

**ANALYSIS OF MARITAL RAPE IN ETHIOPIA IN THE CONTEXT  
OF INTERNATIONAL HUMAN RIGHTS**

**by**

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## **Declaration**

I declare that the *Analysis of Marital Rape in Ethiopia in the Context of International Human Rights* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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Signed: HD MESHESHA

## **Abstract**

This study focuses on marital rape in Ethiopia in the context of international human rights law. Marital rape refers to rape committed against women by their lawful husbands. Like rape that is committed by strangers, marital rape has a severe impact on the physical and psychological wellbeing of victims. Consequently, marital rape violates a range of human rights, such as the right to human dignity, right to bodily integrity, right to privacy, as well as the right not to be subjected to cruel, inhuman and degrading treatment.

Marital rape is recognised as one of the forms of violence against women under international human rights instruments ratified by Ethiopia. In addition, the Constitution of Ethiopia recognises the right to equality between women and men during marriage, and prohibits the enactment of laws and policies that discriminate against women.

Studies have shown that the prevalence of marital rape is high in Ethiopia. Despite this fact, the Current Criminal Code of Ethiopia does not regard marital rape as a criminal offence and as a result there is no punishment on the part of perpetrators of this offence. Consequently, this gives husbands the license to rape their wives without any consequence. Owing to various socio-cultural factors, victims of marital rape in Ethiopia do not report these incidents to the police. The fact that there are no remedies under the criminal justice system, also discourages victims from reporting such incidents.

This study, argues that by virtue of adopting human rights instruments at both the UN and AU level which prohibits violence against women, Ethiopia is under obligation to criminalize marital rape. South Africa is one of the few countries in Africa that criminalises marital rape. According to the 1993 Prevention of Family Violence Act, stipulates a man can be found guilty of raping his wife. Later on, the Act was amended by the Family Violence Act of 1998, which gives protection to victims of domestic violence. Despite the criminalisation of marital rape in South Africa, studies indicate that marital rape is still prevalent in the country owing to numerous socio-economic and cultural factors. Hence, from the experience of South Africa it can be understood that criminalizing marital rape alone is not enough to tackle the problem.

### **Key Terms**

Marital rape; Partner rape; Intimate partner violence; Spousal rape; Violence against women; Domestic violence; Sexual assault within marriage; Rape.

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### **Acronyms**

AU	African Union
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Violence Against Women
DEVAW	Declaration on the Elimination of Violence Against Women
EWLA	Ethiopian Women Lawyers Association
FDRE	Federal Democratic Republic of Ethiopia
FGM	Female Genital Mutilation
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the Study

The concept of marital rape refers to “any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent.”<sup>1</sup> The difference between marital rape and other forms of rape is that the former refers to “a non-consensual sexual assault in which the perpetrator is the victim's spouse.”<sup>2</sup> According to Ellsburg and Heise, a woman is more likely to be raped by her former or current husband than by another person.<sup>3</sup> In fact, sexual violence by marriage partners is twice as common as sexual assaults by strangers.<sup>4</sup>

The history of marital rape goes back to the 17<sup>th</sup> Century English common law, which exempted rape committed by a husband against his lawful wife.<sup>5</sup> According to the Hale Doctrine developed by Sir William Hale, a husband cannot be found guilty of raping his lawful wife, since she has already committed herself to such relationship through her marriage contract.<sup>6</sup> This theory affirms that when women commit themselves to their husbands through marriage, they give their full consent to have sexual intercourse with their husbands, and such consent is irrevocable once given.<sup>7</sup> Hence, husbands could not be prosecuted for raping their wives according to the Hale Doctrine.<sup>8</sup>

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<sup>1</sup> Bergen RK “Marital Rape” March 1999 VAWnet Applied Research Forum p-1 available online at: <http://www.hawaii.edu/hivandaids/Marital%20Rape.pdf> (accessed on March 11, 2013).

<sup>2</sup> Karadas C “A Comparative Study: Development of Marital Rape as a crime in USA, UK and Turkey” 2008 (10:4) *Turkish Journal of Police Studies* p.115.

<sup>3</sup> Mary Ellsburg M and Heise L *Researching Violence Against Women: A Practical Guide for Researchers and Activists* (World Health Organization and Program for Appropriate Technology in Health (PATH) 2005) p.12.

<sup>4</sup> Walker LE *The Battered Woman Syndrome* 3<sup>rd</sup> edition (Spring Publishing Company, 2009) p.180.

<sup>5</sup> Dratch RM “Sexual Abuse and Marital Rape” 2006 *The Jewish Institute Supporting an Abuse Free Environment (JSafe)* p.1.

<sup>6</sup> Gupta B & Gupta M “Marital rape: Current legal framework in India and the need for change” 2013(1:1) *Galgotias Journal of Legal Studies* p.19.

<sup>7</sup> Finkelhor D and Yllo K *License to Rape: Sexual Abuse of Wives* ( Simon and Schuster, 1987) p.2.

<sup>8</sup> Russel D *Rape in Marriage* (Collier Books 1983) p.376.

Similarly, the American legal system adopted the “unities theory”, which affirmed that “the legal existence of the wife is suspended during marriage”.<sup>9</sup> This theory views women as the property of their husbands, rather than independent human beings, which gives men the freedom to rape their wives whenever they want to, without any legal consequences.<sup>10</sup> It was only in the 1970s that the issue of marital rape was raised and given attention to by the Feminist Movement, which alleged that marital rape is an important issue that should be given social and legal recognition.<sup>11</sup> Feminist groups argued that excluding married women from protection against rape went against the principle of equal protection by the law.<sup>12</sup>

Marital rape has been recognised as a violation of the human rights of women by international human rights instruments such as the Declaration on the Elimination of Violence Against Women (hereinafter the DEVAW).<sup>13</sup> The DEVAW gives specific recognition to marital rape as a form of violence against women.<sup>14</sup> Similarly, the Beijing Declaration and Platform for Action defines violence against women as physical, sexual and psychological violence that occurs in the family, including marital rape.<sup>15</sup>

Even though the DEVAW is not legally binding, since it constitutes “soft law”, it forms an important part of the international framework for protecting the rights of women.<sup>16</sup> It sets out international norms that are fundamental to eliminating violence against women.<sup>17</sup> The DEVAW obliges states to condemn all forms of violence against women, including marital rape.<sup>18</sup> It further emphasises that states cannot rely on customs, traditions or religious views to avoid their obligation under international human rights law to curb violence against women.<sup>19</sup> States are further required to follow all the necessary policy and other measures

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<sup>9</sup> *Ibid.*

<sup>10</sup> Duffy K “Is Marital Rape A Crime? Martinique Cook-Brown” p-3 available online at: [www.personal.psu.edu/mlc5474/Marital\\_Rape4%5B1%5D.docx](http://www.personal.psu.edu/mlc5474/Marital_Rape4%5B1%5D.docx) (accessed on March 11, 2013).

<sup>11</sup> U.S. Dept of Justice “U.S. History of Marital Rape: Violence against Women” p.2 available online at: <http://marketing5.net/US-History-of-Marital-Rape-2-download-w12224.pdf> [accessed on 01 September 2013].

<sup>12</sup> *Ibid.*

<sup>13</sup> Declaration on the Elimination of Violence Against Women A/RES/48/104 85th plenary meeting 20 December 1993 article 2(a) (hereinafter the DEVAW).

<sup>14</sup> *Ibid.*

<sup>15</sup> Beijing Declaration and Platform for Action Adopted at the 16th plenary meeting, on 15 September 1995 section D (113(a)).

<sup>16</sup> UNHCR *Handbook for the Protection of Women and Girls: Chapter 6 The International and Regional Legal Framework* (UNHCR ) p.18 p.2.

<sup>17</sup> Preliminary report submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Commission on Human Rights, E/CN/1995/42, para 95.

<sup>18</sup> DEVAW, article 4.

<sup>19</sup> *Ibid.*

without delay, in order to ensure the elimination of violence against women.<sup>20</sup> Furthermore, the preamble of the DEVAW affirms that violence against women amounts to the violation of the basic human rights and fundamental freedoms of women.<sup>21</sup> Hence, marital rape as one form of violence against women that is recognised by the DEVAW, is a crime that violates the human rights of women.

Although the Convention on All forms of Discrimination against Women (hereinafter the CEDAW) does not specifically recognise marital rape as a crime, a closer look at its provisions reveals that it protects women against marital rape implicitly, by protecting them against any discrimination based on sex, regardless of marital status, which impairs their enjoyment of fundamental and human rights.<sup>22</sup> According to General Recommendation No. 19 of the CEDAW Committee, discrimination includes gender-based violence against women which involves acts that inflict physical, physiological and sexual harm or suffering.<sup>23</sup> Hence, the CEDAW implicitly gives protection to women against marital rape. It further stipulates that states have an obligation to ensure that women are accorded the same rights and responsibilities as men during marriage.<sup>24</sup> Thus, the CEDAW affirmed that men do not have the right to force their wives to have sexual intercourse with them without their consent, since both spouses have equal rights within the marriage.

## 1.2 Problem statement

According to a survey conducted by the Ethiopian Women Lawyers Association (EWLA), 31 out of 208 surveyed women have been raped by their husbands.<sup>25</sup> 10.8 % of these women were insulted for refusing to have sex with their husbands.<sup>26</sup> The remaining 5.4% were raped whenever they refused sex, and 1.4% of these women were physically abused by their husbands for refusing to have sexual intercourse.<sup>27</sup> In view of these statistics, a pressing concern is that marital rape is not recognised as a crime under Ethiopian criminal law.

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, preamble para 5.

<sup>22</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force on 3 September 1981) United Nations, Treaty Series, vol. 1249, article 1, available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html> [accessed on 9 March 2013] ( hereinafter the CEDAW).

<sup>23</sup> General Recommendation No. 19 (11th session, 1992) Violence against women article 6.

<sup>24</sup> CEDAW, article 16(1) (c).

<sup>25</sup> Ethiopian Women Lawyers Association 2008(1) *Berchi* p.45.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

Article 620 of the Ethiopian Criminal Code reads as follows:

“whoever compels a woman to submit to sexual intercourse *outside wedlock*, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance is punishable with rigorous imprisonment from five years to fifteen years.”<sup>28</sup>[My own emphasis].

From the above, it can be inferred that the Ethiopian Criminal Code has excluded marital rape from the type of rape that is punishable by law. Hence, there are no legal consequences for rape committed within wedlock. The exemption of spousal rape from punishment has resulted in the use of marriage as ‘a license to rape’.<sup>29</sup>

Violence against women is internationally recognised as a violation of human rights.<sup>30</sup> It should be noted that Ethiopia is a state party to human rights instruments that clearly condemn violence against women, such as the DEVAW, CEDAW, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women, and the Universal Declaration on Human Rights (UDHR).<sup>31</sup> According to the DEVAW, violence against women includes marital rape and state parties are under an obligation to take legislative and other measures to prevent violence against women.<sup>32</sup> In addition to ratifying international human rights instruments that protect women against marital rape, article 35 of the Federal Democratic Republic of Ethiopia (FDRE) Constitution provides for women’s equal rights with men in marriage, which extends to the right to choose when to have sex.<sup>33</sup>

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<sup>28</sup> The Criminal Code of the Federal Republic of Ethiopia proclamation no. 414/2004 9<sup>th</sup> of May, 2005 article 620.

<sup>29</sup> Yllo K “Marital Rape” 1996 The Nattered Women Justice Project available online at: [http://www.bwjp.org/files/bwjp/articles/Marital\\_Rape.pdf](http://www.bwjp.org/files/bwjp/articles/Marital_Rape.pdf) [accessed on 01 September 2013] p.2.

<sup>30</sup> Soul City Institute of Health *Violence Against Women in South Africa: A Resource for Journalists*(Soul City 1999) p.7.

<sup>31</sup> University of Minnesota Human Rights Library “ Ratification of International Human Rights Treaties – Ethiopia” available online at: <http://www1.umn.edu/humanrts/research/ratification-ethiopia.html> (accessed on August 31, 2013).

<sup>32</sup> DEVAW article 2(a).

<sup>33</sup> Article 35 of the FDRE Constitution reads as follows:

1. Women shall, in the enjoyment of rights and protections provided for by this Constitution, have equal right with men.
2. Women have equal rights with men in marriage as prescribed by this Constitution.
3. The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.
4. The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.

Consequently, the failure to recognise marital rape as a form of rape punishable by law under the Criminal Code has contributed to the prevalence of marital rape in Ethiopia. Furthermore, the Ethiopian Constitution states that the government shall implement the right of women to eradicate the influences of harmful customs.<sup>34</sup> Laws, customs and practices that dominate or cause bodily or mental harm to women are prohibited under the Constitution.<sup>35</sup>

Although the Ethiopian Women Lawyer's Association (EWLA) has strongly argued for the inclusion of marital rape under the definition of rape in the amendment process of the Criminal Code, the legislature has rejected this suggestion.<sup>36</sup> This further indicates that the failure of the Ethiopian legislature to incorporate marital rape under the Criminal code creates the impression that marital rape is legal, and this is inconsistent with the objectives of the Constitution, as well as international human rights law.

### 1.3 Research questions

In addressing this research problem, this study will focus on the following questions:

1. How has the crime of rape evolved in Ethiopia, what is the status of marital rape in Ethiopia and the factors that contribute to the prevalence of marital rape in Ethiopia?
2. What are the gaps in the domestic laws of Ethiopia concerning marital rape?
3. To what extent does Ethiopia enforce its obligations under international human rights instruments to protect women from marital rape?
4. How does marital rape violate the fundamental human rights of women?

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5. (a) Women have the right to maternity leave with full pay. The duration of maternity leave shall be determined by law taking into account the nature of the work, the health of the mother and the well-being of the child and family.

(b) Maternity leave may, in accordance with the provisions of law, include prenatal leave with full pay.

6. Women have the right to full consultation in the formulation of national development policies, the designing and execution of projects, and particularly in the case of projects affecting the interests of women.

7. Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property.

8. Women shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements.

9. To prevent harm arising from pregnancy and childbirth and in order to safeguard their health, women have the right of access to family planning education, information and capacity..

<sup>34</sup> The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 (1995) article 35 (hereinafter the FDRE Constitution).

<sup>35</sup> *Ibid*

<sup>36</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa* (Master of Arts Thesis Addis Ababa University, 2008) p.18.

5. How does South Africa address marital rape and which lessons, if any, can Ethiopia learn in this regard?

#### 1.4 Objectives of the Study

The main objective of this study is to critically analyse the status of marital rape in Ethiopia in light of human rights instruments such as the DEVAW, CEDAW, UDHR and ICCPR.

The specific objectives of the study are as follows:

- ❖ To provide a conceptual framework of marital rape and its associated arguments.
- ❖ To examine the historical background of marital rape in Ethiopia.
- ❖ To assess the existing situation and developments with regard to marital rape in Ethiopia.
- ❖ To identify fundamental rights that are violated as a result of marital rape.
- ❖ To examine the status of marital rape under Ethiopian law in light of major international human rights instruments.
- ❖ To examine the legal status of marital rape in South Africa.

#### 1.5 Literature Review

This study reviews scholarly literature on marital rape, specifically in Ethiopia. The studies conducted by researchers such as Bergen<sup>37</sup>, Gelaw,<sup>38</sup> Fekadu,<sup>39</sup> and Hailu<sup>40</sup> will be used in this study.

It has been argued that marital rape should be viewed as one form of domestic violence against women, since most victims of marital rape also suffer from battering by their spouses.<sup>41</sup> In response to such arguments, Bergen argues that marital rape should be recognised as a separate problem, rather than being treated as an extension of domestic

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<sup>37</sup> Bergen RK “Marital Rape” March 1999 VAWnet Applied Research Forum p.3, available online at: <http://www.hawaii.edu/hivandaids/Marital%20Rape.pdf> (accessed on March 11, 2013).

<sup>38</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia: A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association (EWLA)* (Master of Arts Thesis Addis Ababa University).

<sup>39</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa* (Master of Arts Thesis Addis Ababa University, 2008).

<sup>40</sup> Hailu T “Formal and Informal Responses to the Recurring Forms of Violence Against Women in Ethiopia” 2000(2) *Reflections* Heinrich BÄ Foundation.

<sup>41</sup> Bergen RK “Marital Rape” March 1999 VAWnet Applied Research Forum p.3, available online at: <http://www.hawaii.edu/hivandaids/Marital%20Rape.pdf> (accessed on March 11, 2013).



violence against women.<sup>42</sup> The researcher agrees with this view, in that the gravity of the human rights violations against women as a result of marital rape necessitates the separate treatment of this issue.

