIV [*Constitution of Uganda*].

⁶⁶ See *ibid*, National Objective XIX.

⁶⁷ *Ibid*, art 21.

⁶⁸ See *ibid*, art 22.

⁶⁹ See *ibid*, art 23.

⁷⁰ See *ibid*, arts 24, 44.

“dignity, welfare or interest of women.”⁷¹ Finally, under Article 33, the rights of women are outlined, binding the state to protect women and their interests to ensure equal treatment to and dignity of the person with men.⁷² Many of these articles could be used to argue against the constitutionality of marital rape in Uganda.

iv) Case Law

There have been several cases addressing women’s rights issues since the introduction of the Constitution in 1995. One of the notable cases includes *Mifumi v AG*, where petitioners challenged the bride price as perpetuating inequality between men and women in violation of the Constitution.⁷³ Although the Constitutional Court held that the inequality caused by the bride price was overstated by the petitioners, they did overturn the practice of returning the bride price when a marriage is dissolved,⁷⁴ creating a step forward for women who are trapped in abusive marriages for economic reasons. In *Uganda v Nakoupuet*⁷⁵ and in *Uganda v Byarugaba*,⁷⁶ the courts addressed practices of forced marriage as unconstitutional, asserting that sexual intercourse under forced marriage is rape under Section 123 of the Penal Code.

Marital rape is explicitly addressed in *Uganda v Yiga Hamidu*. In this case, there had been an agreement between the complainant and Hamidu that they would be wed, but only once they had been tested for HIV.⁷⁷ After they had been customarily wed, but before the testing had occurred, Hamidu went to collect her and forcefully had sexual intercourse with her. The defense argued that it is legally impossible for a husband to rape his wife, but in his analysis, Misoke Kibuuka J disagreed on constitutional

⁷¹ *Ibid*, art 32.

⁷² See *ibid*, art 33.

⁷³ See *Mifumi (U) Ltd & Ors v Attorney General, Kenneth Kakuru (Constitutional Petition 12 of 2007)*, [2010] UGSC 2 (Uganda, Supreme Court).

⁷⁴ See *ibid*.

⁷⁵ See *Uganda v Nakoupuet (Criminal Case 109 of 2016)*, [2019] UGHCCRD 14 (Uganda, High Court: Criminal Division).

⁷⁶ See *Uganda v Byarugaba (Criminal Session 361 of 2013)*, [2017] UGHCCRD 116 (Uganda, High Court: Criminal Division).

⁷⁷ See *Uganda v Yiga Hamidu & Ors (Criminal Session 5 of 2002)*, [2004] UGHCCRD 5 (Uganda: High Court, Criminal Division).

grounds. He pointed out the lack of explicit exception in the Penal Code for marital rape and cited Constitutional Articles 31 and 33 to assert that women are entitled to equal treatment in marriage. As such, Hamidu was convicted under Section 123 of the Penal Code for raping his wife.

Without explicit clarity on marital rape laws, cases are left to judicial discretion for interpretation. Sometimes, like with the case of *Uganda v Yiga Hamidu*, judges will interpret in favour of constitutional principles of equality. However, because the bride price had not been paid in these cases, an issue that was important in the judgements, the marital defense to rape was never fully abolished.⁷⁸ For this reason, clarity under the Penal Code is needed for access to justice to be felt consistently by women in Uganda, rather than being left up to judicial interpretation.

B. Marital Rape in the Common Law

Uganda's legal system is rooted in English common law, where marriage was an acknowledged exception to the criminalization of rape. As such, when Uganda applied Britain's laws to their own country context in the early 1900s, the legal framework for marital rape was applied to Uganda.

There are three theoretical justifications under English common law for all sexual relations between a husband and wife being lawful: property theory, unity theory, and ongoing consent theory. Under property theory, women were considered the property of men. As such, rape of an unmarried woman was a transgression against her father, and rape of a married woman was a transgression against her husband. However, men were allowed to treat their own chattel as they pleased.⁷⁹ Under unity theory, rather than women being seen as property, they were conceptualized as subservient to their husband's identity once married. A woman's legal personhood was abolished when married, and she became united with her husband's identity instead. This loss of individual identity leaves no possibility for legal accountability for rape within a marriage, as a man could "no more be charged with raping his wife than be charged with

⁷⁸ See Roberson, *supra* note 3 at 223.

⁷⁹ See Anderson, *supra* note 36 at 178.

raping himself.”⁸⁰ Finally, Lord Hale is often cited as the creator of the marital exception to charges of rape under ongoing consent theory. His work was published in 1736, where he stated that husbands cannot be guilty of raping their wives as consent is a part of the marriage contract awarded to husbands at the time of their union.⁸¹ Wives, therefore, cannot withdraw their consent once married, but consent is irrevocably contracted as a conjugal obligation in marriage.⁸²

Whatever the historical justification, the marital exception to charges of rape have held true in English law for centuries, taking root in legal systems and cultures that were influenced by their colonial presence. Since then, however, many of those countries have changed their conceptions of marital rape. For example, the United States was the first to outlaw marital rape in certain states in the 1970s, before it was criminalized federally in 1993. England overruled the marital exception for rape in 1991 in the case of *R v R*, and Canada explicitly criminalized marital rape in 1983. Uganda, however, maintains the idea legally and socially that it is not possible for men to rape their wives. Though often expressed as an “African value” when discussed, perspectives on marital rape in Uganda are inherently tied with the influence that colonial law and culture have imposed in their context through common law theories of the marital exception to rape.

