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Human Rights and Justice Rights Approaches to Gender-Based Violence (GBV): The Case of Kenya's Sexual Offenses Act (KSOA)

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HUMAN RIGHTS AND JUSTICE RIGHTS APPROACHES TO GENDER-BASED VIOLENCE (GBV): THE CASE OF KENYA'S SEXUAL OFFENSES ACT (KSOA)

A Thesis Presented

By

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ABSTRACT

HUMAN RIGHTS AND JUSTICE RIGHTS APPROACHES TO GENDER-BASED VIOLENCE (GBV): THE CASE OF KENYA'S SEXUAL OFFENSES ACT (KSOA)

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Sexual violence produces detrimental and long-lasting physical and psychological trauma that deters a victim's ability to fully participate in the economic, political and social development of their community and nation-state (Legal Action Worldwide, 2014). To fight this crime, the UNDP has developed an International Sexual Violence Protocol. This Protocol recommends consolidation of sexual violence legislation into one document called the Sexual Offense Act. These laws tend to use a justice through rights approach to effectively criminalize and prosecute sexual violence within a comprehensive human rights-based model. By using a justice over human rights-based approach; Kenya's Sexual Offense Act (KSOA) deviated from the UNDP's recommended human rights-based approach. This deviation has earned Kenya

criticism in the Best Practice Report written by LAW and commissioned by UNDP which states that Kenya did not follow a human rights-based and comprehensive approach (Legal Action Worldwide, 2014). The current thesis uses qualitative research methodology to analyze why and how Kenya deviated from the UNDP recommended approach. In doing so, the thesis presents Kenya as a case study that offers a complex and diverse legal, constitutional, and peaceful historical past and that allows in-depth analysis of the role that culture plays in influencing Kenya's Act. The thesis contends that Kenya did use both comprehensive and human rights-based approaches but that were situated in Kenya's African feminist and postcolonial cultural context. The primary documentation used and referenced in this study includes KSOA 2006, The Best Practice Report, international protocols and treaties that govern GBV, the Kenyan national plan framework, the constitution of Kenya 2010, as well as regional protocols, and treaties. This work also uses secondary sources such as Kenyan public documentation, academic journals internet-based articles, journals and blogs.

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TABLE OF CONTENT

CHAPTER ONE

INTRODUCTION

The Sexual Violence Protocol affirms that sexual violence is a form of gender-based violence (GBV). GBV has detrimental, psychological and sometimes physical effects that prohibit women from substantially contributing to and benefiting from economic, social and political development. GBV is also a violation of fundamental freedoms and human rights in public and private settings during armed conflict and peace times. Several international instruments acknowledge the protocol, including the Charter of the United Nations of 1945, Security Council Resolution of 1325, The Universal Declaration of Human Rights 1948, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1975, and the African Charter on Human and People's Rights, 1981. The Protocol outlines criteria for member states to use to formulate their own national Sexual Offences Acts (Legal Action Worldwide, 2014). Kenya legislated its Sexual Offences Act in 2006 (KSOA, 2006).

KSOA is a thirty one page legal document that consolidate all laws relating to sexual violence for the sole purpose of increasing justice accessibility to the women and children who have been sexual abused. KSOA is divided into forty-nine sections and fourteen provisions that deal with sexual offences ranging from rape, attempted rape, sexual assault to investigatory and prosecutor procedure (Republic of Kenya, 2006). Figure 2 contains an exhaustive list of all the sexual offences covered in the original 2006, including the provisions that have been deleted or appealed. This thesis will focus on the provisions that cover various forms of rape, sexual assault and sexual trafficking of women. For instance, section five covers

sexual assault. According to this section, sexual assault can be defined as the unlawful penetration of another person's genital organs with your genital organs or a manipulated object that is not being used for medical or hygienic purposes (Republic of Kenya,2006). A person found guilty of this offence will be convicted to a period of ten years and or life imprisonment.