Gelaw argues that “The act of marital rape is inherently degrading and is the result of the unequal treatment given to women and men and hence is the violation of this specific recognized right to dignity and equality of women with men”<sup>43</sup>. She further indicates that marital rape amounts to cruel, inhuman and degrading treatment which violates the specific provisions of the UDHR, ICCPR and CEDAW.<sup>44</sup> She also claims that marital rape prevents women from exercising their human rights to bodily integrity and privacy.<sup>45</sup>

This is true because forcing a woman to have sexual intercourse against her clearly expressed will violates her right to dignity and to have control over her own body. This clearly breaches the right of women to physical integrity. The physical and psychological pain inflicted on women due to marital rape also amounts to torture, as well as inhuman and degrading treatment. Gelaw further contends that “marital rape violates women’s right to freely choose when where and how to have sexual relations with their spouses. Their right to be secured from unwanted sexual relation and their right to security to sexual autonomy is violated as unwanted sexual intercourse is imposed on them. These rights are the fundamental precepts of any human rights; and governments are instituted to secure them”<sup>46</sup>.

In a study conducted by Fekadu, it has been revealed that most cases of marital rape go unreported in Ethiopia due to social, cultural and religious factors that reflect the superiority of husbands in marital relationships. The absence of remedies in cases of marital rape also tends to discourage women from reporting the event.<sup>47</sup> Similarly, Hailu argues that violence against women is a reflection of the cultural and religious views embedded in the society with

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<sup>42</sup> *Ibid.*

<sup>43</sup> Gelaw, *supra* at note 38, p.34.

<sup>44</sup> *Ibid.*, p.34-35.

<sup>45</sup> *Ibid.*, p.66.

<sup>46</sup> *Ibid.*, p.35.

<sup>47</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa*( Master of Arts Thesis Addis Ababa University, 2008) p.1-2.

regard to the inferiority of women to men.<sup>48</sup> She further contends that the economic, psychological and cultural dependence of women on men exposes women to violence.<sup>49</sup>

The researcher shares the views of the above authors, since there are many social, cultural and religious views in Ethiopia that discriminate against and undermine the rights of women. In rural parts of the country, young girls are subjected to arranged marriages at a very early age. Once they have been forced to get married to men who are older and more experienced than themselves, they are exposed to unwanted sexual intercourse. Most girls are prone to diseases such as fistula as a result of being raped by their husbands. Be that as it may, talking about their sexual relationship is considered to be a taboo in the country, which discourages victims from reporting marital rape.

Griffin contends that the physical and psychological impacts of stranger rape are more devastating and traumatic than those associated with spousal rape.<sup>50</sup> Griffin further argues that in marriage, both parties have presumably agreed to have sexual intercourse, which makes it difficult for a wife to prove that she was forced to have intercourse against her will.<sup>51</sup>

Similarly, another author argues that "the possibilities of serious social, physical or mental harm from a familiar, if unwanted, conjugal embrace [sic] are rather small."<sup>52</sup> The researcher does not agree with the above arguments, since research indicates that marital rape has more severe and long-lasting consequences than stranger rape owing to the fact that victims of marital rape are more likely to experience multiple attacks.<sup>53</sup>

It has been argued that the criminalisation of marital rape violates the right to marital privacy of the husband, since it involves state interference in his marriage.<sup>54</sup> Similarly, in response to

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<sup>48</sup> Hailu T "Formal and Informal Responses to the Recurring Forms of Violence Against Women in Ethiopia" p.4.

<sup>49</sup> *Ibid.*

<sup>50</sup> Griffin, *In Forty-Four States, It's Legal To Rape Your Wife*, STUDENT LAW, Sept., 1980, p.59.

<sup>51</sup> *Ibid.*, p.57.

<sup>52</sup> Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 724 (1954), p.724.

<sup>53</sup> Bergen Rk "Marital Rape" March 1999 VAWnet Applied Research Forum p.-4. Available online at: <http://www.hawaii.edu/hivandaids/Marital%20Rape.pdf> (accessed on March 11, 2013).

<sup>54</sup> Pracher M "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy" 2010 (11:3) *Golden Gate University Law Review* p.741.

the suggestion made by the Ethiopian Women Lawyers Association (EWLA) that marital rape should be criminalised, the Ethiopian legislature argued that the sexual relationship between spouses is too personal to be covered under criminal law.<sup>55</sup>

On the contrary, Pracher contends that protecting the marital privacy of the husband over the right to autonomy and privacy of the wife impairs the latter's physical and psychological wellbeing and reflects the dominant role of men, rather than protecting the privacy of marital relationships.<sup>56</sup> Pracher further argues that marital rape violates a woman's right to bodily integrity and denies her the right to have control over who she shares her body with, which is one of the most important elements of personal identity.<sup>57</sup> Hence, the marital rape exemption denies married women these rights and is a manifestation of disrespect.<sup>58</sup>

The researcher agrees with the argument made by Pracher, in that the right to bodily integrity involves having control over one's body.<sup>59</sup> Hence, marital rape violates the right to bodily integrity, since it allows the bodies of women to be used without their consent.

## **1.6 Methodology of the Study**

The main methodology employed in this study is desktop research, based on a literature review of both primary and secondary sources. Reference will be made to primary sources of law, such as treaties and case law on violence against women in general and marital rape in particular. In addition, secondary sources of law, such as authoritative peer-reviewed journal articles and books relevant to the topic, will be consulted. Published theses and dissertations on the topic will also be reviewed, as well as national constitutions, legislation and policies on marital rape.

## **1.7 Significance of the Study**

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<sup>55</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa* ( Master of Arts Thesis Addis Ababa University, 2008) p.18.

<sup>56</sup> Pracher M "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy" 2010(11:3) *Golden Gate University Law Review* p.751.

<sup>57</sup> *Ibid*, p.746.

<sup>58</sup> *Ibid*.

<sup>59</sup> Pracher M "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy" 1981(11:3) *Golden Gate University Law Review* p.745.

It is hoped that the results of this study will assist in clearly illustrating the status of marital rape in Ethiopia. The study will highlight the legal loopholes in the domestic laws of Ethiopia with regard to marital rape, in light of major international human rights instruments such as the DEVAW, CEDAW and ICCPR. It could also serve as a guide for future studies on the topic by providing some concrete hints and general information. Generally, the gross human rights violations against women as a result of marital necessitates a study on marital rape in Ethiopia in the context of international human rights law.

## **1.8 Chapter layout**

### **Chapter one: Introduction**

This chapter is the introductory part of the study, which aims to familiarise the reader with the content and nature of the study. In this regard, it provides a background to the study and presents the problem statement, and research questions, as well as the objectives, methodology, literature review and outline of the study.

### **Chapter two: Marital rape in Ethiopia: historical background and current challenges**

This chapter aims to provide the reader with a background to the crime of rape in Ethiopia. The purpose of the background is to indicate how the crime of rape has evolved in Ethiopia under the past and present legal system. The current status of marital rape in Ethiopia and the challenges with regard to marital rape will also be discussed in this chapter.

### **Chapter Three: Marital rape under the international human rights framework**

This chapter looks at international human right instruments that recognise marital rape as a violation of human rights. In so doing, United Nations Conventions, as well as non-binding declarations, will be discussed.

### **Chapter four: Marital rape in South Africa: prospects, challenges and lessons for Ethiopia**

In this chapter, marital rape will be discussed in terms of South African law, as well as its interpretation by South African courts. Furthermore, the challenges encountered by the courts regarding the interpretation of the concept of marital rape will be discussed. The chapter will

also highlight the lessons that Ethiopia can learn from the jurisprudence of South Africa with regard to marital rape.

### **Chapter five: Conclusion and Recommendations**

This chapter concludes the study and provides recommendations based on its findings.

## CHAPTER TWO

### MARITAL RAPE IN ETHIOPIA: HISTORICAL BACKGROUND AND CURRENT CHALLENGES

#### 2.1 Introduction

This chapter seeks to provide a background to the crime of rape in Ethiopia. The purpose of this background is to describe how the crime of rape has evolved in Ethiopia under the previous and current criminal law system. The chapter also indicates the extent to which rape in general and marital rape in particular are addressed under the FDRE Constitution.

#### 2.1 Analysis of laws governing the crime of rape in Ethiopia

##### 2.1.1 Criminal laws before the 2004 Criminal Code

The crime of rape under the Ethiopian legal system dates back to the time before the codification of the Fetha Nagast (the law of the kings). Before the Fetha Nagast, there were no written laws in the country. People were instead governed by customary law and oral tradition.<sup>60</sup> The Fetha Nagast (the law of the kings) was the first codified law of Ethiopia, which was translated into Amharic in the 15<sup>th</sup> century.<sup>61</sup> The Fetha Nagast was later replaced by the 1930 Penal Code of Ethiopia.<sup>62</sup>

The 1930 Penal Code was inspired by the Fetha Nagast. It provided for sexual offences under the title “illicit sexual intercourse” without consent.<sup>63</sup> One such offence occurs when a man forces a married woman to have sexual intercourse with him.<sup>64</sup> Article 395 of the 1930 Penal Code dealt with sexual intercourse with a girl who has not attained the age of puberty, without the consent of her parents.<sup>65</sup> In such cases, the man was punished, regardless of whether or not the girl had consented to the act.<sup>66</sup>

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<sup>60</sup> Glory NK. and Zegeye S “The Development of Criminal Law of Ethiopia” 10 March 2012.

<sup>61</sup> Ethiopia- The Legal System Crime and Punishment, available online at: <http://www.mongabay.com/history/ethiopia/ethiopia-the-legal-system-crime-and-punishment.html> (accessed on March 19, 2013).

<sup>62</sup> *Ibid.*

<sup>63</sup> Tsehai Wada “Rethinking the Ethiopian Rape Law” 2012(XXV) *Journal of Ethiopian Law* p.16.

<sup>64</sup> The 1930 Penal Code, article 387.

<sup>65</sup> Tsehai Wada “[Rethinking the Ethiopian Rape Law](#)” 2012(XXV) *Journal of Ethiopian Law* p.16.

<sup>66</sup> *Ibid.*

Similarly, sexual intercourse between a teacher and a student was considered as a crime under the 1930 Penal Code of Ethiopia.<sup>67</sup> It should be noted that such sexual crimes were punishable only once a complaint had been made, unless they took place in public.<sup>68</sup> Considering the fact that talking about one's sexual relationship is considered to be a taboo in Ethiopia, it goes without saying that most of the sexual offences under the 1930 Penal Code were not reported. Under the 1930 Penal Code, only rape committed against under-aged girls and married women was punishable. Hence, marital rape was not recognised as a crime that was punishable under the 1930 Criminal Code.<sup>69</sup>

The 1930 Penal Code was replaced by the 1957 Penal Code. Article 589 of the 1957(1) Penal Code reads as follows:<sup>70</sup>

Whosoever compels a woman, to submit to sexual intercourse **outside wedlock**, whether by the use of violence or grave intimidation, or after having rendered her unconscious or, incapable of resistance, is punishable with rigorous imprisonment not exceeding ten years. Rigorous imprisonment shall not exceed fifteen years where the rape is committed [bold represents my emphasis].

The above provision indicates that rape committed within wedlock was not punishable under criminal law. According to Hailu, the 1957 Penal Code did not recognise marital rape, which implies that victims of marital rape could not rely on general law to seek redress for violations of their human rights as a result of marital rape.<sup>71</sup>

Furthermore, article 599 of the 1957 Penal Code reads as follows:

Where the victim of rape, indecent assault or seduction, or abuse of her state of distress or dependence upon another, freely contracts a marriage with the offender, and where such marriage is not declared null and void, no prosecution shall follow. Where proceedings have already taken place and have resulted in a conviction, the sentence shall terminate forthwith.

From the above provision of the 1957 Penal Code of Ethiopia, it can be inferred that the law exempted a rapist if he later married the girl. Even when proceedings were instituted against the rapist, such proceedings were terminated if he offered to marry his victim. Similarly,

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<sup>67</sup> Penal Code of the Empire of Ethiopia 1930 article 389.

<sup>68</sup> Tsehai Wada "Rethinking the Ethiopian Rape Law" 2012(XXV) *Journal of Ethiopian Law* p.16.

<sup>69</sup> *Ibid.*

<sup>70</sup> Penal Code of the Empire of Ethiopia 1957 article 589 (1).

<sup>71</sup> Hailu T "Formal and Informal Responses to the Recurring Forms of Violence Against Women in Ethiopia" p.7.

under the 1957 Penal Code, in cases where a woman was abducted, charges against the abductor were dropped if marriage was concluded between the abductor and the victim.<sup>72</sup> The National Committee on Traditional Practices of Ethiopia revealed that 69% of marriages in Ethiopia begin with abduction and rape.<sup>73</sup>

Hailu noted that in Ethiopia rape is considered as a damage to family honour and reputation, rather than a violation of the human rights of women.<sup>74</sup> She stated that “marriage is considered as a solution to restore the damage done against the family’s honor. This is also a reason why most abduction cases end up in marriage not to mention the fact that it is also regarded as almost one means of concluding marriage”<sup>75</sup>. Consequently, civil society organisations engaged in gender issues made efforts to sensitise the issue of rape through the use of the media.<sup>76</sup> For instance, the Ethiopian Women Lawyer’s Association (EWLA) strongly argued for the criminalisation of marital rape in the amendment process of the 1957 Criminal Code.<sup>77</sup>

After the collapse of the Dergue regime, the government of the Federal Democratic Republic of Ethiopia was established in 1991.<sup>78</sup> The FDRE government adopted the 1957 Penal Code of Ethiopia until it was replaced by the FDRE Criminal Code of 2004, which is currently being used. The crime of marital rape under the 2004 Criminal Code will be discussed in the next section.

### **2.2.2 The crime of rape under the 2004 Criminal Code**

The Current Criminal Code of Ethiopia, enacted in 2004, has brought about some positive changes with regard to the protection of the rights of women.<sup>79</sup> Such positive steps include

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<sup>72</sup> *Ibid*, article 558(b).

<sup>73</sup> Hari J on Ethiopia’s forced marriages “Kidnapped. Raped. Married. The extraordinary rebellion of Ethiopia’s abducted wives” available online at: <http://www.independent.co.uk/news/world/africa/kidnapped-raped-married-the-extraordinary-rebellion-of-ethiopias-abducted-wives-1922263.html> [accessed on 28 August, 2013].

<sup>74</sup> Hailu T “Formal and Informal Responses to the Recurring Forms of Violence Against Women in Ethiopia” p.8.

<sup>75</sup> *Ibid*.

<sup>76</sup> Tsehai Wada “Rethinking the Ethiopian Rape Law” 2012(XXV) *Journal of Ethiopian Law* p.15.

<sup>77</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa*( Master of Arts Thesis Addis Ababa University, 2008) p.18.

<sup>78</sup> Aneme GA “Introduction to the Ethiopian Legal System and Legal Research” <http://www.nyulawglobal.org/globalex/Ethiopia.htm> (accessed on March 26, 2013).

<sup>79</sup> Dagne HG “Ethiopia: Social Dynamics of Abandonment of Harmful Practices: Experiences in Four Locations” 2010 Innocenti Working Paper p.6.



the criminalisation of many forms of violence against women, such as female genital mutilation (FGM)<sup>80</sup>, abduction<sup>81</sup>, child marriage<sup>82</sup>, women trafficking<sup>83</sup> and sexual harassment.<sup>84</sup> However, the Current Criminal Code failed to incorporate new elements into the definition of rape, as provided under the 1957 Penal Code.<sup>85</sup> Hence, most of the elements of sexual offences under the Current Criminal Code are “verbatim copies” of the 1957 Penal Code.<sup>86</sup>

It should, however, be noted that the provisions of the 1957 Penal Code that dealt with rape are very different to the 1930 Penal Code, which was inspired by the Feteha Negest.<sup>87</sup> The only forms of rape punishable under the 1930 Penal Code were rape committed against a married woman<sup>88</sup> and rape committed against a girl who had not attained the age of puberty.<sup>89</sup> The 1930 Penal Code failed to punish all other forms of rape, including marital rape.<sup>90</sup> Similarly, under the 1957 Penal Code only rape committed “outside wedlock” is punishable under article 589 of the 1957 Penal Code.<sup>91</sup>

Like the 1930 Penal Code and the 1957 Penal Code, the 2004 Criminal Code has failed to recognise rape committed within wedlock as a crime punishable by law. Article 620 of the Criminal Code reads as follows: “whoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance is punishable with rigorous imprisonment to fifteen years”<sup>92</sup>. From this provision, it can be inferred that husbands who force their lawful wives to have sexual intercourse are exempted from punishment, despite the physical and psychological trauma suffered by women as a result of their actions.