C. *International Human Rights Law*

Marital rape is not explicitly mentioned in most of the large international human rights instruments, but rather is related to issues of equality, sexual violence, and general standards of wellbeing. These issues are addressed across many of the conventions and commitments relating to human rights of the past 70 years, but some of the most significant sources of international commitments for marital rape to be considered under are the Universal Declaration of Human Rights (UDHR), and the Convention for the Elimination of all forms of Discrimination

⁸⁰ William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765) at 442.

⁸¹ See P’Odong & Can, *supra* note 1 at 113.

⁸² See Anderson, *supra* note 36 at 178.

Against Women (CEDAW). Regionally, two of the most important international commitments relevant to marital rape include the African Charter and the Maputo Protocol.

i) Universal Declaration of Human Rights (UDHR)

Although created before Uganda was a member of the United Nations, the Universal Declaration of Human Rights is still widely used as a basis for human rights policy globally. There are some relevant foundational provisions that are found across many subsequent human rights declarations and conventions, including the right not to be subjected to cruel, inhuman or degrading treatment⁸³ and freedom from discrimination.⁸⁴ Under Article 16, the UDHR outlined family rights, asserting that men and women are entitled to equal rights during marriage.⁸⁵ As a foundational document for human rights, the UDHR was subsequently fleshed out with more focused conventions and covenants in the decades following its introduction in 1948. Some other relevant bodies include the UN Convention Against Torture (UNCAT), the International Covenant on Civil and Political Rights (ICCPR), and CEDAW.

ii) African Charter of Human and Peoples' Rights

Uganda signed the African Charter of Human and Peoples' Rights (African Charter) in 1992, and it was subsequently ratified in 1994. Created by African countries to address their unique position globally in the post-colonial period, the African Charter formed provisions requiring states to uphold fundamental human rights in their context. Some of the provisions relevant to marital rape include Article 3, which asserts equal protection of the law for every individual.⁸⁶ Much as many other human rights documents, the African Charter protects freedom from discrimination,⁸⁷ the right to life,⁸⁸ the right to dignity and freedom

⁸³ See *Universal Declaration of Human Rights*, 10 December 1948, GA Res 217A (III), art 5 (entered into force 10 December 1948) [UDHR].

⁸⁴ See *ibid*, arts 2, 7.

⁸⁵ See *ibid*, art 16.

⁸⁶ See *African Charter on Human and Peoples' Rights*, Organization of African Unity, 28 June 1981, 1520 UNTS 217, art 3 (entered into force 21 October 1986) [African Charter].

⁸⁷ See *ibid*, art 2.

⁸⁸ See *ibid*, art 4.

from inhuman treatment,⁸⁹ and the right to liberty and security of the person.⁹⁰ Under Article 18, the centrality of the family and the need to protect their position in society is outlined. It is under this position of families as the basis of society that women's right to freedom from discrimination is asserted in 18(3), as is the commitments to abide by international declarations and conventions.⁹¹ Finally, equality rights are outlined in Article 19, where the African Charter explicitly states that "nothing shall justify the domination of a people by another."⁹² Given the criticisms of international human rights bodies being rooted in Western bias, regional documents created and agreed to by African states have the potential to hold more influence in arguing for human rights in Uganda.

iii) Maputo Protocol

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (called the Maputo Protocol) was originally signed by Uganda in 2003 and ratified in 2010. Based on calls from the African Charter, the Maputo Protocol sought to expand on the articles calling for gender equality across African nations. Because it addressed gender-based rights more explicitly, many of the articles created in the Maputo Protocol are relevant to arguments opposing marital rape.

Violence against women, under Article 1(i), is defined as "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm [...]."⁹³ Sexual violence is explicitly mentioned, and states are immediately called upon to address and combat forms of discrimination. Article 3(4) calls upon states to protect women's dignity from sexual violence,⁹⁴ while Article 4 asks states to "enact and enforce laws" that prohibit violence against women, including

⁸⁹ See *ibid*, art 5.

⁹⁰ See *ibid*, art 6.

⁹¹ See *ibid*, art 18.

⁹² *Ibid*, art 19.

⁹³ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, African Union, 1 July 2003, art 1 (entered into force 25 November 2005) [Maputo Protocol].

⁹⁴ See *ibid*, art 3.

forced sex in the public or private spheres.⁹⁵ Under Article 6, issues relating to marriage are addressed, stating that states shall ensure that “women and men enjoy equal rights and are regarded as equal partners in marriage.”⁹⁶ Equal protection under the law is addressed under Article 8; the right to peace and protection of women in armed conflicts is addressed under Articles 10 and 11; and the right to a positive cultural context is addressed under Article 17. Health and reproductive rights, including the right for women to protect themselves against sexually transmitted infections, are addressed under Article 14.⁹⁷

The Maputo Protocol is a document that was developed by African nations to apply to African contexts and calls states to action to address barriers to women’s equality. Though it does not explicitly outlaw or mention marital rape by name, its contents touch on countless relevant issues overlapping with marital rape and sexual violence.

