



To cite this article: Eyerusalem Jima Haile, *Addressing Marital Rape In Ethiopia: An Alternative Approach*, *HARAMAYA LAW REVIEW* 10: 1-20 (2021)

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## ADDRESSING MARITAL RAPE IN ETHIOPIA: AN ALTERNATIVE APPROACH

*Eyerusalem Jima Haile\**

### Abstract

*Ethiopia is one of the countries with an explicit exemption of marital rape in its criminal code. Despite its prevalence, challenges associated with legal and socio-cultural factors are hindering a movement towards criminalization of marital rape. This article aims to address challenges of criminalizing marital rape through bottom-up approach which involves using community-based mechanisms as an instrument for law making. To that end, apart from theoretical frameworks and legal instruments, several foreign court cases are consulted. Furthermore, interview has been conducted with key and relevant individuals. Moreover, a comparative approach, by referring the practices of South Africa and Zimbabwe was employed to analyze techniques of criminalizing marital rape. It is argued that marital rape is a complex socio-legal problem and strategy to end it through criminalization is best achieved by employing community-based methods. The article affirms that marital rape is not a unique practice by a particular group or cultures; it is rather a universal problem. Thus, particularizing claim to legal and cultural causes cannot be used as a reasonable defence towards state failure to fulfil human rights obligations. Hence, culture and tradition should not be used as a defense for injustice rather; they should be used as tools to stigmatize violent behaviors. Moreover, criminalization of marital rape is an essential first step, but not the only means of addressing the problem. It is essential that criminalization measures be complemented with alternative solutions.*

**Keywords:** *Bottom-up approach, marital exemption, marital rape, sexual violence, Ethiopia*

### I. INTRODUCTION

Despite legal, institutional and social variations in addressing the problem of sexual violence, marital rape is the most widespread and socially tolerated human rights violation throughout the world.<sup>1</sup> According to the global studies, one third of women worldwide have

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\* The author has received LL.B from Wollega University School of Law and LL.M from Addis Ababa University. She is currently serving as a Lecturer at School of Law and Federalism at Ethiopian Civil Service University. The author is reachable at [jerylaw@gmail.com](mailto:jerylaw@gmail.com).

<sup>1</sup> KERSTIYLO&M.GABRIELA TORRES, RECONCILING CULTURAL DIFFERENCE IN THE STUDY OF MARITAL RAPE, MARITAL RAPE: CONSENT, MARRIAGE, AND SOCIAL CHANGE IN GLOBAL CONTEXT 9,10-18 (Oxford University Press, M. Gabriela Torres ed., 2016) (hereinafter Kersti & Gabriela, Marital Rape: Consent, Marriage, and Social Change in Global Context)

experienced life time sexual violence from their husband or intimate partner.<sup>2</sup> Marital rape causes severe physical, emotional and economic consequences on the victims and the society in general. The problem is so massive that United Nations, World Health Organization and other international organizations recognize the rising cases of marital rape as a 'global pandemic' with a call for standardized global accountability and exploring all legal and other protective initiatives to support women.<sup>3</sup>

Marital rape, involving sexual violence by intimate marital partner is recognized as violations of women human rights and a clear manifestation of sexual violence.<sup>4</sup> Given the violation of rights, many countries in the world eliminated laws granting spousal immunity in cases involving sexual violence by marital partner even though some countries have still maintained the legality of marital rape.<sup>5</sup> This signifies that the traditional patriarchal attitudes which label women as property of their husband interfered with legal sanctions in a large number of jurisdictions around the world.<sup>6</sup>

Sexual violence by marital partner is prohibited both under human rights instruments ratified by Ethiopia and the FDRE constitution.<sup>7</sup> However, Ethiopia has fallen short of its obligation by consistently upholding marital rape exemption. According to the 2016 Ethiopia Demographic and Health Survey (EDHS), nearly 34% of 'ever-married' women have experienced spousal physical, emotional and sexual violence out of which 10% constituted for spousal sexual violence.<sup>8</sup> Moreover, the study conducted by the World Health Organization (WHO) affirmed that nearly 59% of women in Ethiopia which is the highest figure among sample countries are

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<sup>2</sup> WORLD HEALTH ORGANIZATION (HEREINAFTER, WHO), VIOLENCE AGAINST WOMEN: INTIMATE PARTNER AND SEXUAL VIOLENCE AGAINST WOMEN, Fact Sheet, [www.who.int/mediacentre/factsheets/fs239/en/](http://www.who.int/mediacentre/factsheets/fs239/en/) (2016), available at <https://goldenageofgaia.com/2017/07/03/world-health-organization-sexual-violence-against-women/>, last accessed on 5 Sep, 2021.

<sup>3</sup> Kersti & Gabriela, Marital Rape: Consent, Marriage, And Social Change in Global Context, *Supra* note 1, at 9.

<sup>4</sup> COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, GENERAL RECOMMENDATIONS NO. 19: VIOLENCE AGAINST WOMEN, UN Doc. A/47/38 (1992), Para. 23. African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, (2003), Article 4(2)(a). See also World Health Organization, Responding to Intimate Partner Violence and Sexual Violence against Women, Clinical and Policy Guidelines (2013), at 12.

<sup>5</sup> Melanie Randall, *Marital Rape and Sexual Violence against Women in Intimate Relationships: The Less Recognized Form of Domestic Violence, the Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* 11, 11-40 (Melanie Randall, Jennifer Koshan & Patricia Nyaundi eds., Hart Publishing, 2017)

<sup>6</sup> *Id.*

<sup>7</sup> Ethiopia has ratified many of the international and continental human rights treaties that protect women's rights against sexual violence including International Convention on Civil and Political Rights (ICCPR), the Convention on the Elimination of Discrimination against Women (CEDAW), International Convention on Economic Social and Cultural rights (ICESCR) including African Charter on Human and Peoples' (ACHPR) and the Protocol to the African Charter on the Rights of Women in Africa. For detail see *infra* note 52 and *infra* note 69.

<sup>8</sup> Central Statistical Agency, Demographic and Health Survey, Ethiopia, (2016) at 289, Available at: '[Ethiopia Demographic and Health Survey 2016 \[FR328\] \(dhsprogram.com\)](https://dhsprogram.com)', (last accessed on 29 March 2021). [hereinafter EDHS,2016]

being victim of sexual violence by their sexual partner.<sup>9</sup> Furthermore, a growing number of national studies identified marital rape as a widespread sexual violence in Ethiopia.<sup>10</sup>

Legislatures and women rights advocates face serious challenges when raising human rights standards to argue for the criminalization of marital rape.<sup>11</sup> The universal human rights frameworks are resisted as being Eurocentric and unaware of the social and communal realities of women.<sup>12</sup> Hence, addressing questions of whether violation of women rights is inherent to customary laws and whether or not legal and cultural barriers could be raised as a defense for failing to criminalize marital rape is relevant.

The article discusses both the legal and practical aspect of marital rape. For this purpose relevant international and national laws are assessed. Interview has been conducted with key informants from justice sectors and Ministry of Women and Social Affairs (MoWSA). Furthermore, a comparative approach was employed to analyze the techniques of criminalizing marital rape by referring the experiences of South Africa and Zimbabwe. The two countries have been selected for three main reasons. One, they have transformed their legislation along with CEDAW and other human rights treaties. Two, they have in due course removed marital rape exemption and criminalized marital rape under their legal system and finally, they both share a great deal of parallel in socio-cultural and legal settings.