According to Wada, in order to be punishable under article 620 of the 2004 Criminal Code, the act has to involve compulsion and must be performed with the aim of having sexual

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<sup>80</sup> The Ethiopian Criminal Code, article 565-566.

<sup>81</sup> *Ibid*, article 587.

<sup>82</sup> *Ibid*, article 648.

<sup>83</sup> *Ibid*, article 598.

<sup>84</sup> *Ibid*, article 624.

<sup>85</sup> Tsehai Wada “Rethinking the Ethiopian Rape Law” 2012(XXV) *Journal of Ethiopian Law* p.16.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*.

<sup>88</sup> The 1930 Penal Code, 387

<sup>89</sup> *Ibid*, 395.

<sup>90</sup> Tsehai Wada “Rethinking the Ethiopian Rape Law” 2012(XXV) *Journal of Ethiopian Law* p.16.

<sup>91</sup> 1957 Penal Code, article 589.

<sup>92</sup> The Ethiopian Criminal Code, article 620.

intercourse with the victim.<sup>93</sup> Furthermore, the provision indicates that even though the perpetrator can be either a man or a woman, the victim has to be a woman.<sup>94</sup> Wada further interpreted the provision as referring to forced sexual intercourse committed outside of wedlock, which implies that marital rape is not a crime under the Criminal Code.<sup>95</sup> Wada argued that the manners of compulsion include the use of violence, grave intimidation, and rendering the victim unconscious or incapable of resistance.<sup>96</sup>

Wada confirms that the term “outside wedlock” under the Current Criminal Code indicates that rape committed within wedlock is an exception to rape that is punishable by law.<sup>97</sup> He claims that this can be attributed to theories reflecting the moral values of society, which are discriminatory towards women.<sup>98</sup>

Gelaw argues that article 620 of the Criminal Code indicates that compelling a woman to submit to sexual intercourse through the use of violence or grave intimidation, or after rendering her unconscious or incapable of resistance, is not a crime if the act is committed by her husband.<sup>99</sup> Gelaw further argues that the application of the above provision results in “absurdity”, since raping women violates a chain of human rights of these women, such as the right to human dignity and bodily integrity, whether committed in or outside of wedlock.<sup>100</sup>

Despite the suggestion made by the Ethiopian Women Lawyer’s Association (EWLA) to include marital rape under the definition of rape, the legislature chose to reject this suggestion in the amendment process of the 1957 Criminal Code.<sup>101</sup> The reason for the failure to recognise marital rape as a crime punishable by law is attributable to the belief that a sexual relationship within wedlock is too personal to be incorporated into criminal law.<sup>102</sup> As a member of the drafting Committee of the Current Criminal Code, Wada attended a number of

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<sup>93</sup> Tsehail Wada “Rethinking the Ethiopian Rape Law” 2012(XXV) *Journal of Ethiopian Law* p.16.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, p.24.

<sup>98</sup> *Ibid.*

<sup>99</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association(EWLA)*(Master of Arts Thesis Addis Ababa University) p.41.

<sup>100</sup> *Ibid.*

<sup>101</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa*( Master of Arts Thesis Addis Ababa University, 2008) p.18.

<sup>102</sup> *Ibid.*

workshops arranged in order to gather suggestions for revising the 1957 Penal Code.<sup>103</sup> After reading the recommendations by different NGOs regarding the criminalisation of marital rape, Wada criticised such NGOs for not being passionate enough to raise public support.<sup>104</sup> According to Wada, the participants of the workshops were convinced that removing the exception to rape committed within wedlock is contrary to the Ethiopian culture.<sup>105</sup> They also showed the tendency to believe that criminalising marital rape would disrupt the bond between spouses.<sup>106</sup> Hence, rape committed within wedlock was allowed to remain an exception to rape that is punishable by law.<sup>107</sup>

## 2.2 The 1995 FDRE Constitution

The FDRE Constitution has various provisions that protect the human rights of individuals.<sup>108</sup> According to the Constitution, such protection equally applies to women.<sup>109</sup> Article 35 of the Constitution specifically states that women have equal rights with men in the enjoyment of the rights and protections incorporated into the Constitution.<sup>110</sup> This is further affirmed by article 25 of the FDRE Constitution, which states the following:<sup>111</sup>

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, color, **sex**, language, religion, political or other opinion, property, birth or other status.[bold is my emphasis].

Based on the above article, it can be inferred that women are accorded the same rights and entitled to the same protection of rights as men in the Constitution. The Constitution also proscribes discrimination based on sex in the protection of the rights of individuals. Furthermore, the Constitution provides that men and women have equal rights “while entering into, during marriage and at the time of divorce.”<sup>112</sup> Moreover, article 35(2) highlights the equal rights of women and men in marriage.<sup>113</sup>

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<sup>103</sup> Tsehai Wada “Rethinking the Ethiopian Rape Law” 2012(XXV) *Journal of Ethiopian Law* p.24.

<sup>104</sup> *Ibid.*

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

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> FDRE Constitution article 14-28 (chapter one).

<sup>109</sup> *Ibid.*, article 7.

<sup>110</sup> *Ibid.*, article 35(1).

<sup>111</sup> *Ibid.*, article 25.

<sup>112</sup> *Ibid.*, article 34(1).

<sup>113</sup> *Ibid.*, article 35(2).

Despite a specific recognition of the equal rights of men and women during marriage by the Constitution, marital rape is not recognised as a crime under the Ethiopian Penal Code.<sup>114</sup> As discussed earlier, marital rape involves forcing a woman to have sexual intercourse against her will during marriage.<sup>115</sup> This clearly violates the equal rights of women in deciding whether or not to have sexual intercourse with their husbands. Even though the recognition of such rights during marriage by the Constitution is a positive step towards the protection of the human rights of women, the Constitution has failed to elaborate on what these equal rights are. Under the Constitution, the state is duty bound to enforce the rights of women by eliminating the influences of harmful traditional practices, traditions and customs.<sup>116</sup> Moreover, the enactment of laws that cause physical or psychological harm to women is proscribed under the Constitution.<sup>117</sup> This provision requires laws to be enacted in compliance with the human rights of women. According to a national report on progress made in the implementation of the Beijing Platform for Action on Ethiopia, the government of Ethiopia has created an enabling environment for the amendment of laws that are discriminatory towards women.<sup>118</sup> Accordingly, the Ethiopian family code has been revised in a gender sensitive manner.<sup>119</sup>

One of the harmful traditional practices that impede women from exercising their constitutional rights is the societal belief that women should be submissive to the sexual desires of their husbands. The exclusion of marital rape from rape punishable by law under the Ethiopian Criminal Code contributes to the prevalence of marital rape in Ethiopia. Since there are no legal consequences for rape committed within wedlock, men continue to rape their wives, and this has severe physical and psychological repercussions for such victims. This is clearly in contravention of the provision of the Constitution, which proscribes the enactment of laws that cause physical and psychological harm to women. According to Wada,<sup>120</sup> the failure of the legislature to criminalise marital rape is attributable to theories that

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<sup>114</sup> The Ethiopian Criminal Code article 620.

<sup>115</sup> Karadas C “A Comparative Study: Development of Marital Rape as a crime in USA, UK and Turkey” 2008 (10:4) *Turkish Journal of Police Studies* p.115.

<sup>116</sup> *Ibid*, article 35(4).

<sup>117</sup> *Ibid*.

<sup>118</sup> Prime Minister Office/Women's Affairs Sub Sector “A National Report on Progress made in the Implementation of the Beijing Platform for Action (Beijing + 10) Ethiopia” March 2004, p.15, available online at: <http://www.un.org/womenwatch/daw/Review/responses/ETHIOPIA-English.pdf> (accessed on 26 August 2014).

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

<sup>120</sup> Wada T “Rethinking the Ethiopian Rape Law” 2012 (XXV) 2 *Journal of Ethiopian Law*.

reflect the moral values of society, which are discriminatory towards women.<sup>121</sup> Wada further contends that the issue of the exemption of marital rape from the Criminal Code is under-researched, and gender-based civil societies are required to place the issue on the public agenda.<sup>122</sup>

#### **2.4 The status of marital rape in Ethiopia**

Rape is one of the most widespread crimes in Ethiopia.<sup>123</sup> According to a report by the United Nations, Ethiopian women are very likely to be exposed to domestic violence at the hands of their partners.<sup>124</sup> The report has also revealed that about 60% of Ethiopian women are exposed to sexual violence.<sup>125</sup> In 100 countries across the world, marital rape is a criminal offence and is punishable by law.<sup>126</sup> In Ethiopia, however, marital rape is not considered to be a crime under the Ethiopian criminal law system.<sup>127</sup>

According to a study conducted by Gelaw, 60% of the respondents had been raped by their husbands.<sup>128</sup> The same study indicated that 57.15% (15 out of 35) of marital rape victims in Ethiopia had failed to report the incident.<sup>129</sup> The reasons given for underreporting included the cultural acceptance of domestic violence.<sup>130</sup> A study conducted in 2004 by a gender-based NGO on violence against women found that one in every two women believes that a husband is justified in beating his wife for refusing to have sex.<sup>131</sup> In the same study, 10.4% of student respondents agreed that a woman should be punished for refusing to have sex with her lawful husband.<sup>132</sup> The study also revealed that the prevalence rate of marital rape in

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<sup>121</sup> *Ibid*, p.24.

<sup>122</sup> *Ibid*, p.25.

<sup>123</sup> Wada T “Rethinking the Ethiopian Rape Law” 2012 (XXV) 2 *Journal of Ethiopian Law* p.15.

<sup>124</sup> BBC News “Ethiopian Women are Most Abused” available online at: <http://news.bbc.co.uk/2/hi/africa/6040180.stm> [accessed on 01 September 2013].

<sup>125</sup> *Ibid*.

<sup>126</sup> Sharma K “Behind the Locked Doors: The Evil of Marital Rape” available online at: <http://www.mightylaws.in/1246/locked-doors-evil-marital-rape> [accessed on 27 August 2013].

<sup>127</sup> FDRE Criminal Code article 620.

<sup>128</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association(EWLA)*(Master of Arts Thesis Addis Ababa University) p.58.

<sup>129</sup> *Ibid*.

<sup>130</sup> Immigration and Refugee Board of Canada, *Ethiopia: domestic violence, including legislation, state protection and services available to victims (2007-2011)*, 14 December 2011, ETH103921.E, available at: <http://www.refworld.org/docid/50b748242.html> [accessed on 29 August 2013].

<sup>131</sup> Wada T “Rethinking the Ethiopian Rape Law” 2012(XXV)2 *Journal of Ethiopian Law* p.25.

<sup>132</sup> *Ibid*, p.26.

Ethiopia is 14.9%, and that 5.4% of women were raped whenever they refused to have sex with their husbands.<sup>133</sup>

In Ethiopia, many factors contribute to the prevalence of marital rape. One such factor is the belief of society that having sexual intercourse with one's husband is the duty of a married woman.<sup>134</sup> Society in general expects women to be submissive to the sexual desires of their husbands.<sup>135</sup>

Early marriage is another factor that contributes to the prevalence of marital rape in Ethiopia. A study conducted by Hervish revealed that Ethiopia's rate of early marriage is one of the highest in the world.<sup>136</sup> According to Hervish, owing to the limited autonomy to make decisions on sexual matters, girls who get married at an early age are highly exposed to gender-based violence, such as marital rape.<sup>137</sup>

Furthermore, the economic dependence of women on their husbands exposes them to marital rape.<sup>138</sup> A study conducted by Gelaw indicated that most victims of marital rape could not leave their abusive husbands because they did not have their own incomes and had nowhere else to go.<sup>139</sup>

According to Fekadu, women in Ethiopia do not consider forced sex within wedlock to be rape.<sup>140</sup> Fekadu further contends that the status of marital rape in Ethiopia is not documented due to legal, cultural and religious barriers that prevent victims from reporting the incident.<sup>141</sup> The cultures and religions in society at large reflect the superiority of men over women in

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<sup>133</sup> *Ibid*, p.24.

<sup>134</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia: a case study of Alumni association of the Faculty of Law of Addis Ababa University and Ethiopian Women Lawyers Association (EWLA)* (Master of Arts Thesis Addis Ababa University) p.71.

<sup>135</sup> *Ibid*, p.44.

<sup>136</sup> Hervish A "Despite Challenges, Ending Early Marriage in Ethiopia is Possible" available online at: <http://www.prb.org/Publications/Articles/2011/child-marriage-ethiopia.aspx> (accessed on 26 August, 2014).

<sup>137</sup> *Ibid*.

<sup>138</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : a case study of Alumni association of the Faculty of Law of Addis Ababa University and Ethiopian Women Lawyers Association (EWLA)* (Master of Arts Thesis Addis Ababa University) p.49.

<sup>139</sup> *Ibid*.

<sup>140</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa* ( Master of Arts Thesis Addis Ababa University, 2008) p.1.

<sup>141</sup> *Ibid*.

marital relationships.<sup>142</sup> Moreover, the fear of retribution from perpetrators and the absence of remedies for marital rape under the criminal justice system contributes to the under-reporting of marital rape in Ethiopia.<sup>143</sup>

In its 2009 submission to the United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW), the government of Ethiopia acknowledged that domestic violence is a "pervasive problem" in Ethiopia.<sup>144</sup> The African Rights Monitor, a US-based NGO, also affirmed that rape and domestic violence are common in Ethiopia.<sup>145</sup> Similarly, the 2012 report by the Social Institutions and Gender Index indicated that "Violence against women is widespread and abuses, including wife beating and spousal rape, are pervasive social problems with wide acceptance."<sup>146</sup> Despite the prevalence of marital rape in Ethiopia, the Ethiopian Criminal Code has exempted men who commit rape against their wives from punishment. Although the CEDAW Committee urged Ethiopia to amend its criminal law in order to criminalise marital rape, in its concluding observations on the country in 2011, the legislature still failed to comply with the request of the Committee.<sup>147</sup>

## 2.5 Challenges with regard to marital rape in Ethiopia

Marital rape is the least recognised and understood form of domestic violence.<sup>148</sup> There are various challenges with regard to marital rape in Ethiopia. One of the main challenges is the criminal law, which exempts rape committed within wedlock from punishment. Due to the exemption of marital rape from punishment under the Criminal Code, men have been using their marital status as a license to rape their wives. Hailu contends that the law in Ethiopia is not 'sensitive to the width and severity of violence against women.'<sup>149</sup>

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> Immigration and Refugee Board of Canada, *Ethiopia: domestic violence, including legislation, state protection and services available to victims (2007-2011)*, 14 December 2011, ETH103921.E, available at: <http://www.refworld.org/docid/50b748242.html> [accessed on 29 August 2013].

<sup>145</sup> *Ibid.*

<sup>146</sup> Refugee Documentation Centre of Ireland "Information on state protection for victims of rape-Ethiopia" 13 March, 2013, p.3, available online at: <http://www.refworld.org/pdfid/518255504.pdf> (accessed on 26 August, 2014).

<sup>147</sup> Committee on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women-Ethiopia Forty-ninth Session, 11-29 July, 2011, para 21.

<sup>148</sup> Yllo K "Marital Rape" 1996 The Nattered Women Justice Project p.9.

<sup>149</sup> Hailu T "Formal and Informal Responses to the Recurring Forms of Violence Against Women in Ethiopia" 2000(2) *Reflections* Heinrich BA Foundation p.7.

Moreover, in Ethiopia, talking about one's sexual relationship is considered to be a taboo, which explains why rape in general and marital rape in particular goes unreported.<sup>150</sup> Hence, shame or fear on the part of the victim contributes to the prevalence of marital rape in Ethiopia.<sup>151</sup> Most of the members of society believe that rape does not exist in marriage, as married women have impliedly given their consent to have sexual intercourse with their husbands through the contract of marriage.