IV. Legal Arguments for the Criminalization of Marital Rape in Uganda

Likely, outlawing marital rape would be a challenge in the current cultural climate of Uganda and given the responses to previous policy attempts at these changes. However, based on the ways that marital rape could be argued to violate the Constitution of Uganda, there is ample opportunity to attempt to challenge it in court. The mere omission of marital rape in the Penal Code leads to inconsistent and unpredictable outcomes from the legal system. Moreover, under international law, the criminalization of marital rape must be explicit through the necessity of consent, as definitions of rape without mention of consent are insufficient to satisfy state obligations to women’s rights.⁹⁸

⁹⁵ *Ibid*, art 4.

⁹⁶ *Ibid*, art 6.

⁹⁷ See *ibid*, art 14.

⁹⁸ See Randall & Venkatesh, *supra* note 64 at 196.

There are a multitude of legal arguments that could be made against marital rape under domestic and international law.⁹⁹ They could include arguments such as the right to health, to life, and to liberty and security of the person, all of which relate to the negative health outcomes of forced sexual activity. A high risk of sexually transmitted infections and pregnancies in a country with high rates of maternal mortality are strong arguments as to why marital rape's health outcomes violate women's rights in Uganda. These avenues are worthwhile and are among many of the different ways in which the criminalization of marital rape could be argued to violate the Constitution in Uganda. More directly, however, would be arguments based on explicit Constitutional provisions. Some of these arguments include violations of freedom from discrimination, freedom from torture, and equality rights.

A. *Marital Rape as a Violation of Equality Rights*

A society in which women are not permitted to refuse consent is one where women cannot be seen as equal to men.¹⁰⁰ Arguing that marital rape violates rights to equality is based on Article 21(1) of the Constitution of Uganda and can encompass broad reasonings about how women experience disproportionate rates of sexual domestic violence. Cultural bases to justify marital rape, including ideas of wives' obligations to fulfill husbands' sexual needs, inherently creates a hierarchy within households. Where marital rape is not addressed legally and culturally, women's rights to equality are violated. Further protections for equality can be found in the UDHR,¹⁰¹ CEDAW,¹⁰² the African Charter,¹⁰³ and the Maputo Protocol.¹⁰⁴ Moreover, laws aimed at redressing social imbalances in society are not considered inequality under the Ugandan Constitution, but are, in fact, required under Article 21(4)(b). Equality under the law goes beyond omissions, but rather the Constitution requires the

⁹⁹ See e.g. *ibid* at 177.

¹⁰⁰ See *ibid* at 192.

¹⁰¹ See UDHR, *supra* note 83, arts 1, 7.

¹⁰² See CEDAW, *supra* note 86, arts 2, 3.

¹⁰³ See African Charter, *supra* note 90, art 19.

¹⁰⁴ See Maputo Protocol, *supra* note 97, art 2.

government to address inequalities explicitly through their created laws.

B. Marital Rape as Discrimination

The Constitution of Uganda outlines the protections from discrimination under Article 21, where it forbids discrimination on two grounds that could be relevant to marital rape: sex and social standing.¹⁰⁵ The first line of argumentation, discrimination on the basis of sex, would require evidence that women are disproportionately impacted by marital rape, and thus its non-criminalization is discriminatory in nature.¹⁰⁶ Evidence for gender-based violence as a form of discrimination exist in many international bodies' works, including the CEDAW Committee's General Recommendation 19.¹⁰⁷ Under this argument, women are the disproportionate recipients of gender-based violence, and Uganda's unwillingness to protect them violates the Constitution. The second line of argumentation under Article 21 is based on social standing. This reasoning asserts that marriage, a social status, should not be a reason for women to lose their protections against sexual assault. Married women having less legal autonomy over their sexual activity than non-married women is a form of discrimination based on social standing, and thus violates the Constitution of Uganda. Arguments based on discrimination can be further emphasized by international human rights commitments under the UDHR,¹⁰⁸ CEDAW,¹⁰⁹ the African Charter,¹¹⁰ and the Maputo Protocol.¹¹¹

C. Marital Rape as Torture or Cruel, Inhuman or Degrading Treatment

¹⁰⁵ See *Constitution of Uganda*, *supra* note 65, art 21(2).

¹⁰⁶ See Randall & Venkatesh, *supra* note 64 at 189.

¹⁰⁷ CEDAW General Recommendation No. 19: Violence Against Women, UN Committee on the Elimination of Discrimination Against Women, 30 January 1992, 11th Session at para 6.

¹⁰⁸ See UDHR, *supra* note 83, art 2.

¹⁰⁹ See CEDAW, *supra* note 86, art 2.

¹¹⁰ See *African Charter*, *supra* note 90, arts 2, 18(3).

¹¹¹ See *Maputo Protocol*, *supra* note 97, art 2.