Differing from the previous works in Ethiopia that focus on rights based top-down claims to the problem, this article focuses on addressing challenges of criminalizing marital rape through community-based bottom-up approach.

Discussing about the issues related to criminalization of marital rape in the first introductory section, the rest of this article contains five sections. The second section provides a general overview focusing on the extent and effects of marital rape in Ethiopia. The third section discusses about the justifications of marital rape exemptions in general and, figures out Ethiopian marital rape justifications and exceptions in particular by analyzing the relationships between marital rape and violation of human rights on the one hand and, Ethiopia's obligation to take legal measures on the other. Section four discusses about the challenges and techniques of criminalizing marital rape basing on the experiences of Zimbabwe and South Africa. Section five examines the alternative and complementary measures for the criminalization of marital rape. Finally, section six summarizes the paper by providing concluding remarks.

## II. MARITAL RAPE IN ETHIOPIA: A GENERAL OVERVIEW

Marital rape is not a criminal act in Ethiopia. It is therefore difficult to obtain accurate data on sexual violence by marital partner. However, there are limited data and studies conducted in

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<sup>9</sup> WORLD HEALTH ORGANIZATION, PREVENTING INTIMATE PARTNER AND SEXUAL VIOLENCE AGAINST WOMEN: TAKING ACTION AND GENERATING EVIDENCE, (2010), at 13.

<sup>10</sup> See *infra* note 14 and *infra* note 18.

<sup>11</sup> VenkateshVasanthi, *Pluralistic Legal Systems and Marital Rape: Cross-National Considerations*, in Melanie Randal, Jennifer Koshan and Patricia Nyaundi, (eds.), *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*, OXFORD: HART PUBLISHING, 2017. 89 –136, (2019), at 8. [hereinafter Venkatesh]

<sup>12</sup> *Id.*

Ethiopia which can help make a reliable assertion regarding the extent of marital rape. In 2016, EDHS, collected data on spousal violence and found that 10% of 'ever-married women' have experienced sexual violence from their husbands, with 7% of spousal sexual violence experienced within the twelve months of the survey.<sup>13</sup> A systemic review finding by researchers on community-based cross-sectional studies in Ethiopia showed that nearly 19.2% to 78% women affirmed that they have experienced lifetime domestic violence from their intimate partners.<sup>14</sup> Similarly, 19.2% to 59% of women confirmed as they suffered continuous sexual violence by their intimate marital partner.<sup>15</sup> According to the survey, one in five women experienced sexual violence during pregnancy time.<sup>16</sup>

Marital rape has adverse impacts on women, families and societies at large as well. Women who are abused by their intimate marital partners suffer from physical, psychological and economic problems.<sup>17</sup> The survey conducted by Ethiopian Women Lawyers Association (EWLA) revealed that quarter of surveyed women were found to be victims of spousal rape and suffered physical attack when they refused sex.<sup>18</sup> Similarly, a case study conducted by Kebkab showed that the sexual attack caused the victims both psychological and physical harm. Among others, victims experienced betrayal, a feeling of shame on themselves, loss of trust on their husbands and humiliation. Moreover, the unwanted sexual aggression has resulted in body cut and unplanned pregnancy.<sup>19</sup> Marital rape is inherently humiliating and it is a clear violation of the human rights of women to dignity and equality.<sup>20</sup> Moreover, researchers found that marital rape amounts to cruel, inhuman and degrading treatment which violates the fundamental human rights of women and due to this, call for the criminalization of the act.<sup>21</sup>

Despite the adverse physical, psychological and economic consequences of marital rape, the government of Ethiopia preferred silence in considering the violation as personal and domestic matter. Yet, women in Ethiopia who are victim of marital rape are suffering the consequences of sexual violence behind the closed doors. The legal exemption under the Criminal Code of Ethiopia allows for a marriage to serve as a defense for the perpetrator. Differing from the previous works in the area, the writer aimed at exploring how to interfere in the legal exemptions

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<sup>13</sup> EDHS, 2016, *supra* note 8 at 289.

<sup>14</sup> Agumasie Semahegn & Bezatu Mengistie, *Domestic Violence against Women and Associated Factors in Ethiopia: SYSTEMATIC REVIEW*, REPRODUCTIVE HEALTH JOURNAL, 1, 4-5 (2015).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> WHO, *supra* note 9 at 16-20. The physical effect of marital rape results in different health problems including HIV, reproductive organ and urinary-tract infections and other sexually-transmitted diseases. The psychological impacts associated with marital rape and other forms of abuse by partners result in emotional suffering and suicidal thoughts. Sexual violence by intimate partners also downplays the family integrity mainly through undermining children's health and well-being both through the psychological impacts and undermining the ability of mothers to care for themselves and their children.

<sup>18</sup> Ethiopian Women Lawyers Association, BERCHI ANNUAL JOURNAL, Issue 7, (2008), at 45.

<sup>19</sup> Kebkab Sirgew, *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)*, Addis Ababa University, at 56.

<sup>20</sup> *Id.*, at 34.

<sup>21</sup> *Id.*, at 35.

focusing on challenges of criminalizing marital rape and figuring out an approach to end marital rape through criminalization by using community-based methods.

### III. HISTORICAL AND MODERN JUSTIFICATIONS FOR MARITAL RAPE EXEMPTION

#### A. Historical Justifications for Marital Rape Exemption

Delineation between ‘rape outside of marriage’ and ‘forced sex in marriage’ leads to differential treatment in the criminal law of most countries.<sup>22</sup> Traditionally, the legal definition of rape is limited only to forced sexual intercourse other than one’s wife.<sup>23</sup> This is known as the *marital exemption* and, for centuries, it made the marriage a license to rape.<sup>24</sup> The marital vow “I do” was taken as a full consent to have sex under any circumstance to free the husband from legal accountability for rape he commits on his wife.<sup>25</sup> The marital rape exemption entrenchment is a reflection of women’s subordinate status both in a wider society and in a marriage.<sup>26</sup>

Michelle J. Anderson recites three major theories for the labeling of marital rape as lawful under English common law. These theories are; property theory, the unity theory, and the ongoing consent theory.<sup>27</sup> Proponent of property theory labels unmarried woman as the property of her father and a married woman as the property of her husband. Rape was taken to be wrong doing by a man against his property.<sup>28</sup> Property theory gives the husband unlimited right by placing women as a chattel than human being. However, this theory received critics from courts of United States. In the case between *United States v. Trammel*, the court declared that “nowhere in modern society...is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being...”<sup>29</sup>

According to ‘unity theory,’ up on marriage, a husband and wife are regarded as one person that in effect put an end to woman’s independent identity and consolidated within her husband’s legal existence.<sup>30</sup> Different scholars have raised critics on this theory on the ground that husbands are charged for committing other crimes on their wife; yet, exempting them from criminal liability for committing sexual violence against their wife is unreasonable.