Rape on the other hand, is defined as the intentional and unlawful penetration of the victim's genitals without their informed consent. A person found guilty of this offense will be imprisoned for a period of no less than ten years or life imprison (Republic of Kenya, 2006). Although KSOA has been a revolutionary and important foundational piece of gender-based violence legislation, because it was the first gender-based legal document to be passed after Kenya's independence. It has been criticized in LAW's Best Practice report for not following a comprehensive human right-based approach and not including prevalent forms of sexual violence like marital rape (Legal Action Worldwide, 2014).

The Best Practice report by LAW on the other hand, is a meticulous and detailed report that discusses current sexual violence legislative provisions and their gaps, the importance of Sexual Offence Acts, Overview of findings from UN Best Practice protocol and Overview of findings from Sexual Offence Acts in Kenya, the Gambia, Sierra Leone and South Africa, comparable jurisdictions and the recommended Sexual Offences Act provisions and structure. The recommended sexual violence designed model, also known as UN Best Practice protocol is tabulated into eleven main areas and summarized in figure 1. The first section shown in Figure 1, is the definition of legislation cemented in a human right-based and comprehensive approach.

LAW says:

> "Legislation should be rights based, apply equally to all women and provide for the prevention, protection and survivor empowerment. It should clarify the relationship between customary and religious law and remove all conflicting provisions." (Legal Action Worldwide, 2014).

According to this definition, KSOA does not follow a comprehensive human right-based model; but this definition is very unclear and ambiguous, and my thesis contends that UNDP human rights-based model is not clearly defined; neither is it a comprehensive or an inclusive model. UNDP and other international human right organizations encourage nation-states, organizations and individuals who draft and implement Sexual Offence Acts to use justice through rights as their human rights-based approach. In the Best Practice report, this recommendation has implied that the authors of the report, LAW, do not implicitly define what they mean by a comprehensive human rights-based approach; neither do they implicitly ascribe to one. The Best Practice report is ambiguous and confusing because of this.

Furthermore, the model needs to be updated to include new cultural aspects of human rights and LGBTQ rights. For example, the Kenyan Sexual Offences Act (KSOA) does indeed include a human rights-based approach. There are four types of human rights-based approaches. What the authors of the LAW report do not seem to understand is that KSOA uses an approach that emphasizes justice over rights (Legal Action Worldwide, 2014).

As stated by Lettinga and Troost, a justice over rights-based approach prioritizes the immediate need for legal justice and the need to prosecute over human rights. KSOA follows this approach. Also, LAW's study does not emphasize the importance of power relations and consent in their evaluation of the Kenya Sexual Offences Act. This current thesis will examine the rationale behind the formulation of KSOA of 2006. According to Kenyan Legal scholar,

Makua Mutua, it is essential to demarginalize women's rights questions in the construction of transitional justice vehicles like LAW's. For a long time, international human right movement's marginalized women and women's rights while constructing transnational justice vehicles despite the apparent existence of CEDAW. Mutua particularly emphasizes the invisibility of African women agency and their input while creating these protocols. Mutua argues that it is crucial to first empower women to formulate these protocols themselves, thus making them visible and equal. This thesis explores whether KSOA has attempted to include and empower women as best as it could, which was contingent on the resources and negotiating power available to the authors at the time of Acts construction. This study hypothesizes that the Best Practice report and other international sexual violence protocols, which national sexual Offence Acts are meant to be formulated on, are not inclusive because they were formulated without the participation of women, specifically African women. This study evaluates Kenya's sexual offence act in this light. While assessing the KSOA, this thesis will answer the following research questions: How does Kenya's sexual offences act deviate from the UNDP study? Why does it? Why does the KSOA, 2006 follow a strictly legal framework over a framework that centers around Western human rights? How might the prosecution of sexual violence differ in national environments in comparison to internationally formulated protocols? What does this mean for protecting women from sexual violence?