Under the Constitution of Uganda, Ugandans are to be protected from any form of torture, cruel, inhuman or degrading treatment.¹¹² These protections are further cemented by international and regional human rights bodies, including the UDHR¹¹³ and the African Charter.¹¹⁴ In 2008, the Committee Against Torture (CAT) asserted in General Comment 2 that gender violence or rape constitutes torture¹¹⁵ according to the elements outlined in the definition of torture under Article 1 of the Convention Against Torture.¹¹⁶ The CAT Committee specifically identified women as a social group at risk of experiencing torture by private actors,¹¹⁷ and requires not only criminalization as a remedy against sexual violence, but also sensitization training and reporting.¹¹⁸ This categorization of rape as a form of torture followed decades of advocacy by women's human rights movements, first in acknowledging sexual abuse as a form of torture in prisons or war, then expanding beyond the public-private distinction to view gendered violence by non-State actors also as a form of torture.¹¹⁹ There is a wealth of research on the evolution of the legal arguments surrounding gender-based violence and sexual assault as torture,¹²⁰ and considering state commitments on national and international stages to protect their citizens from cruel, inhuman, and degrading treatment, it is

¹¹² See *Constitution of Uganda*, *supra* note 65, arts 24, 44.

¹¹³ See *UDHR*, *supra* note 83, art 5.

¹¹⁴ See *African Charter*, *supra* note 90, art 5.

¹¹⁵ See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2*, Committee Against Torture, 24 January 2008, CAT/C/GC/2 at para 22 [*Convention Against Torture*, 2008].

¹¹⁶ See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations General Assembly, 10 December 1984, 1476 UNTS 85, art 1 (entered into force 26 June 1987).

¹¹⁷ See *Convention Against Torture*, 2008, *supra* note 115 at para 22.

¹¹⁸ See *ibid* at para 24.

¹¹⁹ See Rhonda Copelon, "Gender Violence as Torture: The Contribution of CAT General Comment No. 2" (2008) 11:2 CUNY L Rev 229 at 243.

¹²⁰ See e.g. Barbara Cochrane Alexander, "Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims" (2000) 15:4 Am U Intl L Rev 895; Katharine Fortin, "Rape as torture: An evaluation of the Committee Against Torture's attitude to sexual violence" (2008) 4:3 Utrecht L Rev 145.

possible to use these arguments to legally combat marital rape in Uganda.

D. The Limitations of Legal Arguments

It is also essential to note that while legal action regarding marital rape would be an important step towards equality for women and the reduction of gender-based violence in Uganda, the law cannot be the only solution to complex human rights issues. There exists a fundamental gap between equality sought in legal reform and the lived experience of women, particularly in the global South.¹²¹ This can be attributed to a variety of reasons, including resource scarcity in the criminal justice system. Ensuring that women can access justice would require more resources for training responses to domestic violence for police, as well as in the courts. Beyond these basic resource provisions, there would remain a shortage in necessary sources of support for survivors of sexual violence, as well as a justice system that is expensive and entirely inaccessible for many of the women who the laws would seek to protect.¹²² Further, even if marital rape is successfully criminalized in Uganda and the resource barriers to the justice system were addressed, cultural opinions do not change overnight. Efforts to advance legal equality need to unfold in tandem with efforts to have cultural conversations, and increased education surrounding consent, equality, and sexual health. Educating both women and men can serve to prevent non-consensual sexual interactions, as well as increase women's perceptions on their own autonomy to report sexual assault.¹²³ These efforts to educate and advocate can be undergone by government and private institutions to enhance sensitization and influence public perceptions about marital rape.¹²⁴ Over time, alongside legal provisions, cultural shifts can result in larger impacts for vulnerable women experiencing sexual violence in their homes.

¹²¹ See Irehobhude O Iyioha, ed, *Women's Health and the Limits of Law*, 1st ed (London: Routledge, 2019) at 2.

¹²² See P'Odong & Can, *supra* note 1 at 129.

¹²³ See *ibid* at 132.

¹²⁴ See Eskow, *supra* note 45 at 707.

V. Conclusion

Marital rape exists because of a variety of intersecting historical and cultural factors that have created the current social and legal environment in Uganda. Though we should be wary of human rights and Western feminism and their sometimes-insensitive approaches to addressing cultural differences, marital rape exists only in circumstances where there is a lack of consent. Protecting women from being unable to withdraw consent in their own homes and their own relationships returns power to their hands, rather than undermining their autonomy. Women's inability to make decisions about their own sexual activity has severe impacts on their health, including higher risks of HIV and sexually transmitted infections, harm for young women to their developing bodies, and physical and mental health consequences that are tied to sexual violence. However, should efforts be made to criminalize marital rape in Uganda, they will undoubtedly be met with cultural resistance from the government and within households.

Although marriage is not explicitly an exception to rape in the Penal Code, the way that it is discussed in Ugandan laws both implicitly and explicitly allows for "conjugal rights"; for husbands to assert their right to have their sexual needs met by their wives. Though there have been some examples of judicial activism where judges have disagreed with marriage as an exception to rape laws, marital rape's lack of explicit mention leads to inconsistent outcomes in the legal system. In the common law, there are a few theoretical justifications for the marital exemption to rape, which have no doubt also influenced Uganda's common law system and its legal opinions. Under international human rights agreements, marital rape is not explicitly mentioned, but rather is entwined with other frequently mentioned fundamental rights, including equality, freedom from discrimination, family rights, and protection from sexual violence. There are many arguments that could be made to criminalize marital rape under the Constitution of Uganda and international agreements, including the right to freedom from discrimination; the right to freedom from torture or cruel, inhuman, or degrading treatment; or the right to equality. It is important to remember, however, that successfully changing the law will not single-handedly lead to improvements for women experiencing sexual violence in their homes in Uganda. There must be efforts

A Critical Legal Analysis of Marital Rape in Uganda

made simultaneously to pursue both legal and social change for the state of marital rape to be truly challenged. The law has the power to change social discourse and can be a driver of cultural change,¹²⁵ but it cannot be changed without larger social conversations. Efforts to improve education around consent for the general populace, as well as training for those in the legal system will lead to better usage of the law as it evolves.