The third and the most dominant theory is the ongoing/implied consent theory. According to this theory, marriage is understood as granting a wife’s ongoing consent to sexual intercourse. This theory bases itself on dominant Sir Matthew Hale doctrine in the 17<sup>th</sup> century. Hale

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<sup>22</sup> Cemalettin Karadas, *A Comparative Study: Development of Marital Rape as A Crime in USA, UK and Turkey*, TURKISH JOURNAL OF POLICE STUDIES, Vol 10 (4), at 115, (2008).

<sup>23</sup> *Id.*

<sup>24</sup> Kersti Yllo, *Marital Rape, The Battered Women’s Justice Project*, (1996), at 2, available at: [https://www.bwjp.org/assets/documents/pdfs/marital\\_rape.pdf](https://www.bwjp.org/assets/documents/pdfs/marital_rape.pdf), (last accessed on 9 February 2020).

<sup>24</sup> *Id.*

<sup>25</sup> Diana E. Russell, *Rape in Marriage 1*, at 17 (MACMILLAN PRESS, 1990)

<sup>26</sup> Venkatesh, *supra* note 11, at 128.

<sup>27</sup> Michelle J. Anderson, *Marital Immunity, Intimate Relationships and Improper Inferences: A New Law on Sexual Offenses by Intimates*, HASTINGS LAW JOURNAL, Vol.54, 1463-1572, at 1476, (2003).

<sup>28</sup> *Id.*

<sup>29</sup> Linda Jackson, *Marital Rape: A Higher Standard is in Order*, WILLIAM & MARY JOURNAL OF WOMEN AND LAW, 183 at 188 (1994), See also *Trammel vs. United States*, 445 U.S. 40 (1980).

<sup>30</sup> See *supra* note 25.

indicated that “the husband cannot be guilty of a rape he committed on his lawful wife, for by their mutual matrimonial consent and contract, the wife has given up her in this kind unto her husband whom she cannot retract.”<sup>31</sup> The idea behind the implied consent is that since sexual intercourse is the vital part of the union, it is not always necessary for the husband to obtain the consent of his wife for sex. Forcing of wife for sexual intercourse is an indication of exercising legitimate right under the marital contract.

The critics to implied consent theory justify that in the normal course of events, private parties to the contract seek redress from the court of law than taking self-help remedy. Similarly, if a woman refused to fulfill her sexual duty, the husband should not have resorted to forced sex violating the protected rights of women.<sup>32</sup> Criticizing the theory, in a House of Lords decision in *R v R*<sup>33</sup> Lord Hale declared that;

...the idea that a wife, by marriage consents in advance to her husband to having sexual intercourse with her whatever her state of health is or however her objections is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the criminal law...Hence, it shall not be right for husband to force his wife for sexual intercourse whenever he needs.

### **B. Modern Justifications for Marital Rape Exemption**

In today’s world, there are countries which still maintain marital rape exemption by excluding marital rape from the realm of their penal codes. Most countries use modern theories that are more acceptable than their predecessors. The modern theories justify spousal rape exemption based on the justification of marital privacy, marital reconciliation, and fear of false allegations. Moreover, difficulty of proof and less seriousness of marital rape are also categorized under modern justifications for marital rape exemption.

Proponents of marital privacy advocate that the right to privacy of marriage is so fundamental that any one should not interfere.<sup>34</sup> Arguing against marital privacy, Fus holds that it is not possible to exclusively grant marital privacy to non-consensual act.<sup>35</sup> As a husband cannot be immune for beating his wife, it cannot be possible to justify rape of one’s wife under the guise of marital privacy.<sup>36</sup> Courts of different jurisdictions rejected marital privacy theory by proposing sound counter-arguments. In *People v. Liberta* case,<sup>37</sup> the New York Court of Appeals rejected the marital privacy argument and stated that the right to marital privacy of spouses applies only to consensual acts not to degrading violent acts. Furthermore, the court firmly stated

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<sup>31</sup> *Id.*

<sup>32</sup> Maria Pracher, the Marital Rape Exemption: A Violation of a Woman's Right of Privacy, GOLDEN GATE UNIVERSITY LAW REVIEW, Women's Law Forum, 11(3) (1981).

<sup>33</sup> *R v R*, [1992] 1 A.C. 579 at 610, Available at:

<https://www.casemine.com/judgement/uk/5a8ff8c960d03e7f57ecd66c> (last accessed on 4 March 2020)

<sup>34</sup> Linda, *supra* note 29, at 189.

<sup>35</sup> Fus Theresa, *Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches*, VANDERBILT JOURNAL OF TRANSNATIONAL LAW, Vol.39, 514 (2006).

<sup>36</sup> *Id.*

<sup>37</sup> *People vs. Liberta*, 62 N.Y.2d 651; 1984 N.Y. Available at: <https://www.casebriefs.com/blog/law/family-law/family-law-keyed-to-weisberg/being-married-regulation-of-the-intact-members/people-v-liberta-3/> (last accessed on 23 Aug 2021)

that marital privacy is not unlimited right that can be practiced at the cost of individual integrity. Hence, it is the duty of the state to balance the interest of marital and individual rights.<sup>38</sup>

The concern over false accusation and difficulty of proof arguments bases itself on familiar Lord Hale's caution that says "rape is an accusation easily to be made and hard to be proved and harder to be defended by the accused" is taken as a ground in different admonitory jury directions to reduce the chance of accusation of marital rape.<sup>39</sup> However, opponents of cautionary based rationalization propose three justifications. First, there are crimes like arson whose claims are also very difficult to prove and susceptible for false criminalization<sup>40</sup> though such crimes are criminalized. Second, conviction is not the sole purpose of punishment; it rather serves to create deterrence and educate people about morally right and wrong conducts/behaviors.<sup>41</sup> Finally, rape is enormously under-reported crime due to the nature of the crime and factors associated with victims' fear of social stigma, revenge and double victimization of the judicial system.<sup>42</sup> Thus, they concluded that the fear of false accusation has no valid ground as prosecution of marital rape is considered as humiliating for victim than defendant.<sup>43</sup> The above justifications are also further supported by common law courts. In the case between *Warren v. States*,<sup>44</sup> the court held that there are no crimes by which criminals are given a green card with for mere reason that victims might fabricate the case. Furthermore, in the case between *People v. Liberta*,<sup>45</sup> the court consigns strong justification stating 'if false allegation is the ground for exclusion, all the crimes except homicide remain unpunished.'

### C. Marital Rape Exemption in Ethiopia

#### 1. *The Criminal Code of Ethiopia*

Before the revision of the 2004 Criminal Code, the 1957 Penal Code of Ethiopia served as a penal law to punish criminal acts. The 1957 Penal Code did not only exempt marital rape, but also, contained a provision that prohibited the prosecution of the offender who committed an ordinary rape in the event of subsequent marriage even.<sup>46</sup> The Penal Code thus provided for two forms of exemptions. First, by the definition of Article 589 (1), marital rape is exclusively exempted and second, by virtue of Article 599, an ordinary rape could take the position of marital rape and perpetrator would be exempted from prosecution if he subsequently concluded marriage with the victim. An ordinary rape exemption, among others, raised serious concerns given the rising cases of abduction and subsequent marriages in Ethiopia. The voice called concerns on discriminatory nature of the law and its revision.

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<sup>38</sup> *Id.*

<sup>39</sup> Linda, *supra* note 29, at 191.