Lastly, this thesis will conclude that KSOA of 2006, was a first and necessary step in protecting Kenyan women against sexual violence. While the Act may deviate from the LAW's recommended model; there was a good reason to do so, given that it was pioneered and authored by Kenyan female lawyers. However, future versions of the Act may include more

aspects of the UN human rights components. Furthermore, international protocols need to be updated to reflect local context, as well as current gender trends.

Thesis statement and Research question

The Best Practice report by LAW commissioned by the UNDP incorrectly criticizes KSOA for not following a comprehensive human rights-based approach when in actuality KSOA ascribes to the comprehensive human rights-based model of justice over rights. It deviates from the internationally preferred model because the author attempts to contextualize international human rights law. LAW's and UNDP's lack of acknowledgement of this fact favors the imperialist lens of western international human rights law and feminism; which demonizes African culture and exaggerates the view (or perhaps idea) of African patriarchy.

This thesis study will critically examine the 2006 Sexual Offences Act of Kenya and the human rights-based approach that was used to construct this Act. This study will attempt to understand the factors that influenced the author of KSOA to choose justice over rights instead of the internationally preferred human rights-based approach of justice through rights. This paper will discuss the implication of using justice over rights instead of using justice through rights approach, and this paper will recommend that the Kenya government consider adopting a combination of justice over rights and justice through rights approach in the next amendment of the KSOA.

In addition, this thesis will examine the international protocols on sexual violence and the human rights-based approach that they use. I will describe the Best Practice report on Africa

and use postcolonial feminist theory to explain why it is incomprehensive, as it does not clearly define what constitutes a comprehensive human rights-based approach, it undermines Kenya's sovereign right as a member state to ratify and contextualize the country's own sexual offence act, to make KSOA more efficient and effective. Furthermore, it does not acknowledge the fact that the 2006 sexual offence Act is a foundational legislation that can be amended and changed every five years.

Lastly, while critically examining and discussing KSOA and the International Protocol on Sexual Violence. This study will attempt to answer the following questions which I developed during the beginning stages of my study. How does national law protect women against Gender Based Violence (GBV)? How does Kenyan law protect women against GBV? How and why does Kenya's law deviate from international GBV law? How do human rights approaches to GBV differ from justice-based approaches? How does culture influence the variance around which GBV legislation is enacted across the world?

Rationale/Significance

The rationale behind the current research is to improve the effectiveness and efficiently of Sexual Offence Acts in Africa by examining the KSOA and the human rights-based approach used in this Act. By examining the human right-based model used by Kenya and KSOA contextualization of this study can pre-determine if this methodology is effectual in Kenya and potentially effectual in other African nation-states. Thereby formulating the best methodology for constructing African Sexual Offence Acts. As previously, mentioned, sexual violence is a crime that has for thousands of years continued to negatively impact women's

physical and psychological health. Many victims of sexual violence do not seek redress and justice because of negative societal attitude and state inaction. The few victims and survivors of sexual violence that turn to judicial and legal system for justice are confronted with a

> ‘System that ignores, denies and even condones violence against women, and protects perpetrators, whether they are state officials or private individuals' (Amnesty International, 2002).

Additionally, if we can set the correct legal precedent to fight against sexual violence in Africa during peacetime, these same laws can be used during and after wartime to effectually prosecute and deter sexual violence against women and children.

Methodology

This thesis study applied a qualitative research design model using interpretative techniques. Qualitative research design is a methodology that is used in various academic disciplines, particularly in social sciences. Qualitative methodology allows the researcher to collect data on human behaviour and conduct in-depth analysis on that information for the sole purpose of understanding human behavior and the factors that influences this behaviour. Interpretative techniques, which is one of the most popular techniques of this methodology, allows researchers to examine and answer how, where, what, when, and why questions (Oun&Bach, 2014). It is for this reason that this research design was chosen, as the primary focus of this thesis is to understand why the author of KSOA, Njoki Ndungu, and the

individuals, and organisations that researched this Act chose to deviate from the preferred UNDP international sexual violence protocol.