Marital rape is a violation of fundamental human rights and is experienced by far too many women globally. In Uganda, there is a need to explicitly criminalize marital rape for women to be protected by the legal system. Women deserve to be able to give and withdraw consent to their own bodies in all circumstances, and especially in their own homes. Providing the necessary legal protections to do so, as well as engaging in cultural dialogues and education, will push forward women's rights, their autonomy, and their health in Uganda.

¹²⁵ See Roberson, *supra* note 3 at 231.

Bibliography

LEGISLATION: UGANDA

Constitution of the Republic of Uganda, rev. 2017 (22 September 1995).

Domestic Violence Act, 2010, Act No. 3 (9 April 2010).

Prevention and Prohibition of Torture Act, 2012, Act No. 3 (27 July 2012).

The Domestic Relations Bill, 2003 (2 January 2003).

The Marriage and Divorce Bill, 2017 (2017).

The Penal Code Act, c 120 (15 June 1950).

The Sexual Offences Bill, 2019, Bill No. 32 (18 October 2019).

JURISPRUDENCE: UGANDA

Mifumi (U) Ltd & Ors v Attorney General, Kenneth Kakuru (Constitutional Petition 12 of 2007), [2010] UGSC 2 (Uganda, Supreme Court).

Uganda v Byarugaba (Criminal Session 361 of 2013), [2017] UGHCCRD 116 (Uganda, High Court: Criminal Division).

Uganda v Nakoupuet (Criminal Case 109 of 2016), [2019] UGHCCRD 14 (Uganda, High Court: Criminal Division).

Uganda v Yiga Hamidu & Ors (Criminal Session 5 of 2002), [2004] UGHCCRD 5 (Uganda: High Court, Criminal Division).

SECONDARY MATERIALS

Amnesty International, “‘I can’t afford justice’: Time to address violence against women in Uganda” (April 2010), online (pdf): <[amnesty.org](https://www.amnesty.org)> [perma.cc/7P9Z-5RSN].

A Critical Legal Analysis of Marital Rape in Uganda

- Adinkrah, Mensah, "Criminalizing Marital Rape: Perspectives of Ghanaian University Students" (2011) 55:6 Intl J Off Ther & Comp Crim 982.
- Alexander, Barbara Cochrane, "Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims" (2000) 15:4 Am U Intl L Rev 895.
- Anderson, Michelle J, "Marital Rape Laws Globally" in Kersti Yllö and Gabriela Torres, eds, *Marital Rape: Consent, Marriage, and Social Change in Global Context* (Online: Oxford Academic, 2016) 177.
- Andrews, Penelope, *From Cape Town to Kabul: Rethinking Strategies in Pursuing Women's Human Rights* (New York: Routledge, 2016).
- Blackstone, William, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765).
- Bompani, Barbara, "'For God and For My Country': Pentecostal-charismatic Churches and the framing of a new political discourse in Uganda" in Adriaan van Klinken & Ezra Chitando, eds, *Public Religion and the Politics of Homosexuality in Africa*, 1st ed (London: Routledge, 2016) 19.
- Bukovská, Barbora, "Perpetrating Good: Unintended Consequences of International Human Rights Advocacy" (2008) 5:9 Intl J on HR 7.
- Burgess, Rochelle & Catherine Campbell, "Creating social policy to support women's agency in coercive settings: A case study from Uganda" (2016) 11:1-2 Global Pub Health 48.
- Clark, Shelley Judith Bruce & Annie Dude, "Protecting Young Women from HIV/AIDS: The Case Against Child and Adolescent Marriage" (2006) 32:2 Intl Fam Plan Persp 79.
- Committee on Legal and Parliamentary Affairs, "Report of the Committee on Legal and Parliamentary Affairs on the Domestic Relations Bill, 2003", Legislative Comment, (2005).
- Copelon, Rhonda, "Gender Violence as Torture: The Contribution of CAT General Comment No. 2" (2008) 11:2 CUNY L Rev 229.
- Dude, Annie M, "Spousal Intimate Partner Violence is Associated with HIV and Other STIs Among Married Rwandan Women" (2011) 15:1 AIDS and Behavior 142.