<sup>40</sup> *Id.*, at 192.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Linda, *supra* note 29, at 192. See also *Warren v. State*, 336 S.E.2d 221, 225 (1985).

<sup>45</sup> *People v. Liberta*, *Supra* note 37.

<sup>46</sup> PENAL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No. 158 of 1957, FED. NEGARIT GAZETA, (1957), Art. 599.

The 2004 Criminal Code of Ethiopia<sup>47</sup> which came into force with a view to fill the gaps and rectify the shortcomings of the Penal Code. Those provisions of the previous Penal Code that discriminated against women were omitted from the 2004 Criminal Code and some others have significantly been revised. For instance, Article 599 of the Penal Code which legitimized rape in the event of subsequent marriage was omitted from 2004 Criminal Code. To the contrary, the 2004 Criminal Code, under Article 587 (2) and (3), provides that in the case of an act of abduction accompanied by rape, “the conclusion of a marriage between the abductor and the abducted subsequent to the abduction shall not preclude criminal liability.”

Nevertheless, the 2004 Criminal Code makes no change in the definition of rape and in such way, excludes marital rape from being considered as a crime. In the amendment process of the 1957 Penal Code, EWLA and other Civil Society Organizations argued for the criminalization of marital rape.<sup>48</sup> However, the Ethiopian House of Peoples Representatives rejected the quests for failing to maintain *status quo* and on the ground that marital rape is too personal to be enclosed under the criminal law.<sup>49</sup> Article 620 of the Criminal Code stipulates that “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.” The term outside *of wedlock* excludes the husband from prosecution which means, the husband is not guilty of raping his wife. The clear provisional exception is an indication of discriminatory moral values against women.<sup>50</sup> Thus, due to this exclusionary provision, women in Ethiopia are suffering from sexual violence with grave human rights violations.

## **2. Marital Rape as a Violation of Laws Protecting Human Rights of Women in Ethiopia**

Sexual violence by marital partner violates a bundle of women rights. Various international and regional human rights instruments have recognized sexual violence in general and marital rape in particular as a violation of the fundamental human rights of women.<sup>51</sup> Above all, rape by intimate marital partner is established as contrary to respect for human dignity and the right to equality.<sup>52</sup> This sub-section is aimed at showing the relation between marital rape and violation of human rights articulating why Ethiopia is obliged to take legal measures against the violence.

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<sup>47</sup> THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA 2004, Proclamation No. 414/2004, FED.L NEGARIT GAZETA,(2005) (herein after The Criminal Code of FDRE).

<sup>48</sup> Hiwot D. Meshesha, *Analysis of Marital Rape in Ethiopia in the Context of International Human Rights*, (Unpublished, Master of Laws at the University of South Africa 2014), at 15.

<sup>49</sup>*Id.*

<sup>50</sup> Tsehai Wada, *Rethinking the Ethiopian Rape Law*, XXV, JOURNAL OF ETHIOPIAN LAW, 190-226, at 216 (2012).

<sup>51</sup>COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, GENERAL RECOMMENDATIONS NO. 19: VIOLENCE AGAINST WOMEN, UN Doc. A/47/38 (1992), (CEDAW Committee General Recommendations No. 19), Paragraph 23, UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) General Comment 14 (11 August 2000) Paragraphs 10, 21, 35, 36. See also African Union, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa(Maputo Protocol), (11 July 2003) Art. 4(2(a).

<sup>52</sup> *C.R. v.the United Kingdom*, ECHR 22 (1995). In the Strasbourg, European Court of Human Rights on case number 20166/92 and 20190/92 established that the rape of a women by intimate partner is a clear violation of human dignity and equality.



### ***Marital Rape Violates FDRE Constitution***

The FDRE constitution (hereafter the Constitution) is a catalogue of the fundamental rights of individuals. Being this the case; the Constitution recognizes equal rights of women and men during marriage.<sup>53</sup> This is extended to every marital relation including their right to have equal say on sexual matters. The Constitution, under Articles 16 and 17, has guaranteed the rights to liberty and security of person respectively. Based on Article 16, women have a constitutional right to be protected against bodily harm. Further, Article 35 (4) obligates states to protect women against harmful customs and traditions that can cause physical and mental health. Additionally, there are provisions of the Constitution that have direct relevance to protect women against marital rape including the right to human dignity and honor<sup>54</sup> and the right to protection against inhumane treatment<sup>55</sup> as women have equal rights to enjoy all rights enumerated under the Constitution.<sup>56</sup>

Considering such recognized rights, we can understand how marital rape violates constitutionally guaranteed fundamental rights of women. It is not possible to enjoy basic rights where marital rape is normalized through patriarchal thinking and with the excuse of conjugal rights. Furthermore, Article 13(1) of the Constitution obliges all the executive, legislative and judiciary branch of the government to respect and enforce all the constitutionality guaranteed rights. Moreover, Article 37(1) of the Constitution provides that “everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.” Thus, exempting the perpetrator of marital rape from criminal liability is a clear breach of the state’s constitutional obligation to protect fundamental rights of women in marriage.

### ***International and Regional Human Rights Instruments***

The government of Ethiopia has signed and ratified different international and regional human rights instruments. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>57</sup> is the main instrument addressing discrimination against women. CEDAW does not address discrimination against women including marital rape explicitly. However, the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) has adopted recommendations that are essential in extending the definition of CEDAW to include gender-based violence.<sup>58</sup> According to the definition, discrimination includes

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<sup>53</sup> THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, PROCLAMATION No. 1/1995, FED. NEGARIT GAZETA, (1995), Art. 35(1), (Here in after FDRE Constitution).

<sup>54</sup> *Id.*, Art. 24(1).

<sup>55</sup> *Id.*, Art. 18(1).

<sup>56</sup> *Id.*, Art. 35(1). This is further supported by Article 25 of FDRE Constitution equality provision.

<sup>57</sup> CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN [here in after CEDAW], United Nations General Assembly Resolution 34/180, (1981).

<sup>58</sup> CEDAW Committee, *Supra* note 51, Paragraph 6. Committee on the Elimination of Discrimination against Women, General Recommendations No. 35: Violence against Women, Updating General Recommendation No.19 (2017), Para. 9.

gender-based violence against women that inflicts physical, physiological and sexual harm or suffering.<sup>59</sup> CEDAW provides that women and men should enjoy equal rights within marriage.<sup>60</sup>

The realization of equal rights pertaining to marriage can be manifested through agreements of spouses on sexual matters as well.<sup>61</sup> Moreover, a general recommendation of CEDAW Committee on the Elimination of Discrimination against Women affirms that rape is one way of reflecting violence within family relationship.<sup>62</sup>

Furthermore, CEDAW places a duty on states to take any legislative and other relevant measures to ensure that the equality between women and men with regard to marriage and family relations are maintained.<sup>63</sup> CEDAW also requires states to change discriminatory customs and cultures and further demands prioritizing women rights over protection of communal practices.<sup>64</sup> The CEDAW Committee noted that “states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and, for providing compensation.”<sup>65</sup>

Declaration on the Elimination of Violence against Women (DEVAW) is a soft law with a persuasive value, to which Ethiopia is a signatory. DEVAW addresses the violation of marital rape explicitly. Accordingly, violence against women is any act that occurs in public or private life which could result in physical, sexual and psychological harm and includes among others, marital rape.<sup>66</sup> DEVAW declares that violence against women is a violation of women human rights and one way of forcing women into a subordinate status.<sup>67</sup> DEVAW also calls for state parties to eliminate any customary, religious and traditional notions that undermine women and punish the wrong doers.<sup>68</sup>

Ethiopia has also signed and ratified international bill of human rights that include ICCPR, ICESCR and Universal Declaration on Human Rights (UDHR). The fundamental human rights guarantees are relevant for protection of women against sexual violence. Both the ICCPR and UDHR provide the right of a person to be free from torture and inhuman treatment including the right to physical and mental integrity and dignity of individuals.<sup>69</sup> The concluding observation of the human rights committee stipulated that state party to the treaty is legally obliged to define and criminalize marital rape.<sup>70</sup> Moreover, ICESCR grants the ‘right to the highest attainable

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<sup>59</sup> *Id.*, CEDAW Committee, *Supra* note 51, Para. 6.