Secondly, qualitative interpretative research design allowed me to generate a formal hypothesis and develop precise research question. Examination of KSOA has directed me to hypothesize that international human rights law is embedded in imperialist and neoliberal western paradigms that undermine the development of African public policies and contributes to the disempowerment of African women. It especially undermines African women trying to advance the fight against gender-based violence on the continent. Furthermore, if international human rights laws embraced multiculturalism, and context-specific legislation, then perhaps states would be able to research, draft and implement their Sexual Offence Acts better.

Third, applying an interpretive methodological approach has allowed me to use the research findings of my study to make GBV policy recommendations for global governance and national policies. One of the reasons that sexual violence has continued to thrive is because states, some regional and international organisations do not prioritise on the correct policy and legislative areas to combat this epidemic. Using this research design based on normative theory has allowed me to focus on human rights-based approaches and formulate potential priority areas that policymakers and international human right organisations can focus on. I specifically hope that my findings will be used to improve KSOA as my research is situated in Kenyan cultural grounding.

Although qualitative interpretive research approach is a popular methodological design, using a single case study has limited my sample size, thus potentially restricting the findings of this thesis to a particular populace (Oun&Bach, 2014). Most East African nation-states share similar political and legislative history, as they were colonised by the British. In spite of this, these similarities do not guarantee that the findings of this study can be apply to the whole of the East African region as gender is a social construct highly influenced by cultural and religious norms and practices which vary from country to country.

On the other hand, although my sample size is limited, Kenya is considered the hegemonic nation-state in the horn of Africa, which means studying this national-state will offer valuable and much-needed insight on sexual violence and sexual violence legislation; and the best legislative policies to implement in the East African region.

Lastly, this thesis used library based resources and data. The primary documentation examined in this study includes KSOA 2006, The Best Practice report, International Protocols and treaties, the Kenyan national plan framework, the Constitution of Kenya 2010, regional protocols and treaties. Secondary sources are Kenyan public documentation, academic journals internet-based articles, journals and blogs. Additionally, I have also used some archive document that I collected in Kenya during my 2018 archival research search. I managed to obtain the old constitution and the national plan to implement KSOA. Due to the limited accessibility to public documents and archives, the majority of resources utilised in this study were internet-based.

Chapter Overview

This thesis is divided into five chapters and each chapter is divided into various sections. In chapter one, provides theoretical and methodological overview of my thesis. It begins by outlining my thesis statement, rational and research objectives, the research questions that informed this study and the answers that this thesis proposes. Furthermore, It describe the research design methodology used, the advantages and disadvantages of using this design.

Chapter Two introduces sexual violence comprehensively and presents a literature review and describes the theoretical framework that will be used to defend the arguments made in this thesis. Specifically, gender and feminism, sexual violence, human rights and gender rights, African feminism and postcolonial feminism.

Chapter three, presents a comprehensive overview of the international Sexual Violence protocol, Intersectionality of Justice through rights approach and The Best Practice Report and Recommended Sexual Offense Acts provisions and structure.

Chapter four, discusses the KSOA in its entirety and it discusses justice over rights approach in regards to KSOA. It, presents a historical background on KSOA, importance of Sexual Offence Acts, the content of KSOA, repealed and deleted sections of KSOA and the implementation of KSOA. It also presents the intersectionality between justices based human rights-based approach in Kenya's KSOA, human rights law and imperialism, and post-

colonial theoretical framework in relation to African public policy.

Chapter five, offers recommendations that will enhance both KSOA and the Best Practice report. This chapter is divided into one section, section six. Section six, offers future additions for KSOA AND International Protocols – Rights, Consent, and how to integrate African women's voice into international and national law. It also, summarizes the research done and gives concluding remarks.

CHAPTER TWO

LITERATURE REVIEW

Introduction.