- Encyclopaedia Britannica, "Religion of Uganda" (last visited 17 July 2023), online: <britannica.com> [perma.cc/Q88W-PBVY].
- Eskow, Lisa R, "The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution" (1996) 48:3 Stan L Rev 677.
- Fortin, Katharine, "Rape as torture: An evaluation of the Committee Against Torture's attitude to sexual violence" (2008) 4:3 Utrecht L Rev 145.
- Iyioha, Irehobhude O, ed, *Women's Health and the Limits of Law*, 1st ed (London: Routledge, 2019).
- Kamurungi, Elizabeth & Arthur Arnold Wadero, "Museveni rejects sexual offences and succession Bills", *Monitor Uganda* (18 August 2021) online: <monitor.co.ug> [perma.cc/4AN7-EBK3].
- Karamagi, Charles AS et al, "Intimate partner violence against women in eastern Uganda: implications for HIV prevention" (2006) 6:284 BMC Pub Health 1.
- Kiconco, Allen, *Gender, Conflict and Reintegration in Uganda: Abducted Girls, Returning Women* (New York: Routledge, 2021).
- Longman, Chia & Tamsin Bradley, "Interrogating the Concept of 'Harmful Cultural Practices'" in Chia Longman & Tasmin Bradley, eds, *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion* (New York: Routledge, 2016) 11.
- Mari Tripp, Aili, *Women and Politics in Uganda* (Madison: University of Wisconsin Press, 2000).
- McWilliams, Monica, "Human Rights Meets Intimate Partner Sexual Violence" in Kersti Yllö and Gabriela Torres, eds, *Marital Rape: Consent, Marriage, and Social Change in Global Context* (Online: Oxford Academic, 2016).
- Mengo, Cecilia et al, "Marital Rape and HIV Risk in Uganda: The Impact of Women's Empowerment Factors" (2019) 25:15 Violence Against Women 1783.
- Ministry of Gender, Labour and Social Development "Combined 4th, 5th, 6th & 7th Periodic Report on the Implementation of

A Critical Legal Analysis of Marital Rape in Uganda

CEDAW in Uganda”, Report to Committee on the Elimination of Discrimination Against Women (2009).

Mutua, Makau wa, “Savages, Victims and Saviors: The Metaphor of Human Rights” (2001) 42:1 Harv Intl LJ 201.

Nanfuka, Esther et al, “Leaving a Violent Child Marriage: Experiences of Adult Survivors in Uganda” (2020) 9:172 Soc Sciences 1.

Neal, Sarah et al, “Childbearing in adolescents aged 12–15 years in low resource countries: a neglected issue. New estimates from demographic and household surveys in 42 countries” (2012) 91:9 Acta Obstetrica et Gynecologica Scandinavica 1114.

Olukya, Godfrey, “Marital rape bill splits Ugandans”, *The Africa Report* (7 March 2013), online: <[theafricareport.com](http://theafricareport.com/perma.cc/L4TL-6HUG)> [perma.cc/L4TL-6HUG].

P’Odong, Patricia A & Barbara L Can, “Combatting Marital Rape: The Law and Criminal Justice System in Uganda” in Ashwanee Budoo-Scholtz and Emma Charlene-Lubaale, eds, *Violence Against Women and Criminal Justice in Africa: Volume II* (Switzerland: Palgrave Macmillan, 2020) 109.

Randall, Melanie & Vasanthi Venkatesh, “The Right to No: The Crime of Marital Rape, Women’s Human Rights and International Law” (2015) 41:1 Brook J Intl L 153.

Roberson, Ali, “The Profitability of Ending the Marital Rape Exception: Ugandan Societal Norms Impeding Women's Right to Say No” (2020) 16:2 Loy U Chicago LJ 215.

Speizer, Ilene S, “Intimate Partner Violence Attitudes and Experience Among Women and Men in Uganda” (2010) 25:7 J Interpersonal Violence 1224.

Tamale, Sylvia, *When the Hens Begin to Crow: Gender and Parliamentary Politics in Uganda* (New York: Routledge, 2018).

UN Women “Convention on the Elimination of All Forms of Discrimination Against Women: Text of the Convention” (last visited 17 July 2023), online: *United Nations Entity for Gender Equality and the Empowerment of Women* <un.org/womenwatch> [perma.cc/YG76-AFJJ].

Wanjala, Christine, "Marital rape: Is it a crime or a conjugal right?", *Monitor Uganda* (15 March 2013), online: <monitor.co.ug> [perma.cc/LZ7D-97QX].

Watera, Winnie Brenda, "Comment: Marital rape controversy", *The Independent Uganda* (28 November 2016), online: <independent.co.ug> [perma.cc/G23R-WWRA].

World Health Organization, "Adolescent Pregnancy" (15 September 2022), online: *World Health Organization Newsroom* <who.int/news-room/fact-sheets/detail/adolescent-pregnancy> [perma.cc/7D6C-QREH].

OTHER MATERIALS

African Charter on Human and Peoples' Rights, Organization of African Unity, 28 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

CEDAW General Recommendation No. 19: Violence Against Women, UN Committee on the Elimination of Discrimination Against Women, 30 January 1992, 11th Session.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations General Assembly, 10 December 1984, 1476 UNTS 85 (entered into force 26 June 1987).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Committee Against Torture, 24 January 2008, CAT/C/GC/2.

Convention on the Elimination of all forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Union, 1 July 2003 (entered into force 25 November 2005).

Universal Declaration of Human Rights, 10 December 1948, GA Res 217A (III) (entered into force 10 December 1948).

Appendix – Mentioned Provisions

The Penal Code Act, Uganda

123: Definition of rape.