<sup>60</sup> CEDAW, Article 16.

<sup>61</sup> Dubravka Simonovic, *International Framework on Violence against Women with Focus on the CEDAW*, Expert Group Meeting Prevention, at 12.

<sup>62</sup> CEDAW Committee, *supra* note 51, Para. 23.

<sup>63</sup> *Id.*, Para. 16 (1).

<sup>64</sup> CEDAW, *supra* note 57, Art. 2 (f). See also CEDAW, Art. 5.

<sup>65</sup> *Id.*, Para. 9.

<sup>66</sup> Declaration on the Elimination of Violence against Women (DEVAW), United Nations, Resolution 48/108, (1993), Art. 1 & 2(a).

<sup>67</sup> *Id.*, Preamble Para. 5 & 6.

<sup>68</sup> *Id.*, Art. 4(j) & 4(d).

<sup>69</sup> UDHR, Art. 5, ICCPR, Art. 7.

<sup>70</sup> UN Human Rights Committee (HRC), Concluding Observations on the United Republic of Tanzania, (6 August 2009) CCPR/C/TZA/CO4, Para. 10.

standard of mental and physical health.<sup>71</sup> In this regard, the UN Committee on Economic, Social and Cultural Rights provides that the violations of the right to health can be realized through legal enforcement.<sup>72</sup> As established before, marital rape violates women's personal integrity and dignity and gravely affects mental and physical health as well.

Regionally in 2018, Ethiopia ratified the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) with a clear reservation of marital rape provision.<sup>73</sup> Protection of women from all spheres of violence including marital rape is the main obligation of under the Maputo Protocol. The marital reservation raised huge internal critics on Ethiopia's commitment towards protecting women from sexual violence. Concerned by such regressive measures, in its 2019 Concluding Observation, the CEDAW Committee urged Ethiopia to withdraw its reservation from Maputo Protocol and to criminalize marital rape.<sup>74</sup>

The above legal frameworks, explicitly illustrate Ethiopia's legal obligations to combat harmful cultural practices, prejudices and, in particular, to protect women from sexual violence including marital rape.

### ***3. Challenges to Criminalizing Marital Rape in Ethiopia***

Marital rape is a complex legal and societal problem where several factors play a role of curtaining the infringement of the rights and its consequences. Even, those countries that criminalize the act are facing challenges to effectively address the problem. Based on the interview result and focus of the article, two core factors associated with the prosecution and socio-cultural barriers are highlighted as follows;

#### ***Criminal Law and Evidentiary Concern***

Some statutes exclude marital rape prosecution to avoid further challenges in prosecution. According to the respondent from the Ministry of Justice, the main challenge on prosecuting marital rape starts from marital rape exemption under the Criminal Code which makes the task of prosecution impossible.<sup>75</sup> Difficulties of producing evidence and fear of revenge have limited many women from reporting the violence.<sup>76</sup> She further added that reservations associated with the nature of the crime and challenges of proof have limited the effectiveness of the justice sector.<sup>77</sup> It is feared that since the judgment of the court is based on evidence, it will be hard to

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<sup>71</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) Art. 12.

<sup>72</sup> UN Committee on Economic, Social and Cultural Rights (Committee on ESCR), General Comment 14 (11 August 2000), Para 1.

<sup>73</sup> African Commission on Human and Peoples' Rights, Ratification Table-Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, Available at: [African Commission on Human and Peoples' Rights Ratification table \(achpr.org\)](https://www.achpr.org/ratification-table-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa), (last accessed on 10 Sep 2021).

<sup>74</sup> Committee on the Elimination of Discrimination against Women, Concluding Observation, CEDAW/C/ETH/CO/8 (2019).

<sup>75</sup> Interview with Enku Asnake, Women and Children Affairs Directorate, Office of the FDRE Attorney General, on 4th December 2020.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

proof the occurrence of rape within marriage.<sup>78</sup> However, the experience of other countries suggests that such fears are not tenable.

Furthermore, the respondent from Ministry of Women and Social Affairs (MoWSA) has indicated that marital rape is highly intertwined with culture based stereotypes.<sup>79</sup> Some individuals even consider the quest for criminalization as the extreme aspect of gender movement. A bunch of complex issues including the concern over family integrity, false accusation and evidence matters cover the concern of criminalization.<sup>80</sup>

On similar concern, in the interview made with a public prosecutor working in the Ministry of Justice underlined the need to depoliticize marital rape.<sup>81</sup> She asserted that, undoubtedly proving marital rape is challenging for lawyers and judges. Nonetheless, the challenge is not only for marital rape, but also, for all sexual related crimes. Hence, legal system should look for the ways how to resolve this challenge than to weigh the challenges more than the law.<sup>82</sup>

The writer argues that magnifying concerns over evidence and the would be false allegation at the cost of women right is not justifiable and in fact, amounts to double violations of right though it is less probable for women to file a false accusation. In both marital rape and rape outside of marriage, the proof is difficult as the crime is not committed publicly. The court can prove with especial techniques including sign of physical resistance, physical injury and medical evidence as it is being done in other jurisdictions. Moreover, Ethiopia is a country where marriage is considered as a private issue and exposing marital issue is considered wrong.

### ***Socio-cultural Factors***

The actions and attitude of the community play an immense role in shaping the legal and social environment of victims. Ethiopia is one of the patriarchal societies where male dominance and control is considered as a norm. Social and cultural acceptance of marital rape as a common trait in marriage creates a big challenge in addressing the problem of marital rape in Ethiopia.

In this regard, the interviewed respondent from MoWSA indicated that criminalizing marital rape that involves fleeing the social and cultural hurdles is not an easy task. First, law is drafted with the consideration of culture and custom of the society. Since marital rape is not considered as wrong by our community, it will be challenging to divert the attitude of the society.<sup>83</sup> Second, it is believed that criminalizing marital rape affects continuation of the marriage.<sup>84</sup> The writer believes that marriage should not exist at the cost of spouse's emotional death and it is the duty of the government to safeguard the physical, psychological and mental well-being of women.

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<sup>78</sup> *Id.*

<sup>79</sup> Interview with Mr. Seleshi Tadesse, Director of Women Issue Mobilization and Participation, Ministry of Women and Children Affairs (MoWCA), on 10<sup>th</sup> December, 2020.