The cultural and religious views of society have also played their own role in increasing marital rape in Ethiopia. In Ethiopia, violence against women is accepted as part of the culture in society.<sup>152</sup> Early marriage is one of the cultural factors that contribute to the prevalence of marital rape in Ethiopia. In many regions of Ethiopia, such as the Amhara and Oromia regions, giving away a daughter to marriage at an early age is considered to be a privilege. A study conducted by Nekatibeb in the Oromia and Amhara regions revealed that families impose marriage on young girls.<sup>153</sup> Marriage can also be imposed through abduction.<sup>154</sup> Imposed marriages mostly result in marital rape, since young girls are forced to marry older men who are more experienced. The girls are not physically and psychologically ready to have sexual intercourse, since they did not give consent to the marriage in the first place.<sup>155</sup> Therefore, it is inevitable for such young girls to be compelled to have sex with their husbands which results in health problems such as traumatic fistula.<sup>156</sup>

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<sup>150</sup> Tadiwos S "Rape in Ethiopia" *Excerpt from Reflections: Documentation of the Forum on Gender, Number 5, July 2001, Panos Ethiopia* available online at: <http://www.preventgbvafrica.org/sites/default/files/resources/panosreflect5.excerpts.pdf> [accessed on 01 September 2013] p.5.

<sup>151</sup> Immigration and Refugee Board of Canada, *Ethiopia: domestic violence, including legislation, state protection and services available to victims (2007-2011)*, 14 December 2011, ETH103921.E, available at: <http://www.refworld.org/docid/50b748242.html> [accessed on 29 August 2013].

<sup>152</sup> Tadiwos S "Rape in Ethiopia" *Reflections Documentation of the Forum on Gender Number 5, July 2001*, p.3, available online at: <http://www.preventgbvafrica.org/sites/default/files/resources/panosreflect5.excerpts.pdf> [accessed on 01 September 2013].

<sup>153</sup> Nekatibeb T *Low Participation of Female Students in Primary Education* (UNESCO International Institute for Capacity Building in Africa 1991) p.27.

<sup>154</sup> *Ibid.*

<sup>155</sup> Adolescent and Youth Reproductive Health HEAT Module "Early Marriage" available online at: <http://labspace.open.ac.uk/mod/oucontent/view.php?id=450518&section=1.4> [accessed on 02 September 2013].

<sup>156</sup> Traumatic fistula is "an abnormal opening between the reproductive tract of a woman or girl and one or more body cavities or surfaces, caused by sexual violence, usually but not always in conflict and post-conflict settings. he brutal rape can result in genital injury and can lead to the formation of a rupture, or fistula, between a woman's vagina, her bladder, rectum, or both. ( UNFPA "Traumatic Fistula" available online at: <http://www.friendsofunfpa.org/netcommunity/page.aspx?pid=293> [accessed on 02 September 2013].



Furthermore, most women in Ethiopia are not aware that marital rape violates their inherent human rights to dignity, privacy and bodily integrity, as they are not knowledgeable about their human rights that are provided for under international human rights instruments to which Ethiopia has acceded.<sup>157</sup> 81% of Ethiopian women believe that they are the property of their husbands and that the latter therefore have the right to assault them if they dare to refuse sex.<sup>158</sup> Hence, they are not aware of their human rights guaranteed under international human rights law.<sup>159</sup> According to the concluding observations of the Committee on the Elimination of Discrimination against Women in Ethiopia, the government should enhance the awareness of women of their human rights through legal literacy programmes using all appropriate means, including the media.<sup>160</sup>

Even when women find the courage to report marital rape, despite the sexual stereotypes they encounter within society, the police fail to conduct further investigations with regard to their complaints.<sup>161</sup> The reason that the police provide for their inaction is the private nature of marital relationships. The fact that the Criminal Code does not recognise marital rape as a crime discourages the police from conducting investigations and taking action. Due to the lack of relief after reporting incidents of marital rape, women are discouraged from making further reports when the incident is repeated. Therefore, the absence of laws that protect women adequately from marital rape and the lack of enforcement mechanisms have impeded the protection of the human rights of women.<sup>162</sup>

### 2.3 Summary

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<sup>157</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association (EWLA)* (Master of Arts Thesis Addis Ababa University) p.55.

<sup>158</sup> Gebremariam AG “ Speaking Truth on Behalf of Ethiopian Women” available online at: [http://www.huffingtonpost.com/alemayehu-g-mariam/speaking-truth-on-behalf\\_b\\_635317.html](http://www.huffingtonpost.com/alemayehu-g-mariam/speaking-truth-on-behalf_b_635317.html) [accessed on 29 August, 2013].

<sup>159</sup> *Ibid.*

<sup>160</sup> Committee on the Elimination of All Forms of Discrimination Against Women, Concluding observations of the Committee on Elimination of Discrimination Against Women- Ethiopia, Forty-Nine Session 11-29 July, 2011, Para 13..

<sup>161</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association (EWLA)* (Master of Arts Thesis Addis Ababa University) p.73.

<sup>162</sup> Tadiwos S “Rape in Ethiopia” *Excerpt from Reflections: Documentation of the Forum on Gender, Number 5, July 2001, Panos Ethiopia* available online at: <http://www.preventgbv africa.org/sites/default/files/resources/panosreflect5.excerpts.pdf> [accessed on 01 September 2013] p.7.

The 1995 FDRE Constitution gives protection to the rights of women under its various provisions. Article 25 of the Constitution stipulates the right to equality and equal protection of the law, without discrimination based on any ground, including sex. The Constitution also entitles women to equal rights with men during marriage. It is clear that historically the right of women to be protected against domestic violence was not adequately enforced. Both the 1930 Penal Code and the 1957 Penal Code excluded marital rape from the forms of rape punishable by law. Although the 2004 Criminal Code of Ethiopia brought some positive changes with regard to the protection of women from harmful traditional practices, it still failed to criminalise marital rape. Marital rape is one of the most underreported crimes in the country, due to the societal belief that having sexual intercourse with one's husband is the duty of a married woman. Furthermore, talking about sexual relations in marriage is considered to be taboo in Ethiopia. Under the Current Criminal Code, rape committed within wedlock is not punishable. The next chapter will discuss the obligations of Ethiopia to address marital rape under international human rights instruments.

## **CHAPTER THREE**

### **MARITAL RAPE UNDER THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK AND ITS APPLICATION IN ETHIOPIA**

#### **3.1 Introduction**

This chapter discusses marital rape in light of international and regional human rights instruments ratified by Ethiopia. The purpose of the Chapter is to tease out the core rights that marital rape violates and to determine whether Ethiopia is fulfilling its obligations under the international human rights framework. Before such analysis, the chapter will give a brief background of arguments made internationally for and against the criminalization of marital rape.

#### **3.2 Arguments for and against the criminalisation of marital rape**

There have been hot debates worldwide both for and against the criminalisation of marital rape. One of the major arguments in favour of the marital rape exemption is based on the right to privacy. It has been argued that the right to marital privacy of the husband is implicated when the state interferes in his marriage under the pretext of marital rape.<sup>163</sup> Similarly, in justifying the marital exemption from rape punishable under the Criminal Code, members of the legislature contend that the sexual relationship between spouses is so personal that it cannot be covered under criminal law.<sup>164</sup>

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<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

In response to such arguments, Pracher contends that “A formulation of privacy which would protect a marital unit rather than an individual's rights within that relationship disregards basic premises of privacy by failing to recognize an individual's autonomy over selfhood.”<sup>165</sup> She further argues that the contention that the marital rape exemption protects marital privacy makes the notion of privacy vague, in that by allowing the marital exemption, what is protected is the dominant role of the husband, rather than the marital relationship or privacy.<sup>166</sup> According to Pracher, “A woman does not forfeit her right to privacy upon marriage.”<sup>167</sup>

Another argument against the criminalisation of marital rape has to do with the existence of implied consent to have sexual intercourse with one's husband through the marriage contract. This argument goes back to the ‘Hale Doctrine’ developed by a jurist named Sir William Hale.<sup>168</sup> According to the Hale Doctrine, a husband cannot be held liable for raping his lawful wife, since she has already given her consent to such relationship through the marriage contract.<sup>169</sup> In response to the suggestion made by EWLA to incorporate marital rape into the 2004 Criminal Code, it has been argued by some lawyers that marital rape does not exist, since the wife has already given her consent to have sexual intercourse with her husband, and criminalizing it would undermine the sanctity of marriage.<sup>170</sup> On the contrary, Dutta argues that marriage does not turn women into sex slaves.<sup>171</sup> She further contends that “To say that the husband can rape his wife after the marriage is to deny independent existence, right to live with self respect and right to self-determination.”<sup>172</sup> In support of the criminalisation of marital rape, Pracher argues that the exemption of marital rape from punishment violates the

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<sup>165</sup> Pracher M “The Marital Rape Exemption: A Violation of a Woman's Right of Privacy” 1981 (11) *Golden Gate University Law Review* p.751.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*, p.752.

<sup>168</sup> Pracher M “The Marital Rape Exemption: A Violation of a Woman's Right of Privacy” 1981 (11) *Golden Gate University Law Review* p.717.

<sup>169</sup> Gupta B & Gupta M “Marital rape: Current legal framework in India and the need for change” 2013(1:1) *Galgotias Journal of Legal Studies* p.19. See also Finkelhor D and Yllo K *License to Rape: Sexual Abuse of Wives* (Simon and Schuster, 1987) p.2.

<sup>170</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association (EWLA)* (Master of Arts Thesis Addis Ababa University).

<sup>171</sup> Dutta S Marital Rape- Gross Violation of Human Rights? (Women's Perspective) available online at: <http://www.mightylaws.in/653/marital-rape-gross-violation-human-rights-womens-perspective> [accessed on 27 August 27, 2013].

<sup>172</sup> *Ibid.*

right to bodily integrity of women.<sup>173</sup> Similarly, Koenig *et al* argue that rape in general and marital rape in particular violates the right to self-determination of women in relation to their own bodies, as well as the right to bodily integrity.<sup>174</sup>

It has been argued that the marital rape exemption creates an irrational distinction between married women and single women.<sup>175</sup> West contends that like unmarried women, married women need security and protection from the state against sexual violence.<sup>176</sup> West further argues that “The creation of a class of citizens subject to legalized violence is the core effect, if not the purpose, of the marital rape exemption. Surely, the constitutional guarantee of equal protection must guard against that effect.”<sup>177</sup>

Similarly, Hart argues that the marital rape exemption promotes a culture of impunity in which violence against women is socially accepted, and serves to maintain women’s inequality, both within marriage and in the broader society.<sup>178</sup> It suggests that marriage gives men the license to rape their wives, which exposes women to violence and denies them the equal protection of the law.<sup>179</sup> Hart further indicates that extending the protection of the law to only women raped by strangers denies marital rape victims the equal protection of the law, which is a fundamental protection guaranteed under international human rights law.<sup>180</sup>

Another argument against the criminalisation of marital rape is that women might use marital rape charges against their husbands as a form of revenge.<sup>181</sup> In other words, women can fabricate marital rape just to punish their husbands whenever they are angry and want revenge.<sup>182</sup> In response to this argument, the proponents of the criminalisation of marital rape argue that marital rape is not the only crime capable of being fabricated. Crimes such as

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<sup>173</sup> Pracher M “The Marital Rape Exemption: A Violation of a Woman’s Right of Privacy” 1981 (11) *Golden Gate University Law Review* p.746.

<sup>174</sup> Koenig KA, Lincoln R & Groth L “The Jurisprudence of Sexual Violence” Sexual Violence & Accountability Project Working Paper Series University of California Berkeley May 2011 p.47.

<sup>175</sup> West R “Equality theory, marital rape, and the promise of the Fourteenth Amendment” 1990 (42) *Florida Law Review* p.65.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*, p.66.

<sup>178</sup> Hart S “Rape, Marriage and Rights” 14 June 2014 available online at: <https://www.opendemocracy.net/5050/sasha-hart/rape-marriage-and-rights> (accessed on 26 August, 2014).

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> Sharma k “Behind the Locked Doors: The Evil of Marital Rape” available online at: <http://www.mightylaws.in/1246/locked-doors-evil-marital-rape> [accessed on 27 August 2013].

<sup>182</sup> *Ibid.*

theft and arson for insurance purposes can also be fabricated by people.<sup>183</sup> The researcher agrees with the contention of the proponents of the criminalisation of marital rape, since the actual victims of marital rape should not be denied protection from the legal system due to the possibility of fabricated cases against innocent men. This would amount to the protection of men from fabricated cases of marital rape, by denying protection to actual victims of marital rape.

In addition, it has been argued by the opponents of the criminalisation of marital rape that such criminalisation has a tendency to destroy marriages, since it minimises the chances of reconciliation between spouses.<sup>184</sup> Proponents of the criminalisation of marital rape, on the other hand, argue that it is marital rape, rather than its criminalisation, that destroys marriage, since women resort to divorce when they get tired of being raped by their husbands.<sup>185</sup> Furthermore, the preservation of marriages should not override the need to protect women from violence, such as marital rape.<sup>186</sup> It has also been argued that if a woman is ready to institute proceedings against her husband, the marriage has already passed the stage of reconciliation.<sup>187</sup>

### 3.3 United Nations human rights instruments

#### 3.3.1 Convention on Elimination of All Forms of Discrimination against Women (CEDAW)

The Convention on Elimination of All Forms of Discrimination against Women (hereinafter the CEDAW) was drafted in 1979 as the first international treaty focusing specifically on the human rights of women.<sup>188</sup> It was enacted in 1981 with the aim of adopting measures to eliminate discrimination against women in all its forms.<sup>189</sup> The United Nations Committee on

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<sup>183</sup> Wada T “Rethinking Ethiopian Rape Law” 2012 (XXV) 2 *Journal of Ethiopian Law* p.10.

<sup>184</sup> Mahoney P and Williams LM “Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape” available online at: [http://www.ncdsv.org/images/nmfr\\_partnerviolence\\_a20-yearliteraturereviewandsynthesis.pdf](http://www.ncdsv.org/images/nmfr_partnerviolence_a20-yearliteraturereviewandsynthesis.pdf) [accessed on 01 September 2013] p.4.

<sup>185</sup> Sampson F “The Legal Treatment of Marital Rape in Canada, Ghana, Kenya and Malawi- A Barometer of Women’s Human Rights” available online at: <http://theequalityeffect.org/pdfs/maritalrapebarometer.pdf> [accessed on 01 September 2013] p-???

<sup>186</sup> *Ibid.*

<sup>187</sup> Wada “Rethinking Ethiopian Rape Law” 2012 (XXV) 2 *Journal of Ethiopian Law* p.10.

<sup>188</sup> Luisa Blanchfield “The U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Issues in the U.S. Ratification Debate” Congressional Research Service Report for Congress June 28, 2011 p.1, available online at:

<sup>189</sup> Preamble of the CEDAW, para 16.

the Elimination of Discrimination against Women ( hereinafter the CEDAW Committee) is the body of experts on women rights, established pursuant to article 17 of the CEDAW, in order to monitor progress made by state parties in terms of the implementation of the CEDAW.<sup>190</sup>

The CEDAW defines discrimination against women as:<sup>191</sup>

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 [my own emphasis].

Based on the above article, it can be inferred that the CEDAW protects women against any discrimination based on sex, regardless of marital status, which might impair their enjoyment of fundamental and human rights.<sup>192</sup> According to Simonovic, discrimination under the CEDAW involves both direct and indirect discrimination in all aspects of public and private life.<sup>193</sup>

Furthermore, the CEDAW provides that states parties are duty bound to take appropriate measures to ensure the equality between women and men with regard to marriage and family relations.<sup>194</sup> It further stipulates that men and women are entitled to equal rights during marriage and at its dissolution.<sup>195</sup> Hence, under the CEDAW, family matters fall under state obligations with regard to the protection of human rights.<sup>196</sup> One of the rights to which women are entitled to during marriage is the right to choose when to have sexual intercourse

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<sup>190</sup> CEDAW, article 17. See also United Nations Entity for Gender Equality and the Empowerment of Women “Convention on the Elimination of All Forms of Discrimination against Women” available online at: <http://www.un.org/womenwatch/daw/cedaw/committee.htm> (accessed on 25 August 2014).

<sup>191</sup> *Ibid*, article 1.

<sup>192</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18 December 1979, entered into force on 3 September 1981) United Nations, Treaty Series, vol. 1249, article 1, available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html> [accessed on 9 March 2013] ( hereinafter the CEDAW)

<sup>193</sup> Simonovic D “International Framework on Violence Against Women with focus on the CEDAW” Expert Group Meeting Prevention of violence against women and girls Bangkok, Thailand 17-20 September 2012, p.3.