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 personating her husband, commits the felony termed rape.

124. Punishment for rape.

A person convicted of rape is liable to suffer death.

125. Attempt to commit rape.

Any person who attempts to commit rape commits a felony and is liable to imprisonment for life with or without corporal punishment.

126. Abduction.

Any person, whether male or female, who— (a) with intent to marry or be married to or to have sexual intercourse with another person or to cause that person to marry, be married or have sexual intercourse, takes that other person away or detains him or her against his or her will; or (b) unlawfully takes another person under the age of eighteen years out of the custody of any of the parents or of any other person having lawful care or charge over that person, commits an offence and is liable to imprisonment for seven years.

127. Elopement.

(1) Any person who elopes with a married woman or entices or causes a married woman to elope with him commits an offence and is liable⁴¹ on conviction to imprisonment for a term not exceeding twelve months or to a fine not exceeding two hundred shillings; and, in addition, the court shall order any such person on first conviction to pay the aggrieved party compensation of six hundred shillings, and on a subsequent conviction compensation not exceeding twelve hundred shillings.

(2) Any female who elopes with a married man or entices or causes a married man to elope commits an offence and is liable on first conviction to imprisonment for a term not exceeding twelve

months or to a fine not exceeding two hundred shillings; and, in addition, the court shall order any such person on first conviction to pay the aggrieved party compensation of six hundred shillings, and on a subsequent conviction compensation not exceeding twelve hundred shillings.

(3) Any person who agrees to elope with another person commits an offence and is liable on first conviction to a caution by the court and on a subsequent conviction to imprisonment for a term not exceeding six months or to a fine not exceeding six hundred shillings.

128. Indecent assaults, etc.

(1) Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years, with or without corporal punishment.

(2) It shall be no defence to a charge for an indecent assault on a girl under the age of eighteen years to prove that she consented to the act of indecency.

(3) Any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl, or intrudes upon the privacy of such woman or girl, commits a misdemeanour and is liable to imprisonment for one year.

129. Defilement of persons under eighteen years of age.

(1) Any person who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment.

(2) Any person who attempts to perform a sexual act with another person who is below the age of eighteen years commits an offence and is on conviction, liable to imprisonment not exceeding eighteen years.

(3) Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

(4) The circumstances referred to in subsection (3) are as follows—
(a) where the person against whom the offence is committed is

below the age of fourteen years; (b) where the offender is infected with the Human Immunodeficiency Virus (HIV); (c) where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed; (d) where the victim of the offence is a person with a disability; or (e) where the offender is a serial offender.

(5) Any person who attempts to perform a sexual act with another person below the age of eighteen years in any of the circumstances specified in subsection (4), commits an offence and is liable on conviction, to imprisonment for life.

(6) Where a person is charged with the offence under this section that person shall undergo a medical examination as to his or her Human Immuno Deficiency Virus (HIV) Status.

(7) In this section— “disability” means a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation; “serial offender” means a person who has a previous conviction for the offence of defilement or aggravated defilement; “sexual act” means— (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; (b) the unlawful use of any object or organ by a person on another person’s sexual organ; “sexual organ” means a vagina or a penis.

129A. Child to child sex.

(1) Where the offender in the case of any offence under section 129 is a child under the age of twelve years, the matter shall be dealt with as required by Part V of the Children Act.

(2) Where an offence under section 129 is committed by a male child and a female child upon each other when each is not below the age of twelve years of age, each of the offenders shall be dealt as required by Part X of the Children Act.

129B. Payment of compensation to victims of defilement.

(1) Where a person is convicted of defilement or aggravated defilement under section 129, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual and psychological harm caused to the victim by the offence.

130. Defilement of idiots or imbeciles.

Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of

her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, commits a felony and is liable to imprisonment for fourteen years.

Constitution of Uganda

National Objectives and Directive Principles of State Policy

XIV. General social and economic objectives

The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that

- a. all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and
- b. all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

XIX. Protection of the family

The family is the natural and basic unit of society and is entitled to protection by society and the State.

Constitutional Provisions

21. Equality and freedom from discrimination

1. All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal

1. protection of the law.

2. Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

3. For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability. [...]

22. Protection of right to life

A Critical Legal Analysis of Marital Rape in Uganda

1. No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

2. No person has the right to terminate the life of an unborn child except as may be authorised by law.

23. Protection of personal liberty

1. No person shall be deprived of personal liberty except in any of the following cases -

a. in execution of the sentence or order of a court, whether established for Uganda or another country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted; or of an order of a court punishing the person for contempt of court;

b. in execution of the order of a court made to secure the fulfillment of any obligation imposed on that person by law;

c. for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda;

d. for the purpose of preventing the spread of an infectious or contagious disease;

e. in the case of a person who has not attained the age of eighteen years, for the purpose of the education or welfare of that person;

f. in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of the care or treatment of that person or the protection of the community;

g. for the purpose of preventing the unlawful entry of that person into Uganda, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Uganda or for the purpose of restricting that person while being conveyed through Uganda in the course of the extradition or removal of that person as a convicted prisoner from one country to another; or

h. as may be authorised by law, in any other circumstances similar to any of the cases specified in paragraphs (a) to (g) of this clause.