<sup>80</sup> *Id.*

<sup>81</sup> Interview with Liya Eskinder, Head of Women and Children affairs, FDRE Attorney General, Bole Branch, on 13<sup>th</sup> December 2020.

<sup>82</sup> *Id.*

<sup>83</sup> Interview with Mr. Seleshi Tadesse, *supra* note 79.

<sup>84</sup> *Id.*

A study conducted in Western part of Ethiopia, from the urban and rural settings, indicates that the attitude of people and traditional norms play an immense role in safeguarding the act of sexual violence by intimate partner.<sup>85</sup> Majority of women prefer tolerating the husband in silence than externalizing the matter.<sup>86</sup> The study indicated that misuse of biblical verse which dictates the wife to submit for her husband is repeatedly raised as a defense to abuse women.<sup>87</sup> Additionally, gender stereotypes, which put women to behave passively and not to speak out marital matters, created condition under which intimate violence against women are tolerated.<sup>88</sup> Similarly, a study conducted in Southern part of Ethiopia found out that 9.4% of women who are victim of marital rape tolerated the sexual violence because of cultural influences.<sup>89</sup> The study identified that there is a general tagging which put men as having biological desire for sex which is ‘similar to hunger.’<sup>90</sup> Thus, wives are required to be sexually ready to fulfill the desire of their husband; if not, they should face the consequences that are acceptable and pardonable.<sup>91</sup>

There are also several cultural norms and practices that contributed to continuous violence against women. To mention, early marriage and abduction are common harmful cultural practices are prevalent despite rare prosecutions based on existing laws. Abduction and rape are the causes for 69% marriage in Ethiopia.<sup>92</sup> As discussed earlier the law imposes clear obligation on state parties to eliminate and abolish cultural and gender-based stereotypes that result in discriminatory treatment of women.<sup>93</sup> The failure of the state to criminalize marital rape is an affront to women’s dignity. Apart from deterring potential criminals, criminal law has vital role in shaping the society’s attitude toward gender stereotypes.

### ***Can Culture be a Cause for State Failure?***

As discussed above, in most cases, states raise culture-based excuses for failing to comply with their international human rights obligations. Imposing western based oriented right frameworks are resisted as being Eurocentric and unable to respond to the specific social and cultural settings. This section responds to culture based resistance basing on African human rights instruments. Accordingly, in order to address the critics targeted on international human rights instruments, African regional human rights instruments are adopted with the consideration

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<sup>85</sup> Sileshi Garoma Mesganaw Fantahun & Alemayehu Worku., Intimate Partner Violence against Women in West Ethiopia: A Qualitative Study on Attitudes, Woman’s Response, and Suggested Measures as perceived by Community Members, *Journal of Reproductive Health*, 1, 1-2 (2012).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, at 4.

<sup>88</sup> *Id.*

<sup>89</sup> Helen Abelle, *Marital Rape as a Violation of the Fundamental Human Rights of Women, the Case of Hawassa City*, 1,141-142, (Unpublished Thesis, Addis Ababa University, Institute of Human Rights, 2011).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, at 142.

<sup>92</sup> Johann Hari, Ethiopia's Forced Marriages, Kidnapped, Raped, Married Ethiopia’s Wives, the Extraordinary Rebellion of Ethiopia's Abducted Wives, *Independent, World Africa News*, (2010).

<sup>93</sup> FDRE Constitution, *supra* note 53, Art 35(4) & CEDAW, *supra* note 57, Art. 2(f).

of the African values and claims of African women.<sup>94</sup> The **African Charter** on Human and Peoples' Rights (ACHPR) obliges states to protect women from any discriminatory practices and ensure women's protection based on international human rights instruments.<sup>95</sup> Furthermore, the Maputo Protocol obligates states to prevent and punish all forms of sexual violence and discrimination against women including marital rape.<sup>96</sup> Thus, the African human rights instruments unequivocally provide protection for women and obligate states to create a domestic environment free from social and cultural acts of violence. Therefore, holding marital rape exemption with the cover of culture cannot be realistically defended.

The human rights discourse has been criticized for being stereotypical where gender-based violence are particularly labeled as traditional and non-Eurocentric.<sup>97</sup> Violence against women cannot be monolithically described.<sup>98</sup> Neither can the experience of women be specified to a certain tribe, race and other social categories.<sup>99</sup> Unlike unique practices to a particular culture and groups, sexual violence by intimate partner is practiced and condoned by most states across the world.<sup>100</sup> In most cases, the states use culture-based excuses to retain patriarchy and to cover their obligation.<sup>101</sup> As culture should no more be an excuse, the Ethiopian government is required to revisit its stand on marital rape.

#### IV. CRIMINALIZING MARITAL RAPE: A LESSON FROM SOUTH AFRICA AND ZIMBABWE

South Africa and Zimbabwe are exemplary African countries in explicitly criminalizing marital rape in their legal system. Both countries have a patriarchal society that uses sexual violence as a control mechanism and for the oppression of women. In spite of this fact, the two countries transformed their legislation along with the human rights treaties and in due course removed marital rape exemption and criminalized marital rape under their legal system.

South Africa is the leading African country in criminalizing marital rape. The country is known for the prevalence of rape cases and named "rape capital of the world."<sup>102</sup> Until the year 1992 to 1993, spousal rape is highly undervalued by the society and rape is perceived to be committed outside of marriage.<sup>103</sup> In 1992, in the case between *State v Ncanywa*,<sup>104</sup> the supreme

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<sup>94</sup> African Charter on Human and Peoples' Rights, (Banjul Charter), adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), (Entered in to force 21 October 1986).

<sup>95</sup> *Id.*, Art. 2 & 18.

<sup>96</sup> African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 Art. 4(b) (e).

<sup>97</sup> Venkatesh, *supra* note 11, at 117.

<sup>98</sup> *Id.*, at 91.

<sup>99</sup> Kimberle W. Crenshaw, *Mapping the Margins: Inter-sectionalist, Identity Politics, and Violence against Women of Color*, 43 STANFORD LAW REVIEW 1241 (1990).

<sup>100</sup> *Id.*

<sup>101</sup> Venkatesh. *Supra* note 11, at 91.

<sup>102</sup> Rachel Jewkes & Naema Abrahams, *The Epidemiology of Rape and Sexual Violence in South Africa an Overview*, SOCIAL SCIENCE AND MEDICINE JOURNAL, vol 55, 1231-1232 (2002).

<sup>103</sup> *Id.*

<sup>104</sup> *S v Ncanywa*, 2 SA 182 (Ck) 1992 Available at:

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/assaf11992&div=27&id=&page=> (last accessed on 22 Jul 2021).

court of South Africa firmly held that wife is bound to unlimited sexual duty up on marriage is a fiction that offends good morals.<sup>105</sup> The judge convicts the accused with a ground that, in modern world, where marriage is an institution of two equal partners, the husband has no right to have sex without the will of his wife.<sup>106</sup>

As a response to the Supreme Court ruling above, in 1993, Prevention of Family Violence Act was enacted. This marked the first step to remove marital rape exemption in the country.<sup>107</sup> It reads that “Notwithstanding anything to the contrary contained in any law, a husband may be convicted of the rape of his wife.”<sup>108</sup> Though the Family Violence Act was a breakthrough towards fighting marital rape, it was criticized for its shortcomings to address serious issues. Du to this, the 1993 Prevention of Family Violence Act was replaced by the Domestic Violence Act of 1998 which addressed the limitations observed in the previous Act.<sup>109</sup> The Domestic Violence Act further provided extended definition of domestic relations by recognizing cultural and religious marriage.<sup>110</sup> The domestic violence, as it is defined under the Act includes; physical abuse, sexual abuse, emotional abuse; verbal abuse and psychological abuse which provide full fledge protection for sexual abuse in domestic relations.