<sup>194</sup> General Recommendation No. 19 (11<sup>th</sup> session, 1992) Violence against women article 16(1).

<sup>195</sup> *Ibid*, article 16(1)(c).

<sup>196</sup> Simonovic D “International Framework on Violence Against Women with focus on the CEDAW” Expert Group Meeting Prevention of violence against women and girls Bangkok, Thailand 17-20 September 2012 p.4.

with their husbands.<sup>197</sup> When women are raped by their husbands, they are being denied the equal rights during marriage, which are provided for under the CEDAW.

Moreover, under the CEDAW, women are granted equal rights with men to freely decide on the number and spacing of their children.<sup>198</sup> One of the consequences of marital rape is unwanted pregnancy, which violates the right of women to freely make this decision. This clearly indicates that the marital rape exemption under the Criminal Code breaches this right of women, as provided for under the CEDAW.

According to Simonovic, the CEDAW prohibits state parties as well as public authorities from engaging in any discriminatory practices against women. Moreover, state parties are required to take all appropriate measures, including adopting and amending legislation, to abolish discriminatory practices, customs, laws and regulations in relation to women.<sup>199</sup>

It should be noted that the CEDAW does not contain a specific provision on violence against women or domestic violence.<sup>200</sup> Instead, it addresses violence against women implicitly.<sup>201</sup> Although the CEDAW does not have a specific provision on violence against women, the CEDAW Committee acknowledged the gravity of domestic violence in its General Recommendation 19.<sup>202</sup> According to General Recommendation No. 19 of the Committee on Violence against Women, gender-based violence against women, which involves acts that inflict physical, physiological and sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, constitutes discrimination against women under the CEDAW.<sup>203</sup> General Recommendation No. 19 further stipulates that family violence is one of the most devious forms of violence against women.<sup>204</sup> The General Recommendation has recognised that women of all ages are subjected to violence of all types, including battering, rape, other forms of sexual assault, mental and other forms of violence within the context of family

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<sup>197</sup> Simonovic D “International Framework on Violence Against Women with focus on the CEDAW” Expert Group Meeting Prevention p.12.

<sup>198</sup> *Ibid*, article 16(1)(e).

<sup>199</sup> Simonovic D “International Framework on Violence Against Women with focus on the CEDAW” Expert Group Meeting Prevention of violence against women and girls Bangkok, Thailand 17-20 September 2012 p.4.

<sup>200</sup> *Ibid*, p.3.

<sup>201</sup> *Ibid*.

<sup>202</sup> Jivan V and Forster C “ Challenging conventions: In pursuit of greater legislative compliance with CEDAW in the Pacific” 2009(10) *Melbourne Journal of International Law* p.12.

<sup>203</sup> General Recommendation No. 19 (11<sup>th</sup> session, 1992) Violence against women paragraph 6.

<sup>204</sup> *Ibid*, para 23.



relationships.<sup>205</sup> It should be noted that rape, in relation to family violence, includes marital rape.

With regard to the obligations of state parties in relation to violence against women, General Recommendation No. 19 provides that states can be held accountable for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and are also responsible for providing compensation.<sup>206</sup>

Marital rape involves coercion, since it entails the use of force. As discussed earlier, marital rape also has a grave physical and psychological impact on victims. Hence, the CEDAW implicitly gives protection to women against marital rape. According to the CEDAW Committee, the marital rape exception, which prevents husbands from being convicted of raping their wives, is discriminatory and should be removed from the criminal framework of state parties.<sup>207</sup>

The CEDAW Committee has confirmed the importance of adopting laws that protect women against family violence, rape, sexual assault and other gender-based violence.<sup>208</sup> The Committee has noted that domestic legislation of state parties has not been in conformity with international obligations to curb violence against women.<sup>209</sup> According to the Committee, the legislation of some state parties lacks specific provisions that deal with violence against women, such as domestic violence and marital rape.<sup>210</sup> The Committee further noted that the incorporation of specific domestic violence legislation into both criminal and civil law frameworks is instrumental to ensuring effective legal protection of women from gender-based violence.<sup>211</sup> Moreover, after affirming that rape and all forms of sexual violence constitute grave violations of human rights, the CEDAW Committee has urged state parties to the CEDAW to criminalise all forms of sexual violence against women.<sup>212</sup>

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<sup>205</sup> Ibid, para 23.

<sup>206</sup> Ibid, para 9.

<sup>207</sup> Jivan V and Forster C “ Challenging conventions: In pursuit of greater legislative compliance with CEDAW in the Pacific” 2009(10) *Melbourne Journal of International Law* p.14.

<sup>208</sup> Jivan V and Forster C “ Challenging conventions: In pursuit of greater legislative compliance with CEDAW in the Pacific” 2009(10) *Melbourne Journal of International Law* p.13.

<sup>209</sup> Simonovic D “International Framework on Violence Against Women with focus on the CEDAW” Expert Group Meeting Prevention of violence against women and girls Bangkok, Thailand 17-20 September 2012.

<sup>210</sup> *Ibid*.

<sup>211</sup> Jivan V and Forster C “ Challenging conventions: In pursuit of greater legislative compliance with CEDAW in the Pacific” 2009(10) *Melbourne Journal of International Law*.

<sup>212</sup> *Ibid*.

Furthermore, the CEDAW has imposed the duty on state parties to "take into account the particular problems faced by rural women and take all appropriate measures to ensure the application of the provisions of the present Convention."<sup>213</sup> The CEDAW also makes state parties responsible for modifying the social and cultural views of society by eliminating customary and religious practices that reflect the inferiority of women to men.<sup>214</sup> According to the CEDAW Committee, the persistence of stereotypes and patriarchal attitudes that belittle women are significant challenges to the implementation of the CEDAW.<sup>215</sup> According to Simonovic, the CEDAW provides that "efforts to prevent violence against women must be firmly grounded in work to eliminate discrimination against women which requires not only non-discriminatory laws and policies, but also efforts to change stereotypical conceptions of gender roles, including through education and media".<sup>216</sup>

In its concluding observations on the reports of state parties, the CEDAW Committee has expressed its concern about the failure of some state parties to criminalise marital rape. For instance, in its concluding observations on Togo, the CEDAW Committee observed the prevalence of violence against women in Togo, including forced marriage, domestic violence and marital rape.<sup>217</sup> Moreover, the CEDAW Committee raised its concerns regarding the failure of the country's penal code to criminalise domestic violence, incest, female genital mutilation, sexual harassment and marital rape.<sup>218</sup> Therefore, the Committee urged the state party to adopt comprehensive legislation without delay, in order to address all forms of violence against women. Furthermore, the state party was urged to revise its draft penal code to ensure the criminalisation of marital rape.<sup>219</sup>

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<sup>213</sup> Gebremariam AG "Speaking Truth on Behalf of Ethiopian Women" available online at: [http://www.huffingtonpost.com/alemayehu-g-mariam/speaking-truth-on-behalf\\_b\\_635317.html](http://www.huffingtonpost.com/alemayehu-g-mariam/speaking-truth-on-behalf_b_635317.html) [accessed on 29 August 30, 2013].

<sup>214</sup> CEDAW, article 5(a).

<sup>215</sup> Simonovic D "International Framework on Violence Against Women with focus on the CEDAW" Expert Group Meeting Prevention of violence against women and girls Bangkok, Thailand 17-20 September 2012, p.12.

<sup>216</sup> *Ibid.*

<sup>217</sup> Committee on the Elimination of All forms of Discrimination Against Women, Concluding observation of the Committee on the Elimination of All forms of Discrimination Against Women on Togo, 53rd session 1-19 October 2012 para 22(a).

<sup>218</sup> *Ibid.*, para 22(b).

<sup>219</sup> *Ibid.*, para 23(a).

Similarly, in its 2009 submission to the United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW), the Government of Ethiopia acknowledged that domestic violence is a "pervasive problem" in Ethiopia.<sup>220</sup> Furthermore, Ethiopia has submitted its sixth and seventh periodic report to the CEDAW Committee.<sup>221</sup> In its concluding observations on the combined sixth and seventh periodic report of Ethiopia, the CEDAW Committee expressed its concerns regarding the underreporting of violence against women and domestic violence, due to cultural taboos and a lack of trust in the criminal justice system.<sup>222</sup> Furthermore, the Committee raised its concerns regarding the lack of enforcement of the provisions of criminal law owing to lack of sufficient funds, limited awareness of the existing laws and policies among enforcement officials, and the discriminatory attitudes of society.<sup>223</sup>

Moreover, the CEDAW Committee highlighted the failure of Ethiopia to criminalise marital rape and to adopt a national strategy to curb violence against women.<sup>224</sup> Consequently, the Committee recommended that Ethiopia should criminalise marital rape.<sup>225</sup> However, Ethiopia's representatives failed to respond to request of the Committee.<sup>226</sup>

The stereotyped view of society, which reflects the belief that women have the obligation to please their husbands by being submissive to their desires, contributes to the prevalence of marital rape.<sup>227</sup> By exempting marital rape from punishment, the Ethiopian government fell short of its obligations under the CEDAW to eliminate discriminatory practices against women. Ethiopia, as a state party to the CEDAW, is obliged to eliminate such discriminatory practices and traditions by criminalising marital rape.<sup>228</sup>

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<sup>220</sup> Immigration and Refugee Board of Canada, *Ethiopia: domestic violence, including legislation, state protection and services available to victims (2007-2011)*, 14 December 2011, ETH103921.E, available at: <http://www.refworld.org/docid/50b748242.html> [accessed on 29 August 2013].

<sup>221</sup> Committee on the Elimination of Discrimination against Women forty ninth session 11-29 July 2011 concluding observation of the Committee on the Elimination of Discrimination against Women on Ethiopia. Para2.

<sup>222</sup> *Ibid*, para 20.

<sup>223</sup> *Ibid*.

<sup>224</sup> *Ibid*, para 20.

<sup>225</sup> *Ibid*, para 21(a).

<sup>226</sup> Wada T "Rethinking the Ethiopian Rape Law" 2012 (XXV) 2 *Journal of Ethiopian Law* p.25.

<sup>227</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association (EWLA)* (Master of Arts Thesis Addis Ababa University) p.37.

<sup>228</sup> *Ibid*.

### 3.3.2 The Declaration on Elimination of Violence against Women (DEVAW)

The Declaration on Elimination of Violence against Women (hereinafter the DEVAW) is a non-binding United Nations Declaration enacted with the aim of curbing violence against women in its entirety.<sup>229</sup> The DEVAW constitutes “soft law”, which refers to “quasi-legal instruments that carry legal weight, though generally less than hard law legal instruments.”<sup>230</sup> Despite its non-binding nature, soft law has moral and political force, and it can be used to name and shame in the “court” of international public opinion.<sup>231</sup> The DEVAW defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>232</sup>

The DEVAW indicates that violence against women extends to physical, psychological and sexual violence that occurs within the family, which includes marital rape.<sup>233</sup> In light of the DEVAW, it can be seen that marital rape is given specific recognition as one form of violence against women.<sup>234</sup> The Special Rapporteur on Violence against Women has stated that violence committed by men against their wives is the most prevalent form of domestic violence.<sup>235</sup> According to the Special Rapporteur, the most common manifestation of domestic violence includes marital rape.<sup>236</sup>

The preamble of the DEVAW affirms that violence against women amounts to the violation of the basic human rights and fundamental freedoms of women.<sup>237</sup> Hence, marital rape as one form of violence against women that is recognised by the DEVAW is a crime that violates the human rights of women. The marital exemption from punishment under Ethiopian criminal law therefore amounts to encouraging the violation of the fundamental rights of women. Furthermore, the DEVAW requires state parties to condemn all forms of violence against

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<sup>229</sup> Jabrayilova S “The distinctive features of sexual related offenses: Statutory rape v. marital rape” 2012(9:1) *Anakra Law Review* p.82.

<sup>230</sup> Centre for Human Rights and Humanitarian Law *Human Rights in the U.S.: A Handbook for Legal Aid Attorneys* (American University, Washington College of Law 2013) p.25.

<sup>231</sup> *Ibid.*

<sup>232</sup> DEVAW, article 1.

<sup>233</sup> *Ibid*, article 2(a).

<sup>234</sup> *Ibid.*

<sup>235</sup> Report of the Special Rapporteur on Violence Against Women, UN Doc. E/CN.4/1995/42.

<sup>236</sup> Report of the Special Rapporteur on Violence Against Women, UN Doc.E/CN.4/1996/53.

<sup>237</sup> *Ibid*, preamble para.5.

women, including marital rape.<sup>238</sup> As a state party to the DEVAW, the Ethiopian government should have condemned violence against women in general and marital rape in particular by punishing such offences through its criminal law system.

It further emphasises that state parties cannot rely on customs, traditions or religious views to avoid their obligation under international human rights law to curb violence against women.<sup>239</sup> In other words, the Ethiopian government cannot use the customs and traditions in the country that reflect the superiority of men over women as an excuse for not complying with its obligations under the DEVAW to protect women from marital rape. States are further required to follow all the necessary policy and other measures without delay, in order to ensure the elimination of violence against women.<sup>240</sup> One such policy measure is translating and publishing international instruments that condemn violence against women. However, the Ethiopian legislature has so far, failed to do so.

Moreover, under the DEVAW, state parties are expected to prevent, investigate and punish acts of violence against women, whether committed by the state or by individuals.<sup>241</sup> In addition, state parties are under the obligation to develop national legislation and penal sanctions to rectify the human rights violations suffered by women as a result of violence against women.<sup>242</sup> Ethiopia is a state party to the DEVAW.<sup>243</sup> Thus, as a state party to the DEVAW, the Ethiopian government should have developed national legislation and penal sanctions to redress the wrongs suffered by women as a result of marital rape, which is one form of violence against women. However, the legislature chose to exempt marital rape from the kind of rape punishable by law, which violates the obligation of Ethiopia under the DEVAW.<sup>244</sup> It should be noted that although the DEVAW is not legally binding on state parties, it stipulates international norms that have been globally recognised as fundamental to

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<sup>238</sup> DEVAW, article 4.

<sup>239</sup> *Ibid.*, article 4.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*, article 4(c).

<sup>242</sup> *Ibid.*, article 4(d).

<sup>243</sup> University of Minnesota Human Rights Library “Ratification of International Human Rights Treaties – Ethiopia” available online at: <http://www1.umn.edu/humanrts/research/ratification-ethiopia.html> (accessed on March 12, 2013).

<sup>244</sup> The Ethiopia Criminal Code, article 620.

fighting violence against women.<sup>245</sup> Therefore, by failing to criminalise marital rape, which constitutes violence against women under the DEVAW, Ethiopia has deviated from the international norm recognised by states as fundamental to curbing violence against women.

### **3.3.3 Beijing Declaration and Platform for Action**

The Beijing Declaration and Platform for Action defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”<sup>246</sup> It further provides that violence against women includes marital rape.<sup>247</sup>

The Beijing Declaration requires governments to condemn violence against women and not to use any custom, tradition or religion as an excuse for their failure to comply with the obligation to punish acts of violence against women.<sup>248</sup> Furthermore, it requires states to enact and enforce domestic legislation that effectively suppresses violence against women.<sup>249</sup> Moreover, states are required to periodically review and analyse their legislation, in order to ensure its effectiveness in curbing violence against women.<sup>250</sup>

## **3.4 African Union human rights instruments**

### **3.4.1 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa**

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (hereinafter the AU Women’s Protocol) is a legally binding instrument that supplements the African Charter on Human and Peoples’ Rights.<sup>251</sup> The AU Protocol defines “discrimination against women” as “any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the

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<sup>245</sup> UNHCR *Handbook for the Protection of Women and Girls: Chapter 6 The International and Regional Legal Framework* (UNHCR ) p.18.

<sup>246</sup> Beijing Declaration and Platform for Action Adopted at the 16th plenary meeting, on 15 September 1995 para 113.

<sup>247</sup> *Ibid*, para 113(a).

<sup>248</sup> *Ibid*, para 124(a).

<sup>249</sup> *Ibid*, para 124(c) and 124(d).

<sup>250</sup> *Ibid*, para 124(d).

<sup>251</sup> Viljoen F “An Introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2009) *16 WASH. & LEE J.C.R. & SOC. JUST.* 11 p.11.

recognition, enjoyment or the exercise by women, *regardless of their marital status*, of human rights and fundamental freedoms in all spheres of life.”[my own emphasis].<sup>252</sup> Based on this definition, it can be inferred that any exclusion that impedes the exercise of the human rights of women amounts to discrimination against women, regardless of their marital status.