2. A person arrested, restricted or detained shall be kept in a place authorised by law.

3. A person arrested, restricted or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention and of his or her right to a lawyer of his or her choice.

4. A person arrested or detained

a. for the purpose of bringing him or her before a court in execution of an order of a court; or

b. upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.

5. Where a person is restricted or detained

a. the next-of-kin of that person shall, at the request of that person, be informed as soon as practicable of the restriction or detention;

b. the next-of-kin, lawyer and personal doctor of that person shall be allowed reasonable access to that person; and

c. that person shall be allowed access to medical treatment including, at the request and at the cost of that person, access to private medical treatment.

6. Where a person is arrested in respect of a criminal offence

a. the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable;

b. in the case of an offence which is triable by the High Court as well as by a subordinate court, if that person has been remanded in custody in respect of the offence for sixty days before trial, that person shall be released on bail on such conditions as the court considers reasonable;

c. in the case of an offence triable only by the High Court, if that person has been remanded in custody for one hundred and eighty days before the case is committed to the High Court, that person shall be released on bail on such conditions as the court considers reasonable;

7. A person unlawfully arrested, restricted or detained by any other person or authority, shall be entitled to compensation from that other person or authority whether it is the State or an agency of the State or other person or authority.

8. Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

9. The right to an order of habeas corpus shall be inviolable and shall not be suspended.

24. Respect for human dignity and protection from inhuman treatment

No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment.

32. Affirmative action in favour of marginalised groups

1. Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.

2. Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution.

3. There shall be a Commission called the Equal Opportunities Commission whose composition and functions shall be determined by an Act of Parliament.

4. The Equal Opportunities Commission shall be established within one year after the coming into force of the Constitution (Amendment) Act, 2005.

5. Parliament shall make laws for the purpose of giving full effect to this article.

33. Rights of women

1. Women shall be accorded full and equal dignity of the person with men.

2. The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.

3. The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

4. Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

5. Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom

44. Prohibition of derogation from particular human rights and freedoms

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms

- a. freedom from torture, cruel, inhuman or degrading treatment or punishment;
- b. freedom from slavery or servitude;
- c. the right to fair hearing;
- d. the right to an order of habeas corpus.

Universal Declaration of Human Rights

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 16

A Critical Legal Analysis of Marital Rape in Uganda

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Convention on the Elimination of all forms of Discrimination Against Women

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean 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 the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

A Critical Legal Analysis of Marital Rape in Uganda

- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
 - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
 - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

African Charter

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Maputo Protocol

Article 1: Definitions

For the purpose of the present Protocol:

- a) "African Charter" means the African Charter on Human and Peoples' Rights;
- b) "African Commission" means the African Commission on Human and Peoples' Rights;
- c) "Assembly" means the Assembly of Heads of State and Government of the African Union;
- d) "AU" means the African Union;

A Critical Legal Analysis of Marital Rape in Uganda

- e) "Constitutive Act" means the Constitutive Act of the African Union;
- f) "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by 4 women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;
- g) "Harmful Practices" means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity;
- h) "NEPAD" means the New Partnership for Africa's Development established by the Assembly;
- i) "States Parties" means the States Parties to this Protocol;
- j) "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;
- k) "Women" means persons of female gender, including girls.

Article 3: Right to Dignity

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.
2. Every woman shall have the right to respect as a person and to the free development of her personality.
3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.
4. States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

Article 4: The Rights to Life, Integrity and Security of the Person

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel,

inhuman or degrading punishment and treatment shall be prohibited.

2. States Parties shall take appropriate and effective measures to:

- a) 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;
- b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
- c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
- d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
- e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
- f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
- g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
- h) prohibit all medical or scientific experiments on women without their informed consent;
- i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
- j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women;
- k) ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and

A Critical Legal Analysis of Marital Rape in Uganda

benefits guaranteed under international refugee law, including their own identity and other documents.

Article 6: Marriage

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- a) No marriage shall take place without the free and full consent of both parties;
- b) The minimum age of marriage for women shall be 18 years;
- c) Monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;
- d) Every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
- f) A married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- g) A woman shall have the right to retain her nationality or to acquire the nationality of her husband;
- h) A woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
- i) A woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

Article 8: Access to Justice and Equal Protection Before the Law

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- a) Effective access by women to judicial and legal services, including legal aid;
- b) Support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- c) The establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- d) That law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- e) That women are represented equally in the judiciary and law enforcement organs;
- f) Reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

Article 10: Right to Peace

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.
2. States Parties shall take all appropriate measures to ensure the increased participation of women:
 - a) In programmes of education for peace and a culture of peace;
 - b) In the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
 - c) In the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
 - d) In all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
 - e) In all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.
3. States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social

development in general, and the promotion of women in particular.

Article 11: Protection of Women in Armed Conflicts

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.
2. States Parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

Article 14: Reproductive Rights

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
 - a) the right to control their fertility;
 - b) the right to decide whether to have children, the number of children and the spacing of children;
 - c) the right to choose any method of contraception;
 - d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
 - e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
 - f) the right to have family planning education.
2. States Parties shall take all appropriate measures to:

- a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
- b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
- c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Article 17: Right to Positive Cultural Context

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.
2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.