Furthermore, South Africa shows stiff legal position on marital rape by enacting the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007. 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>111</sup>

In spite of legislative and judicial measures, the patriarchal thinking surrounding marital rape still persists among the society in South Africa. A case between *S v Modise*<sup>112</sup> is one manifestation of the huge barrier behind marital rape. In this case, Judge Gura reasoned out that “The desire to make love to his wife must have overwhelmed him; hence, his somewhat violent behavior...however...minimum force, so to speak, was resorted to in order to subdue the complainant’s resistance...this relationship, of husband and wife should never be overlooked by any judicial officer ,” This can give a lesson that although legislative measures are steps towards the right path, effective realization of marital rape laws cannot be achieved without making the community part of the change.

Zimbabwe is also another African state that has removed marital rape exemption and criminalized spousal rape under its legal system. According to Zimbabwean Criminal Codification and Reform Act No. 23/2004 “Marriage shall not be a defense to a charge of rape...

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Prevention of Family Violence Act, No. 133, S.5 of 1993.

<sup>109</sup> *Id.*, at 5.

<sup>110</sup> Regulation under the Domestic Violence Act, (1998, Act 116 of 1998), Government Gazette 20601, Government Notice No.R.1311.

<sup>111</sup> CRIMINAL LAW SEXUAL OFFENCES AND RELATED MATTERS, Amendment ACT 32 of 2007, Government Gazette 30599, 14 December 2007, Republic of South Africa, Section 56(1).

<sup>112</sup> *S v Modise* (113/06) [2007] ZANWHC 73 (9 February 2007).

that the female person was the spouse of the accused person at the time of any sexual intercourse or other act that forms the subject of the charge.”<sup>113</sup>

Zimbabwe has further strengthened protection for victims of domestic violence under its Domestic Violence Act, which defines violence as “any unlawful act, omission or behavior which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes-physical abuse, sexual abuse and emotional, verbal and psychological abuse.”<sup>114</sup> According to Zimbabwe Domestic Violence Act, a compliant includes “a current, former or estranged spouse of respondent and any person who is or has been in an intimate relationship with the respondent.”<sup>115</sup>

Zimbabwe is a patriarchal society where the culture of tolerance has dominated the institution of marriage.<sup>116</sup> According to the Zimbabwe Demographic and Health Survey, 35% of every married woman suffers from physical and sexual violence from spouses.<sup>117</sup> In spite of the problem, marital rape remains under reported and many women suffered in silence. For instance, “a 27-year-old soldier (husband) from *Induna Barracks* locked up his wife in the bedroom, stuffed her mouth with a dirty wet shirt, tied her hands with an electrical cable, tied her legs with a piece of wire and brutally raped her”<sup>118</sup> for which the court sentenced the husband for 12 years. Following the judgment, the victim suffered from massive social scandals for what happened to her husband. From this, we can understand the need for community-based approach and methods to change the law and attitudes of the society side by side.

From the legal system of the two countries, the government of Ethiopia can learn that the legal abolition of marital rape is a big milestone in protecting the rights of women an. However, criminalization alone cannot bring a lasting change. Hence, it is necessary to trail marital rape criminalization through community-based mechanisms. Community involvements at every stage from the initial mindset to the implementation level is essential to bring about a lasting change as any legal measure, if not enforceable by the community, has no any use.

## V. ALTERNATIVE APPROACHES TO CRIMINALIZATION OF MARITAL RAPE

### A. Community Based Approaches

So far, different scholars in Ethiopia have been calling for criminalization of marital rape focusing on top-down approach that involves declaring a law by a centralized authority to be obeyed and respected by individuals.<sup>119</sup> This article stresses on bottom-up approach of legal

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<sup>113</sup> CRIMINAL CODIFICATION AND REFORM ACT, Act 23 of 2004, Government Gazette, 3 June 2005, Zimbabwe, Chapter 9:23.

<sup>114</sup> Domestic Violence Act, (Zim), Act No. 24 of 2006, *Government Gazette*, (2007), (hereinafter Domestic Violence Act)

<sup>115</sup>*Id.*

<sup>116</sup> Phylis Mbanje, *Spousal Rape Remains under Reported*, NEWSDAY, (15 Dec 2019).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Rachlinski, Jeffrey J, *Bottom-Up versus Top-Down Lawmaking*, CORNELL LAW FACULTY PUBLICATIONS, 2,1-33 (2006).



reform on marital rape. Bottom-up approach involves abstracting a law or general principles from the decision made in communal and individual cases.<sup>120</sup>

Criminalizing marital rape is interference into fundamental community-based institution. Strategy to interfere on marital rape through criminalization is best achieved if there is a close relation with the customary and cultural values that takes into account the specific context of the community.<sup>121</sup> To bring lasting solution to the problem of marital rape, the human rights approach must be associated with a context driven community based approach.<sup>122</sup> Progressive reform can be achieved if change is initiated from culture and religion and win the community.<sup>123</sup> Legal initiations must allow women to use traditional base for self-empowerment and cooperate with the social lobby group<sup>124</sup> so that they can start pushing the government for change.

In a traditional society where majority of women rely on the community mechanisms than the state legal system, it is suggested to criminalize marital rape through religious and customary mechanisms of the communities.<sup>125</sup> There are several instances where customary laws and traditional courts provide a better protection for victims of sexual violence than the state mechanism. For instance, the traditional appeal court of Malawi ruled that a woman is not a property of her husband where the husband treats his wife abusively for the sole fact of paying dowry.<sup>126</sup> In certain cases, religion and customary laws can use a genuine non-discriminatory interpretation that can even influence the state laws.<sup>127</sup> For example, in Israel, the Supreme Court used religious law of Jewish to advance sexual violence law. According to the court, marriage is based on reciprocal conjugal obligations. It is biblical for women to refuse sex during menstrual cycle and different circumstances and, it is prohibited to compel a wife for sexual intercourse.<sup>128</sup> Hence, it would be beneficial for the government of Ethiopia to establish an independent traditional, customary or religious court with a mandate to entertain sexual violence cases including marital rape issues.

Moreover, a change on marital rape by engaging customary and community groups is effective. Religion and culture do not always encourage patriarchy within their system. Instead of fully categorizing customary values as a rigid and abusive, it is crucial to adopt legal and political environment where group of community are given responsibilities to protect the human rights of women. If customary institutions and communities are given authority and power, they

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<sup>120</sup> *Id.*

<sup>121</sup> Secretariat of the Permanent Forum of Indigenous People (SPFII), Gender and Indigenous People's Culture, United Nations, Briefing Note 4(2007).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Venkatesh. *Supra* note 11, at 130.