According to Ebeku, article 2 of the AU Women’s Protocol requires state parties to fight against all forms of discrimination against women through adopting legislative, administrative and other measures.<sup>253</sup> Ebeku notes that such measures must ensure the principle of equality between men and women and prevent all harmful traditional practices that threaten the health and wellbeing of women.<sup>254</sup>

As previously mentioned, marital rape violates various human rights of women, such as the right to human dignity, the right to privacy and the right not to be subjected to cruel, inhuman and degrading treatment. Therefore, exempting marital rape from punishment amounts to excluding married women from the protection of the law. The AU Women’s Protocol requires state parties to fight all forms of discrimination against women through appropriate legislative and administrative measures.<sup>255</sup>

Furthermore, the AU Women’s Protocol defines “violence against women” as acts against women that could cause them physical, psychological and sexual harm.<sup>256</sup> It requires state parties to adopt and implement all the necessary measures to protect women from all forms of violence in general and sexual violence in particular.<sup>257</sup> Moreover, the AU Women’s Protocol encourages state parties to enact and enforce laws to prevent all forms of violence against women, including forced sex.<sup>258</sup> Ebeku explains that this provision includes sexual violence that takes place both privately and in public.<sup>259</sup> It should be noted that the AU Women’s Protocol is the first instrument that urges state parties to end violence against women that is

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<sup>252</sup> African Union, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003 article 1(f).

<sup>253</sup> Ebeku KS “A New Hope for African Women: Overview of Africa’s Protocol on Women’s Rights” 2004 (13:3) *Nordic Journal of African Studies* p.266.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*, article 2(1).

<sup>256</sup> *Ibid.*, article 1(j).

<sup>257</sup> *Ibid.*, article 3(4).

<sup>258</sup> *Ibid.*, article 4(2)(a).

<sup>259</sup> Ebeku KS “A New Hope for African Women: Overview of Africa’s Protocol on Women’s Rights” 2004(13:3) *Nordic Journal of African Studies* p.266.

committed in private or in public.<sup>260</sup> According to Viljoen, the Protocol implicitly requires state parties to criminalise marital rape by focusing specifically on forced sex that is committed within the private sphere.<sup>261</sup> Under the AU Women's Protocol, states are under the obligation to adopt and enforce legislation, with the aim of curbing domestic violence.<sup>262</sup>

Moreover, the AU Women's Protocol stipulates that state parties have an obligation to ensure that women and men have equal rights and that these equal rights are protected during marriage.<sup>263</sup> Marital rape involves a husband forcing his wife to have sexual intercourse with him against her will, which breaches her right to equality within the marriage.

### **3.4 The obligation of Ethiopia under international human rights law to protect the rights of women**

Although Ethiopia has acceded to international human rights instruments that condemn violence against women, such as the CEDAW, the regulation of the crime of rape has not been changed to include marital rape.<sup>264</sup> According to the FDRE Constitution, the fundamental rights incorporated in the Constitution are to be interpreted in light of the UDHR and international human right instruments adopted by Ethiopia.<sup>265</sup> Furthermore, the Constitution stipulates that all international instruments ratified by Ethiopia are an integral part of the law of the land.<sup>266</sup>

The Constitution does not, however, provide for any additional measure that needs to be taken by the legislature to bring such international human rights instruments into effect. On the other hand, the Federal Negarit Gazette Establishment Proclamation No. 3/1995 provides that all federal laws of Ethiopia need to be published in the Federal Negarit Gazette.<sup>267</sup> According to Yeshanew, the Proclamation reflects the need to publish all international human rights instruments ratified by Ethiopia in the official Gazette of the country, in order to make

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<sup>260</sup> Solidarity for African Women's Rights *A Guide to Using the Protocol on the Rights of Women for Legal Action* (Equality Now 2011)p.viii.

<sup>261</sup> Viljoen F "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) *16 WASH. & LEE J.C.R. & SOC. JUST.* 11 p.22.

<sup>262</sup> *Ibid.*

<sup>263</sup> African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 article 6.

<sup>264</sup> United Nations Treaty Collections "Convention on the Elimination of Discrimination Against Women" available at: <https://treaties.un.org> [accessed on 14 April, 2014].

<sup>265</sup> FDRE Constitution article 13(2).

<sup>266</sup> *Ibid.*, article 9(4).

<sup>267</sup> Article 2 of Federal Negarit Gazette Establishment Proclamation No. 3/1995.



them applicable to and enforceable in Ethiopia.<sup>268</sup> This is further confirmed by article 71(2) of the Constitution, which mandates the President of Ethiopia to declare international human rights instruments to be approved by the House of Peoples' Representatives.<sup>269</sup>

It should, however, be noted that among the international human rights instruments ratified by Ethiopia, only the Convention on the Right of the Child (CRC) has been translated into the working language of Ethiopia and published in the official *Negarit Gazette*.<sup>270</sup> Hence, international instruments that protect women from violence, such as the CEDAW and the DEVAW, have not been translated into the official language of Ethiopia or published in the official *Negarit Gazette*.

The failure to translate the human rights instruments ratified by Ethiopia into the working languages of the country has darkened the prospects for the implementation of such international instruments.<sup>271</sup> Studies have revealed that the Federal *Negarit Gazette* Establishment Proclamation has been impeding Ethiopian judges from using international human rights standards in courts, even if Ethiopia has accepted such standards through the ratification of international human rights instruments.<sup>272</sup>

The importance of translating and publishing the provisions of international human rights instruments that protect the rights of women cannot be overstated, since it will give access to and create awareness among the public at large with regard to internationally recognised human rights. The translation of international human rights standards into the working languages of the country also helps to increase the availability of such standards to the general public and makes it easier for ordinary citizens to refer to them.<sup>273</sup>

The CEDAW urges member states to condemn all forms of discrimination against women by adhering to a policy that prohibits discrimination against women.<sup>274</sup> In doing so, states are required to take legislative and other measures to curb discrimination against women.<sup>275</sup> One

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<sup>268</sup> Yeshanew S, 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia' 2008 (8:2) *AFRICAN HUMAN RIGHTS LAW JOURNAL* p.288.

<sup>269</sup> FDRE Constitution article 71(2).

<sup>270</sup> Mesele R *Enforcement of Human Rights in Ethiopia* ( Research Subcontracted by Action Professionals' Association for the People (APAP) 31 August 2002) p.25.

<sup>271</sup> *Ibid.*

<sup>272</sup> Mesele R *Enforcement of Human Rights in Ethiopia* ( Research Subcontracted by Action Professionals' Association for the People (APAP) 31 August 2002) p.39.

<sup>273</sup> *Ibid.*

<sup>274</sup> CEDAW article 2.

<sup>275</sup> *Ibid.*, article 2(c).

such measure involves domesticating the provisions of the CEDAW. Furthermore, the CEDAW stipulates that member states are required to repeal penal legislations that contribute to discrimination against women.<sup>276</sup> Ethiopia, as a state party to the CEDAW and the DEVAW, which protect women against violence, has an obligation to bring its laws in line with the requirements of such instruments.<sup>277</sup>

As previously mentioned, the Ethiopian Criminal Code has excluded marital rape from the kind of rape that is punishable by law.<sup>278</sup> In other words, the protection of women against rape does not extend to rape committed against them by their spouses. This clearly amounts to discrimination against women based on marital status, which violates the provisions of the CEDAW. The fact that the Ethiopian government has failed to protect women from marital rape by exempting marital rape from punishment makes it accountable under the CEDAW.

### **3.3 Fundamental rights infringed upon by marital rape**

Marital rape has severe physical and psychological impacts on women. In addition to these effects, it violates a number of fundamental rights, which will be discussed below.

#### **3.3.1 The right to human dignity**

The right to human dignity is the source of the inherent rights to freedom and physical integrity of individuals.<sup>279</sup> It is given protection under international human rights instruments to which Ethiopia has acceded, such as the UDHR<sup>280</sup> and the ICCPR.<sup>281</sup> Similarly, the 1995 FDRE Constitution provides for the right to human dignity.<sup>282</sup>

The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that acts of torture, inhuman and degrading treatment violate the right to human dignity and other fundamental rights

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<sup>276</sup> *Ibid*, article 2(g).

<sup>277</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa* ( Master of Arts Thesis Addis Ababa University, 2008) p.15.

<sup>278</sup> The Ethiopian Criminal Code article 620.

<sup>279</sup> De Waal J and Currie I *The Bill of Rights Handbook* 5<sup>th</sup> edition (Juta 2005) p.273.

<sup>280</sup> UDHR article 1.

<sup>281</sup> ICCPR article 10.

<sup>282</sup> FDRE Constitution, article 24.

provided for under the UDHR.<sup>283</sup> Therefore, the violation of the right to protection against cruel and inhuman treatment as a result of marital rape also violates the right to women's dignity.

According to the Vienna Declaration and Programme for Action, gender-based violence arising from cultural prejudice is irreconcilable with the dignity and worth of individuals.<sup>284</sup> Hence, marital rape obviously infringes upon the right to human dignity of women. In the case of *Chairman, Railway Board v. Chandrima Das*,<sup>285</sup> the Indian Supreme Court held that the crime of rape violates the right to life and the right to human dignity of victims.<sup>286</sup> Thus, marital rape as one form of rape violates the right to human dignity of victims.

### 3.3.2 The right to privacy

The right to privacy is recognised and protected by international human rights instruments such as the UDHR<sup>287</sup> and the ICCPR<sup>288</sup>, as well as the Ethiopian Constitution.<sup>289</sup> According to General Comment No. 16 on the right to privacy, the protection of this right extends to the protection of personal honour and reputation.<sup>290</sup> The general comment further requires state parties to the ICCPR to make provisions for the effective protection of individuals against unlawful attacks on their honour and reputation.<sup>291</sup> Marital rape involves unlawful attacks on the honour of women.<sup>292</sup>

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<sup>283</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) article 2.

<sup>284</sup> Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 para 18.

<sup>285</sup> *The Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988.

<sup>286</sup> *Ibid.*

<sup>287</sup> UDHR article 12.

<sup>288</sup> ICCPR article 17(1).

<sup>289</sup> The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 (1995) article 26.

<sup>290</sup> N Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation*, 8 April 1988, available at: <http://www.refworld.org/docid/453883f922.html> [accessed on 27 August 2013].

<sup>291</sup> *Ibid.*

<sup>292</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association (EWLA)* (Master of Arts Thesis Addis Ababa University) p.6.

With regard to marital rape, the right to privacy is important because it relates to the right to individual privacy of women and the marital privacy of men.<sup>293</sup> It has been argued that the right to marital privacy of the husband is implicated when the state interferes in his marriage under the pretext of marital rape.<sup>294</sup> In Ethiopia, the Ethiopian Women Lawyers Association (EWLA) suggested that marital rape should be included in the kinds of rape that are punishable by law.<sup>295</sup> However, the idea was rejected due to the belief that the sexual relationship between spouses is so personal that it cannot be covered under criminal law.<sup>296</sup>

On the other hand, it has been argued that marital rape violates the right to individual privacy of women.<sup>297</sup> For instance, in *Bellotti v. Bair*,<sup>298</sup> the United States Supreme Court held that:<sup>299</sup>

Inherent in the right of privacy is the right to make decisions "without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties... For anyone to interfere with one's decision "is fundamentally at odds with privacy interests underlying the constitutional protection afforded to [one's] decision."

In light of the above case, it can be inferred that the right to privacy protects the rights of women to make personal decisions apart from marital or family relationships.<sup>300</sup> Similarly, in *People v. Liberta*,<sup>301</sup> New York's Highest Court held that "marital privacy is meant to provide privacy of acts that both husband and wife find agreeable; it is not meant to shield abuse."<sup>302</sup> Similarly, Pracher contends that protecting the marital privacy of the husband over the right to autonomy and privacy of the wife impairs the physical and psychological

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<sup>293</sup> Pracher M "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy" 2010(11:3) *Golden Gate University Law Review* p.741.

<sup>294</sup> *Ibid.*

<sup>295</sup> Fekadu S *An Assessment of Causes of Rape and its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa* (Master of Arts Thesis Addis Ababa University, 2008) p.18.

<sup>296</sup> *Ibid.*

<sup>297</sup> Gelaw KS *Marital rape as a human rights violation of women in Ethiopia : A case study of Alumni association of the faculty of law of Addis Ababa University and Ethiopian Women Lawyers Association(EWLA)*(Master of Arts Thesis Addis Ababa University) p.29.

<sup>298</sup> *Bellotti v. Bair* 443 U.S. 622, 652 (1979).

<sup>299</sup> *Ibid.* para 655-56.

<sup>300</sup> Pracher M "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy" 1981(11:3)*Golden Gate University Law Review* p.750.

<sup>301</sup> *People v. Liberta*, 64 N.Y., 2d 152 (1984).

<sup>302</sup> *Ibid.*

wellbeing of the latter and reflects the dominant role of men, rather than protecting the privacy of marital relationships.<sup>303</sup>

### **3.3.3 The right not to be subjected to cruel, inhuman and degrading treatment**

The FDRE Constitution provides for the right to protection against inhuman treatment or punishment.<sup>304</sup> The right not to be subjected to cruel, inhuman and degrading treatment is also stipulated under international human rights instruments Ethiopia has acceded to instruments such as the UDHR<sup>305</sup> and the ICCPR.<sup>306</sup> General Comment No. 20 on article 7 of the ICCPR provides that the purpose of the protection against cruel, inhuman and degrading treatment is protecting the dignity as well as the mental and physical integrity of individuals.<sup>307</sup> The general comment further states that no derogation is permitted from the protection against cruel, inhuman and degrading treatment, as provided for under article 7 of the ICCPR, even in times of public emergency which threaten the life of the nation.<sup>308</sup> This highlights the importance accorded to the right under the ICCPR.

According to the Convention Against Torture (hereinafter the CAT), the definition of torture extends to “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...”<sup>309</sup> Similarly, General Comment No. 3 of the Committee against Torture provides that victims of torture and cruel, inhuman and degrading treatment include persons who have suffered harm, whether psychological or physical, regardless of any familial relationship between the perpetrator and the victim.<sup>310</sup>

As has been previously mentioned, marital rape has a grave impact on the physical and psychological wellbeing of women. The physical impacts of marital rape include nausea and vomiting, injuries, vaginismus (a condition where the vaginal muscles tighten so as to make penile penetration impossible or extremely painful) and dyspareunia (painful sexual

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<sup>303</sup> Pracher M “The Marital Rape Exemption: A Violation of a Woman's Right of Privacy” 2010(11:3) *Golden Gate University Law Review* p.751.

<sup>304</sup> The FDRE Constitution article 18(1).

<sup>305</sup> UDHR article 5.

<sup>306</sup> ICCPR article 7.

<sup>307</sup> General Comment No. 20 on article 7 of the ICCPR para 2.

<sup>308</sup> *Ibid*, para 3.

<sup>309</sup> Convention Against Torture(CAT) article 1.

<sup>310</sup> Committee against Torture Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 3 Implementation of article 14 by States parties para 3.

intercourse).<sup>311</sup> On the other hand, the psychological impact of marital rape includes betrayal and shock, humiliation and a sense of being "dirty", anger and guilt, an inability to trust men, an inability to feel comfortable with sex or intimacy, and fear.<sup>312</sup> According to Culbertson and Dehle, marital rape causes more severe psychological disturbance than other forms of rape.<sup>313</sup>

These grave psychological and physical impacts of marital rape constitute 'severe physical or mental pain', as incorporated in the definition of torture under the CAT. Hence, marital rape constitutes an act of torture or cruel, inhuman and degrading treatment. General Recommendation no. 19 on the CEDAW provides that gender-based violence impairs the enjoyment of human rights by women. One such right is the right not to be subjected to torture or to cruel, inhuman and degrading treatment.<sup>314</sup> The Committee further requires state parties to take positive measures in relation to the complaint mechanisms and investigations, in order to encourage victims of marital rape to come forward and seek redress.<sup>315</sup>

### 3.3.4 The right to bodily integrity

The right to bodily integrity refers to the inviolability of the body of human beings and the self-determination of human beings with regard to their own bodies.<sup>316</sup> It reflects the idea that a person's body should not be interfered with by others.<sup>317</sup> The right to bodily integrity is 'the deepest right possessed by a human being next to the right to life'.<sup>318</sup> It should be noted that having control over one's body is strongly related to one's physical integrity.<sup>319</sup> Marital rape involves interfering with the bodies of women without their consent, which infringes upon

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<sup>311</sup> Louse "Short and Long Term Effects of Partner Sexual Assault" 2008 Pandora's Project p.3.

<sup>312</sup> *Ibid*, p.2-3.

<sup>313</sup> Myhill A and Alen J *Rape and Sexual Assault of Women: The Extent and Nature of the Problem: Findings from the British Crime Survey* (Home Office Research, Development and Statistics Directorate 2002) p.42.

<sup>314</sup> General Recommendation no. 19 of the CEDAW para 7(b).

<sup>315</sup> *Ibid*, para 33.

<sup>316</sup> Feminist issues: women's right to bodily integrity and autonomy (self Feminism) available online at:

[http://www.reddit.com/t/Feminism/comments/142nzm/feminist\\_issues\\_womens\\_right\\_to\\_bodily\\_integrity/](http://www.reddit.com/t/Feminism/comments/142nzm/feminist_issues_womens_right_to_bodily_integrity/) [accessed on March 11, 2013].

<sup>317</sup> Bodily Integrity is a Human Right <http://www.foregen.org/old/bodily-integrity/> [accessed on March 28, 2013].

<sup>318</sup> *Ibid*.

<sup>319</sup> Pracher M "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy" 1981(11:3) *Golden Gate University Law Review* p.745.

their right to bodily integrity.<sup>320</sup> It violates the self-determination of women with regard to their own bodies and their bodily integrity.<sup>321</sup>

The UDHR provides that every one has the right to security of person.<sup>322</sup> Similarly, the ICCPR provides for the right to security of person.<sup>323</sup> This involves protection against bodily harm. Furthermore, article 16 of the FDRE Constitution provides that every one has the right to protection against bodily harm.<sup>324</sup> Therefore, since marital rape involves the infliction of bodily harm on women, it violates the right to bodily integrity of women guaranteed under the UDHR, the ICCPR and the Ethiopian Constitution.

### 3.3.5 The right to equality

The right to equality is provided for under the UDHR.<sup>325</sup> The UDHR emphasises the entitlement of every individual to equal protection against discrimination.<sup>326</sup> It further indicates that every person is born free and equal in terms of dignity and rights.<sup>327</sup> With regard to the right to equality of women, the UDHR stipulates that men and women are entitled to equal rights during marriage.<sup>328</sup>

The ICCPR affirms that all persons are equal before the law and entitled to protection against discrimination based on factors such as sex.<sup>329</sup> The ICCPR further provides that it is the responsibility of state parties to ensure the equality of the rights and responsibilities of spouses during marriage.<sup>330</sup> When women are compelled to have sexual intercourse with their husbands, their entitlement under the UDHR and the ICCPR to equal rights with men during marriage is infringed upon. Marital rape also denies women their right to choose whether or not to have sexual intercourse.

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<sup>320</sup> *Ibid*, p.746.

<sup>321</sup> Koenig KA, Lincoln R & Groth L “The Jurisprudence of Sexual Violence” Sexual Violence & Accountability Project Working Paper Series University of California Berkeley May 2011 p.47.

<sup>322</sup> UDHR article 3.

<sup>323</sup> ICCPR article 9(1).

<sup>324</sup> Article16 of the FDRE Constitution.

<sup>325</sup> UDHR article 7.

<sup>326</sup> *Ibid*.

<sup>327</sup> UDHR article 1.

<sup>328</sup> *Ibid*, article 16(1).

<sup>329</sup> ICCPR article 26.

<sup>330</sup> ICCPR article 23(4).

Marital rape reflects the socio-economic and political inequality of women in society.<sup>331</sup> The criminalisation of marital rape entitles women to recognition as autonomous persons, rather than property.<sup>332</sup> On the contrary, when the law exempts marital rape from punishment, it amounts to discrimination against women based on family status.<sup>333</sup> This view is confirmed by Pracher, who argues that:<sup>334</sup>

The marital rape exemption not only robs a married woman of the right to control her body vis-a-vis her husband; but also disregards the serious harm suffered by the victim of rapes and denies a married woman the right, which a single woman has, to legal recourse against her attacker.

Similarly, Dutta contends that:<sup>335</sup>

If an act is an offence by its very nature, it is unreasonable to say that it is not the offence merely because of difference in person committing the act. It will yield discriminatory results, if we interpret that an act committed to any other woman is an offence and is not an offence, if the same act is committed to one's own wife. There is no justification in differentiating between the women who are wives and other women.

The FDRE Constitution unequivocally recognises the right of every individual to equality and equal protection of the law, without discrimination based on any ground.<sup>336</sup> The fact that the Ethiopian Criminal Code denies protection to married women against rape committed by their husbands is evidence of discrimination between married women and single women. Despite the fact that marital rape has more psychological and physical effects on women than stranger rape, Ethiopia's criminal law system has failed to protect married women from marital rape, which violates their right to equality, as provided for under the UDHR, ICCPR and FDRE Constitution.

### 3.5 Summary

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<sup>331</sup> Sampson F "The Legal Treatment of Marital Rape in Canada, Ghana, Kenya and Malawi- A Barometer of Women's Human Rights" 2010 available online at: <http://theequalityeffect.org/pdfs/maritalrapebarometer.pdf> [accessed on 01 September 2013] p.6.

<sup>332</sup> *Ibid*, p.8.

<sup>333</sup> *Ibid*, p.15.

<sup>334</sup> Pracher M "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy" 1981(11:3) *Golden Gate University Law Review* p.718.

<sup>335</sup> Dutta S Marital Rape- Gross Violation of Human Rights? (Women's Perspective) available online at: <http://www.mightylaws.in/653/marital-rape-gross-violation-human-rights-womens-perspective> [accessed on 27 August 2013].

<sup>336</sup> The FDRE Constitution, article 25.



According to the DEVAW, violence against women includes marital rape. The preamble of the DEVAW affirms that violence against women amounts to the violation of the basic human rights and fundamental freedoms of women. Although the CEDAW does not specifically give protection to women against marital rape, it protects women from discrimination based on any grounds, including marital status. General Recommendation 19 of the Committee on the Elimination of Violence against Women, indicates that discrimination includes gender based violence against women, which involves acts that inflict physical, psychological and sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Thus, marital rape amounts to discrimination against women, as it causes both physical and psychological suffering to women. Furthermore, the CEDAW requires state parties to take legislative and other measures to eliminate discrimination against women. It also requires such states to investigate and sanction acts that amount to violence against women. The elimination of discriminatory traditions and customs is also required by state parties, in order to free women from discrimination.

Generally, marital rape violates a number of human rights recognised under the Ethiopian Constitution and international human right instruments to which Ethiopia has ratified and acceded to, such as the rights to privacy, human dignity, physical integrity, equality and to not be subjected to torture or cruel, inhuman and degrading treatment. The next chapter will evaluate how South Africa has addressed the issue of marital rape and determine the lessons that Ethiopia can learn as well as the challenges, if any that South Africa has experienced in criminalizing marital rape.

## **CHAPTER FOUR**

### **MARITAL RAPE IN SOUTH AFRICA: PROSPECTS, CHALLENGES AND LESSONS FOR ETHIOPIA**

#### **4.1 Introduction**

South Africa is one of the few countries in Africa that criminalises marital rape. The purpose of this chapter is to evaluate how the Republic of South Africa has addressed marital rape. Much focus will be on the adoption and implementation of the South African Domestic Violence Act of 1998 which criminalises marital rape. Furthermore, the chapter will examine the challenges faced by South African authorities and institutions in addressing and dealing with marital rape in South Africa. The last section of this chapter highlights the lessons that Ethiopia can learn from the law and jurisprudence of South Africa with regard to marital rape.

#### **4.2 Marital rape in South Africa in light of the South African Domestic Violence Act of 1998**

The Final Constitution of the Republic of South Africa was enacted in 1996, with the aim of healing the divisions and injustices suffered during the apartheid era and creating an open and

democratic society based on human dignity, equality and freedom.<sup>337</sup> Section12(c) of the Constitution states that: “everyone has the right to freedom and security of the person, which includes the right to be free from violence from either public or private sources.”<sup>338</sup> From the above section, it can be inferred that the Constitution protects individuals, including women, from violence committed by family members such as husbands.

South Africa was named “rape capital of the world” owing to the prevalence of rape in the country.<sup>339</sup> In South Africa, rape has emerged as “a crime of extreme violence”.<sup>340</sup> Commentators have noted the similarity between rape in South Africa and rape committed during armed conflict in terms of the extent of injuries, degradation and mutilation suffered by victims.<sup>341</sup>

In South Africa, it was believed by society that rape cannot be committed by a woman’s husband or partner.<sup>342</sup> According to Hancox, the situation of marital rape is worse than other forms of rape, since it constitutes one of the least recognised forms of rape.<sup>343</sup>

In response to the gravity of the problem of rape in general and marital rape in particular, the Prevention of Family Violence Act was enacted in 1993, which criminalised marital rape in South Africa.<sup>344</sup> It states that “Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.”<sup>345</sup> It should be noted that South Africa is a leading example of the few African countries that have

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<sup>337</sup> The Constitution of the Republic of South Africa (1996), preamble.

<sup>338</sup> *Ibid*, section12(c).

<sup>339</sup> Hancox G “Marital Rape in South Africa” October 25, 2012, p-70 available online at: <file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> (accessed on March 12, 2013).

<sup>340</sup> “Rape in South Africa” available online at: <https://www.opendemocracy.net/5050/sasha-hart/rape-marriage-and-rights> (accessed on 26 August 2014).

<sup>341</sup> *Ibid*.

<sup>342</sup> Hancox G “Marital Rape in South Africa” October 25, 2012, p-70 available online at: <file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> (accessed on March 12, 2013)..

<sup>343</sup> *Ibid*.

<sup>344</sup> Prevention of Family Violence Act, No. 133 of 1993.

<sup>345</sup> *Ibid*, section 5.

criminalised marital rape.<sup>346</sup> Although the Prevention of Family Violence Act of 1993 was a remarkable step towards fighting violence against women in South Africa, it was criticised for its serious shortcomings.<sup>347</sup>

Fedler argues that the Prevention of Family Violence Act of 1993 was flawed, in that it failed to give a legal definition of domestic violence.<sup>348</sup> According to Fedler, one of the shortcomings of the Prevention of Family Violence Act of 1993 has to do with the vague definition that it provided for family violence.<sup>349</sup> Moreover, Amien argues that the remedies provided under the 1993 Prevention of Family Violence Act were narrow and insufficient.<sup>350</sup>

The Prevention of Family Violence Act was later replaced by the Domestic Violence Act of 1998 which granted protection to victims of domestic violence.<sup>351</sup> It addressed the weaknesses of the Prevention of Family Violence Act of 1993.<sup>352</sup> The application of the Domestic Violence Act of 1998 is broader than that of the Prevention of Family Violence Act, since the former widened the definition of domestic violence.<sup>353</sup> For instance, it gives protection to women married by custom and religion, and to those who were or are cohabiting with the perpetrator.<sup>354</sup> It has also widened the extension of legal remedies for victims of

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<sup>346</sup> African countries that outlawed marital rape include Burundi, Cape Verde, Namibia, Rwanda and Zimbabwe. (Progress of the World's Women "Fact sheet: Sub-Saharan Africa" 2011-2012 p.3, available online at: <http://progress.unwomen.org/wp-content/uploads/2011/06/EN-Factsheet-SSA-Progress-of-the-Worlds-Women.pdf> (accessed on 25 August 2014 ).

<sup>347</sup> Njezula AB *Investigating Domestic Violence against Women in South Africa* (MPhil thesis University of Western Cape 2006) p.13.

<sup>348</sup> Mathews S and Abrahams N "Combining Stories and Numbers: An Analysis of the Impact of the Domestic Violence Act (No.116 of 1998) on Women" The Gender Advocacy Programme & the Medical Research Council (Gender & Health Research Group), November 2001, p.6, available online at: <http://www.mrc.ac.za/gender/domesticviolence.pdf> (accessed on 25 August 2014).

<sup>349</sup> *Ibid.*

<sup>350</sup> Amien W "Recent Developments in the Area of Women's Rights in South Africa: Focus on Domestic Violence and Femicide" p.5, available online at: <http://www.engender.org.za/publications/DV&Femicide.pdf> (accessed on 26 August, 2014).

<sup>351</sup> Amien W "Recent Developments in the Area of Women's Rights in South Africa: Focus on Domestic Violence and Femicide" p.4, available online at: <http://www.engender.org.za/publications/DV&Femicide.pdf> (accessed on 26 August, 2014).

<sup>352</sup> Njezula AB *Investigating Domestic Violence against Women in South Africa* (MPhil thesis University of Western Cape 2006) p.14.

<sup>353</sup> Amien W "Recent Developments in the Area of Women's Rights in South Africa: Focus on Domestic Violence and Femicide" p.5, available online at: <http://www.engender.org.za/publications/DV&Femicide.pdf> (accessed on 26 August, 2014).

<sup>354</sup> *Ibid.*

domestic violence and gave the police more power in relation to domestic violence cases.<sup>355</sup> According to the Domestic Violence Act, a domestic relationship includes the relationship between a married couple<sup>356</sup>. Therefore, the Domestic Violence Act of 1998 maintained the criminalisation of marital rape that was introduced by the Prevention of Family Violence Act of 1993.<sup>357</sup>

### 4.3 The interpretation of marital rape by South African courts and perceived challenges

Despite the criminalisation of marital rape, judges still give due weight to the existence of marriage between parties in considering rape cases.<sup>358</sup> For instance, in *S v Modise*<sup>359</sup> the case was brought before the South African High Court in the form of an appeal. In this case, the complainant and the appellant were a married couple.<sup>360</sup> For almost a year, the couple did not share the same bed.<sup>361</sup> The appellant used to sleep at his parental home rather than his matrimonial home.<sup>362</sup> One evening, he came to his matrimonial home unexpectedly and joined the complainant in bed.<sup>363</sup> She then escaped to the house of her neighbours.<sup>364</sup> Later, in the middle of the night, he asked the complainant to make love to him and when she

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<sup>355</sup> *Ibid.*

<sup>356</sup> Domestic Violence Act No. 116 OF 1998 (1998)Section 1((vii)(a).

<sup>357</sup> Amien W “Recent Developments in the Area of Women’s Rights in South Africa: Focus on Domestic Violence and Femicide” p.5, available online at: <http://www.engender.org.za/publications/DV&Femicide.pdf> (accessed on 26 August, 2014).

<sup>358</sup> Hancox G “Marital Rape in South Africa” October 25, 2012, p.71, available online at: <file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> (accessed on March 12, 2013).

<sup>359</sup> *S v Modise* (113/06) [2007] ZANWHC 73 (9 November 2007).

<sup>360</sup> *Ibid*, para 2.

<sup>361</sup> *Ibid*.

<sup>362</sup> *Ibid*, para 3.

<sup>363</sup> *Ibid*.

<sup>364</sup> *Ibid*.

refused, he grabbed her and undressed her.<sup>365</sup> He then throttled her and held her down on the bed.<sup>366</sup> The appellant then turned her over and made her lie on her back.<sup>367</sup> When he tried to lie on top of her, she started struggling with him. Finally, she managed to break loose and jump out of bed.<sup>368</sup> The appellant denied his attempt to rape his wife and contended that she never went to the house of the neighbours.<sup>369</sup>

After measuring all the evidence brought before it, the Court held that the appellant attempted to have sexual intercourse with his wife without her consent.<sup>370</sup> Hence, the Court found the appellant guilty of attempted marital rape. However, the Court did not agree with the sentence imposed on the appellant by the trial court.<sup>371</sup> The Court held that:

This is a man whose wife joined him in bed, clad in panties and a nightdress. When life was still normal between them, they would ordinarily have made love. The appellant must, therefore, have been sexually aroused when his wife entered the blankets. The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behavior. He, however, neither smacked, punched nor kicked her. Minimum force, so to speak, was resorted to in order to subdue the complainant's resistance.

From the reading of the above statement of the Court, it can be understood that the judge used the existence of a valid marriage contract between the appellant and the complainant as a mitigating factor in sentencing the complainant. The Court held that the spousal relationship between the parties should not be overlooked by any judge.<sup>372</sup>

Similarly, in *S v Moipolai*<sup>373</sup> the High Court used the existence of a relationship similar to that of a husband and a wife for 7 years between a man who raped his 8 month pregnant lover in the presence of another woman as a mitigating factor in sentencing such rapist.<sup>374</sup> After the judgments rendered by the High Court in the above cases, The Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 was enacted, which states that “When imposing a sentence in respect of the offence of rape the following shall not constitute

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<sup>365</sup> *Ibid*, para 5.