<sup>126</sup> *Id.* See also *WasiliMpaweni v Wasili Mary*, NTAC Civil Appeal Case No 86(1979).

<sup>127</sup> Joseph J. Gross, *Marital Rape: A Crime? A Comparative Law Study of the Laws of the United States and the State of Israel*, INTERNATIONAL JOURNAL OF COMPARATIVE AND APPLIED CRIMINAL JUSTICE (1991), at 207.

<sup>128</sup> *Meera Dhungana v His Majesty's Government et al*, Writ No 55 of the year 2058 BS, Nepal Supreme Court (2006).

could accept the responsibilities from human rights treaties to reduce the violence against women.<sup>129</sup>

Moreover, even if marital rape is criminalized, the community mechanisms will still serve to get the support of the community and achieve effective realization women rights.<sup>130</sup> For instance, in Senegal, the grass root human rights group plays a great role in mobilizing the community and providing a consensus building education to abandon the traditional genital cutting practice.<sup>131</sup> Changes to the practice of female genital mutilation, abduction and early marriage are examples in Ethiopia where the traditional mechanisms play an important role in shaping local customs. Hence, culture and tradition should never be used as a defense for injustice rather they should be used as tools to stigmatize violent behaviors.

## **B. Complementary Measures to Criminalization**

Criminalizing marital rape is without doubt, an important step in protecting women. However, experiences of other countries reveal that is not the only solution due to the inherent limitations of criminal law. First, criminal law does not necessarily change the underlined stereotypes and attitudes of the society. Second, until a date the act is criminalized it is necessary to devise alternative measures to protect women from violence and support the criminalization process.

### ***1. Adopting Alternative Domestic Violence Resolution Models***

Criminal law by its nature is limited to take in to account the complex relations of individuals engaged in domestic violence. If we make criminalization as the only means used to combat marital rape, victims with a complex linkage with the perpetrator who do not want to use court punishment will be left without justice.<sup>132</sup> It is worth suggesting that force of law coexists with community-based solutions. In this aspect, Zimbabwe brought about one innovative model where the victims have option either to criminalize or to alternatively use anti-domestic violence counselors. The council comprises of members from community groups including council of chiefs and church elders, representatives of different government institutions including from justice and gender affairs office and non- governmental organizations.<sup>133</sup> This alternative model can give the victim an option whether to discuss or prosecute sexual violence by intimate partner. According to the Domestic Violence Act of Zimbabwe,<sup>134</sup> the roles of anti-domestic violence counselors, among others, includes; “counseling and mediating the solution of any problems in personal relationships....; and carrying out investigations, upon the instruction of a court.”

This model can give relief for victims of marital rape whose life is highly involved with the perpetrator and at the same time who wants the violence to end. Given the religious and cultural

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<sup>129</sup> Venkatesh. *Supra* note 11, at 130.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Venkatesh, *supra* note 11, p.135.

<sup>133</sup> Anti-Domestic Violence Council of Zimbabwe, Ensuring a Zimbabwe Free from Domestic Violence, Available at: <http://www.advCouncil.org.zw/>, (last accessed on, 30 February 2020).

<sup>134</sup> Domestic Violence Act, *supra* note 116, Section 15.

community in Ethiopia, adopting an alternative model which engages elders and religious fathers in collaboration with the legal counselors will be fruitful.

## 2. *Inter-Sectional Approach to Marital Rape*

In Ethiopia, there is a well-known saying in Amharic, '*Dir biyabir anbesa yasir*' which shows the power of unity. The author wants to raise this point to show how the efforts taken by a certain limited concerned bodies fail to bring the issue of marital rape in the forefront. Most researchers in the area blame the efforts taken by legislatures, civil society organizations and other sectors for playing a fewer roles than expected. However, it is important to address the factors behind their short of run. In this regard, recent studies on marital rape indicate that, the previous approaches focusing solely on human rights and criminal law approach to criminalization of marital rape are not successful.<sup>135</sup> There should be functional integration to protect women against marital violence such as the health sector, the justice sector, media, communities, state governments and non-governmental organizations.<sup>136</sup>

According to Tsehai Wada, who was the member of the drafting committee of the 2004 Criminal Code, one of the reason for failure of the Ethiopian House of Peoples Representatives to criminalize marital rape in the revision process was some NGOs working on the issue were not passionate enough to raise public support.<sup>137</sup> However, the experience of other countries show the unity of media and different sectors through putting a spotlight on seriousness of the issue and standing by the side of lobbying groups that help the community to understand the impact of marital rape and the parliament to categorize spousal rape as a crime.<sup>138</sup> Collective role and responsibility will be important in enhancing understanding on the effect of marital violence and how each sector including the community, play its role in prevention and abolishing.

## VI. CONCLUSION

Even if decades have passed since countries began to reform their legal system and criminalize marital rape, it is still beyond the reach of criminal law in Ethiopia. Regardless of its prevalence, several studies in Ethiopia invoke cultural and legal factors as hindrance towards attempts at legal reform. The presence of these challenges cannot be an excuse for failing the human rights duty of the government to protect the rights of women. Despite similar kinds of challenges, South Africa and Zimbabwe have taken concrete step and criminalized marital rape. The non-criminalization of marital rape remains to be one of the contributing factors for the prevalence of the act. This is because criminalizing sexual violence has a great role in transforming social norms towards equality and condemning violent behaviors and actions. The legal measure also helps ensure protection of women from the heinous offence committed

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<sup>135</sup> WHO, *supra* note 9, at 14.

<sup>136</sup> *Id.*

<sup>137</sup> Tsehai Wada, *supra* note 50, at 24.

<sup>138</sup> Arthur Okwemba, *Media's Role in Marital Rape*, Sunday Express, Available at <https://sundayexpress.co.ls/media's-role-in-marital-rape/2011> (last accessed on 10<sup>th</sup>Sep 2021).

against them by their marital partner. Thus, the government of Ethiopia is supposed to resort to a clear constitutional and human rights based obligations through criminalizing marital rape.

The experience of countries that have criminalized marital rape shows though the act is criminalized, but the patriarchal thinking surrounding marital rape still persists among the community and law implementing organs. Marital rape is a violation of rights within a core family institution in broader community. Yet, one of the strategies to end marital rape through criminalization could better be achieved through working in cooperation with customary and religious mechanisms considering specific local contexts. Customary and religious mechanisms used to bring authority to the condemnation of marital rape that in turn put pressures on the state to change the existing laws and provide adequate protection against the violence. Furthermore, even if marital rape is criminalized, the community-based mechanisms can still help to facilitate access to justice, enforce laws contextually and get public support. Under these circumstances, efforts of criminalizing demand mobilizing community-based human rights groups to change the mindset of people within the groups and make human rights norms part of their customary practice.

Furthermore, criminalization efforts need to work on the consideration that marital rape is not a private problem nor is a problem of a single culture, religion or custom rather; it is a collective problem that demands cultural protection as well. However, it does not always true that criminalization of marital rape can be materialized without a clear and functioning linkage between relevant government organs, NGOs, Media and community and religious institutions. Due to this fact, if criminalization of marital rape is taken as a sole solution to the problem, some women who do not want to use the state law as a weapon of punishment will be left without justice. Thus, the article suggests for the relevance of community based alternative solutions that can be used to complement the criminalization measures.

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