<sup>366</sup> *Ibid*.

<sup>367</sup> *Ibid*.

<sup>368</sup> *Ibid*.

<sup>369</sup> *Ibid*, para 6.

<sup>370</sup> *Ibid*, para 16.

<sup>371</sup> *Ibid*, para 18.

<sup>372</sup> *Ibid*, para 21.

<sup>373</sup> *S v Moipolai* 2005 (1) SACR 580 (BD).

<sup>374</sup> *Ibid*, para 26.

substantial and compelling circumstances justifying the imposition of a lesser sentence; any relationship between the accused person and the complainant prior to the offence being committed.”<sup>375</sup>

On the contrary, in *S v Baloyi*,<sup>376</sup> the Constitutional Court of South Africa held that the state is under an obligation to deal with domestic violence in a way that protects the rights of women to freedom and security of the person, to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the right not to be subjected to torture or cruel, inhuman or degrading treatment.<sup>377</sup>

The Constitutional Court further held that:<sup>378</sup>

The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 further confirms the country’s legal status on marital rape, stating that “it is not a valid defense for an accused person to contend that a marital or other relationship exists or existed between him or her and the complainant.”<sup>379</sup>

It should, however, be noted that despite the criminalisation of marital rape in South Africa, South African women are still victims of marital rape.<sup>380</sup> A study conducted in 2010 revealed that 18.8% of women admitted to being raped by their partners.<sup>381</sup> The prevalence of marital rape in South Africa, despite its criminalisation, is attributable to factors such as sex stereotypes, cultural and religious views, and lack of education and awareness.<sup>382</sup> Based on the experience of South Africa, it is evident that legislation alone is not sufficient to curb

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<sup>375</sup>The Criminal Law(Sexual Offences and Related Matters) Amendment Act, No 32 of 2007 Section 3(aA).

<sup>376</sup> *S v Baloyi* 2000 (2) SA 425 (CC).

<sup>377</sup> *Ibid*, para 11.

<sup>378</sup> *Ibid*, para 12.

<sup>379</sup> *Ibid*, section 56(1).

<sup>380</sup> Hancox G “Marital Rape in South Africa” October 25, 2012 available online at: <file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> (Accessed on March 12, 2013).

<sup>381</sup> *Ibid*.

<sup>382</sup> *Ibid*, p-4.

violence against women, such as marital rape.<sup>383</sup> In addition to criminalising marital rape, it is necessary to work on changing the perspectives and attitudes of society with regard to this issue.<sup>384</sup> Thus, gender-based stereotypes must be eliminated by creating awareness and educating society through the media.<sup>385</sup> Furthermore, education and public sensitisation about marital rape through the media are instrumental in combating marital rape.<sup>386</sup> Moreover, training must be given to the police and prosecutors, owing to the large number of reports about the insensitivity of the South African police towards marital rape victims.<sup>387</sup>

#### **4.4 Lessons that Ethiopia can learn from the law and jurisprudence of South Africa with regard to marital rape**

As previously mentioned, South Africa is a leading example of African countries that have criminalised marital rape.<sup>388</sup> The country has amended its laws so as to ensure the protection of the rights of women from domestic violence in general and marital rape in particular. The South African Prevention of Family Violence Act provides that a man can be accused of raping his own wife.<sup>389</sup> Hence, under the Prevention of Family Violence Act, a man cannot use the existence of a valid marriage contract as an excuse to commit rape. After the enactment of the Prevention of Family Violence Act, social service mechanisms were created in South Africa to ensure the safety of marital rape victims.<sup>390</sup> The Social Welfare Department, as well as NGOs, have been assisting victims of marital rape.<sup>391</sup>

Furthermore, the Domestic Violence Act of South Africa defines violence against women as encompassing physical abuse, sexual abuse, and emotional, verbal and psychological abuse.<sup>392</sup> Moreover, the Criminal Law (Sexual Offences and Related Matters) Amendment

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<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid.*

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid.*

<sup>387</sup> *Ibid.*

<sup>388</sup> Hancox G “Marital Rape in South Africa” October 25, 2012 available online at: <file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> (Accessed on March 12, 2013).

<sup>389</sup> Prevention of Family Violence Act, No. 133 of 1993 article 5.

<sup>390</sup> Seabi AT *Marriage, Cohabitation and Domestic Violence in Mpumalanga* (Mini-dissertation for Master of Social Sciences University of Pretoria 2009) p.35.

<sup>391</sup> *Ibid.*

<sup>392</sup> Domestic Violence Act No. 116 OF 1998 (1998)Section 1((vii i).



Act, No 32 of 2007 was enacted, which confirms the country's legal status on marital rape. It states that "it is not a valid defense for an accused person to contend that a marital or other relationship exists or existed between him or her and the complainant."<sup>393</sup> Based on the criminal laws of South Africa regarding domestic violence in general and marital rape in particular, it can be seen that South African criminal laws are aimed at enhancing the protection of women's human rights.

In contrast, under the Ethiopian criminal law system, the existence of marriage can be used as a valid defence by a man who raped his lawful wife.<sup>394</sup> Under the 1957 Penal Code of Ethiopia, criminal proceedings instituted against a rapist were discontinued if such rapist married the victim.<sup>395</sup> Therefore, under the previous and current criminal laws of Ethiopia, marriage has been used as a license to rape women.

Ethiopia has many lessons to learn from the criminal laws of South Africa, one of which is the removal of the marital rape exemption from its criminal code. Ethiopia should also pass a separate legislation protecting the human rights of married women, similar to that of the Family Violence Act of 1998. It should, however, be borne in mind that passing a legislation that criminalises marital rape does not solve the problem of marital rape. In light of the experience of South Africa, it can be seen that despite the criminalisation of marital rape, problems associated with marital rape still persist.<sup>396</sup> A study conducted by the Medical Research Council in South Africa in 2010 revealed that 18.8 % of women admitted to being raped by their spouses.<sup>397</sup>

According to Hancox, laws that criminalise marital rape are not enough to tackle the problem.<sup>398</sup> It is necessary to focus on changing the views of society regarding the rights of

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<sup>393</sup> The Criminal Law(Sexual Offences and Related Matters) Amendment Act No 32 of 2007 section 56(1).

<sup>394</sup> FDRE Criminal Code, article 620.

<sup>395</sup> Penal Code of the Empire of Ethiopia 1957, article 389.

<sup>396</sup>Hancox G "Marital Rape in South Africa" October 25, 2012 available online at: <file:///C:/Documents%20and%20Settings/saron/My%20Documents/marital-rape-south-africa.htm> (Accessed on March 12, 2013).

<sup>397</sup> *Ibid.*

<sup>398</sup> *Ibid.*

women and discrimination against women.<sup>399</sup> Similarly, Kungu contends that “Criminal law is limited in that it addresses the behavior but does not necessarily change the attitudes that produce the behavior, or the attitudes towards the harm itself. This means that the law may be explicit in its prohibition and consequences, but as long as the people themselves do not perceive marital rape to be harm, the law will not be effective.”<sup>400</sup>

As has been discussed earlier in this study, the Ethiopian society is patriarchal in nature. One of the main rationales behind the exemption of marital rape from punishment in the country is the deep-rooted view of society that having sexual intercourse with one’s husband is the duty of a married woman. Hence, there is a need to create awareness within society about the human rights of women, in order to eliminate discriminatory practices against women, such as marital rape. Furthermore, training should be given to the police, public prosecutors and judges on the human rights violations that are associated with marital rape.

#### **4.5 Summary**

South Africa is one of the leading African countries in criminalizing marital rape. The 1993 Prevention of Family Violence Act stipulates that a man can be found guilty of raping his wife. The Act was further amended by the Family Violence Act of 1998, which grants protection to victims of domestic violence. The Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 further affirms that the existence of a marital relationship cannot be used as a mitigating factor in sentencing a rapist. Although the criminalisation of marital rape in South Africa is a courageous step towards the protection of the rights of women, it has not entirely prevented marital rape in South Africa from occurring. In fact, studies show that marital rape is still a prevalent crime in South Africa. This can be attributed to various socio-economic and cultural factors. However, Ethiopia should address the issue of marital rape through statutory provisions as a first step even though criminalizing marital rape is not enough by itself to put a halt to the problem. Moreover, one of the lessons to draw is the fact that marital rape violates a number of women’s rights including the right to equality of women. Hence, rape should be viewed as a crime and punished accordingly, regardless of whether or not it is committed within

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<sup>399</sup> *Ibid.*

<sup>400</sup> Kung’u CW *Criminalization of Marital Rape in Kenya* (LL.M Thesis University of Toronto 2011) p.28.

marriage. Ethiopia should also enact a separate legislation on violence against women, similar to that of the 1998 Family Violence Act of South Africa, which protects women against family violence in general and marital rape in particular. Ethiopia should further provide legislation for the sentencing of rapists. In so doing, it should follow the example of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007, which provides that the existence of a marriage should not be considered as a mitigating factor in sentencing. Ethiopia should also learn that laws that criminalise marital rape are not enough to solve the problem and should therefore also focus on implementation mechanisms, political will to enforce laws as well as spend more on educating society about the rights of women and the effect marital rape has on them.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Conclusion**

Marital rape involves a man having sexual intercourse with his wife against her will. Traditionally, it was believed that it is the wifely duty of women to submit to the sexual desires of their husbands. There have been debates worldwide both for and against the criminalisation of marital rape. One of the major arguments against the criminalisation of marital rape is the consent theory developed by Sir William Hale. According to this doctrine, women have given their consent to have sexual intercourse with their husbands through the contract of marriage. Similarly, the “Unities” theory viewed women as properties of their husbands, and therefore incapable of making their own decisions.

International human rights instruments such as the DEVAW and the Beijing Declaration and Platform for Action recognise marital rape as one form of violence against women. Furthermore, General Recommendation No. 19 of the CEDAW provides that violence against women includes acts that cause physical and psychological harm to women. Taking into

account the physical and psychological trauma inflicted upon victims of marital rape, it goes without saying that it amounts to one form of violence against women under the CEDAW. South Africa is among the first African countries to criminalise marital rape. According to the 1993 Prevention of Family Violence Act, a man can be held liable and subjected to punishment for compelling his wife to have sexual intercourse with him against her will. Furthermore, the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 provides that the existence of marriage is not a valid defence to charges of rape.

In contrast, under the Current Criminal Code of Ethiopia, rape committed within wedlock is exempted from punishment. Hence, a rapist can use the existence of a marriage between him and the victim as a valid defence in order to escape punishment. Ethiopia is a state party to international human right instruments that protect women from discrimination and violence, such as the UDHR, the ICCPR, the CEDAW and the DEVAW. Under the CEDAW, state parties are required to take legislative and other measures to ensure the protection of the right of women to equality of. Denying protection to rape victims under the pretext of the existence of a marriage with the rapist violates the right to equality of men. Marital rape also infringes upon women's right to physical integrity, which is the most fundamental right possessed by individuals. Moreover, the physical and psychological suffering experienced by women as a result of marital rape constitutes an act of torture or cruel, inhuman and degrading treatment under the Convention against Torture (the CAT). The violation of the right of women to not be subjected to cruel, inhuman and degrading treatment in turn violates their right to human dignity.

The right to privacy involves the effective protection of individuals against unlawful attacks on their honour and reputation. Therefore, the right to privacy of women is also compromised as a result of marital rape. It should be noted that the above human rights violated by marital rape are recognised and protected by the Ethiopian Constitution, as well as international human rights instruments to which Ethiopia has acceded to. However, the Ethiopian Criminal Code has exempted marital rape from punishment, which denies married women all the above-mentioned human rights. Taking into account the physical and psychological suffering caused for women as a result of marital rape, the exemption of such violent acts from punishment contravenes the purpose of the Ethiopian Constitution, as well as international human rights law.

Due to various socio-cultural and economic factors, marital rape in Ethiopia often goes unreported. As a result, it is difficult to determine the exact prevalence rate of marital rape in the country. One of the reasons why marital rape remains unreported is the societal belief that submitting to the sexual desires of a man is the duty of his wife. In addition, talking about one's sexual relationship is considered to be a taboo in the country. Even when women find the courage to report an incident of marital rape, the police are hesitant to go further with criminal proceedings, due to the belief that relationships within marriage are personal and private. The fact that the law does not provide any remedy for this kind of rape also discourages the police from undertaking further investigations. Hence, no matter how grave the physical and psychological impacts of marital rape are, women do not have any redress against such an offence.

## **5.2 Recommendations**

Based on the conclusions drawn above, the researcher recommends the following actions in order to curb the human rights violations associated with marital rape in Ethiopia:

Firstly, the Current Criminal Code of Ethiopia must be amended to include marital rape in the forms of rape that are punishable by law. In other words, marital rape should be indicated as a crime punishable by law under the Criminal Code of Ethiopia. However, the criminalisation of marital rape does not in itself solve the problem if the law is not implemented. To curb non-implementation of laws on marital rape, the government must continuously be engaged in attempting to convince the legal community responsible for implementing the laws of the criminal nature of marital rape. In so doing, police officers, public prosecutors and judges should be sensitised and given training on the criminal nature of marital rape and the human rights violations associated with it.

Secondly, victims of marital rape should be encouraged to report the incident to the police, by creating a more welcoming environment among law enforcement agencies. In so doing, the government must focus on establishing special units of investigation and prosecution for sexual offences in general and marital rape in particular.

Thirdly, the penalties for marital rape must be specifically provided for and victims of marital rape should be granted appropriate redress for the harm that they have suffered. Like South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007, the existence of marriage should not be used as a mitigating factor in the sentencing of rapists. Hence, Ethiopian courts and other law enforcement bodies should treat husband rapists as severely as other rapists.

Fourthly, the House of Peoples' Representatives should take all the necessary steps to publicise international human right instruments to which Ethiopia has acceded that protect women from violence in the Federal Negarit Gazette of the country. It should translate such treaties into the official language of Ethiopia, in order to make it easier for the general public to understand and exercise their fundamental human rights.

Fifthly, taking into account its obligations under the CEDAW and the DEVAW, Ethiopia should learn from the laws of South Africa on marital rape and enact specific legislation aimed at curbing violence against women in general and marital rape in particular. Ethiopia should comply with its obligations under the CEDAW and the DEVAW to protect women from violence, by recognising marital rape as one form of violence against women, as stipulated under the DEVAW. Furthermore, the country should take legislative and other measures to enhance the protection of women's right to equality. In so doing, the government should implement measures such as media campaigns to sensitise society with regard to the issue of marital rape, as well as the publication of laws. Moreover, the government must design action plans and allocate sufficient resources to combating domestic violence in general and marital rape in particular.

In addition, the state should also do its best to abolish discriminatory customs, traditions and practices, such as abduction and early marriage, that hinder women's ability to exercise their human rights to dignity and equality. In so doing, the government should address harmful customs and traditional practices through public education programmes, and enforce the prohibition of such practices, with a special emphasis on rural areas.

Furthermore, education should be designed to make women aware of their human rights, such as the rights to bodily integrity, privacy, human dignity and equality, among others. The

educational administration of Ethiopia, as well as universities and academic institutions, must incorporate information about the law on rape and the consequences that it entails, as well as human rights that are violated as a result of rape in general and marital rape in particular, into the curriculum. Public education is also instrumental in sensitising the public and creating awareness about the evils of marital rape and the human rights that it violates. Hence, human rights education campaigns must be implemented within society at formal and informal levels by both government and NGOs working in the field of domestic violence.

In this regard, the Ethiopian government should encourage and work together with NGOs and civil society organisations to combat marital rape in Ethiopia. The government should cooperate with NGOs working in the field of domestic violence, in order to establish various institutions that provide support for victims of marital rape. Moreover, NGOs, the police, hospitals and judicial authorities should establish a network to exchange information and share experiences, in order to ensure the protection of victims of marital rape. The government and NGOs should further arrange training and workshops with a view to creating awareness on the issue of marital rape and the human rights violated as a result of it.

Lastly, the role of the media in changing the attitudes of society regarding domestic violence in general and marital rape in particular cannot be overstated. The media should create a strong forum for awareness raising and advocacy with regard to the human rights violations associated with marital rape. Furthermore, the media should provide response mechanisms for victims of marital rape and encourage them to report such incidents to the police.

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