Gender-based violence (GBV) occurs every day globally and is a worldwide epidemic that violates the victim's human rights (UNAIDS, 2014). There are multiple forms of gender-based violence and sexual violence is one of them. In an effort to curb these forms of interpersonal violence various pieces of legislation have been constructed. Sexual Offence Act is legislation that consolidates all laws pertaining to sexual offence with the aim of enhancing victim's access to justice. This chapter will extensively discuss gender-based and sexual violence and part of theories of GBV such as feminism, African feminism and post-colonial feminism.

Gender and feminism

One out of three women will experience some form of GBV in their life time. This means that day in and day out, women are physically, sexually and psychologically abused and violated. In Kenya, 40.7% of women will experience physical and or sexual violence in their lifetime and 25.5% of women have experience physical and or sexual violence in last 12months (UN,2014). GBV is a crime that utterly traumatizes the victim and disrupts their lives. GBV is violence directed towards an individual based on their gender and sexual orientation. It takes on numerous forms of violence; this includes physical, sexual, verbal, emotional, psychological abuse, and economic or educational deprivation in a public or private location.

It is rampant transnationally because of gender inequality that is precipitated by the systematic disenfranchisement and disempowerment of women, girls and other minorities.

> "It is a crime that shocks and traumatizes the victim and undermines the status of women in society" (Amnesty International, 2002).

GBV undermines the status of women in society and within the home because in some communities violated and abused women are seen as dirty and impure. For the reason that, this crime goes mostly unreported, and victims are shamed into silence because of socially embedded systematic patriarchy (Amnesty International, 2002).

There have been numerous studies, and discussion about what causes GBV and most studies have shown that inequitable gender norms and practices are the root cause of this type of interpersonal violence (Rowley and Anderson, 2016). To better under gender norms and practices, one must first fully understand what gender is. Gender is a socially constructed concept that assigns societal roles to men and women. These roles are predetermined by culture. Gender dictates the relationship between men and women, their conceptualization of and interaction with society as a whole (Reeves and Baden, 2000). Gender is taught behaviour and norms; an individual's biological attributes do not determine it, it not static as it can be changed and it varies from society to society, but most common gender heterosexual binary attributes are universal. In most parts of the world, men are socialized to be robust, self-reliant, and economic providers. They have more political, economic and social power; and they are the primary decision-makers in public and private forums;

> "The most common theory points to the fact that men are stronger than women and that they have used their greater physical power to force women into submission. A more subtle version of this claim argues that their strength allows men to monopolize tasks

> that demand hard manual labour, such as ploughing and harvesting. Men had control of food production, which in turn translates into political clout. There are two problems with this emphasis on muscle power. First, the statement that men are stronger to women is true only on average and only concerning certain types of strength. Women are generally more resistant to hunger, disease, and fatigue than men. Many women can run faster and lift heavier weights than many men" (Harari, 2011).

Women, on the other hand, are socialized and perceived differently from their male counterparts. Women are considered to be the homemakers, submissive, and the weaker gender. Women, in comparison to their male counterparts, have minimal political, economic and political powers and freedoms (Yusuff, 2018). Chimamanda Ngozi Adichie reflects on this aspect of patriarchy in her book We Should All Be Feminist. She says:

> "We teach girls to shrink themselves, to make themselves smaller. We say to girls; you can have ambition, but not too much. You should aim to be successful, but not too successful. Otherwise, you would threaten the man. Because I am female, I am expected to aspire to marriage. I am expected to make my life choices always keeping in mind that marriage is the most important. Now marriage can be a source of joy and love and mutual support, but why do we teach girls to aspire to marriage, and we do not teach boys the same? We raise girls to see each other as competitors not for jobs or accomplishments, which I think can be a good thing, but for the attention of men. We teach girls that they cannot be sexual beings in the way that boys are." (Adichie, 2014).

One of the significant issues of socializing both heterosexual genders so differently is one gender, men tend to think of themselves as more superior to women, these thoughts than lead to toxic masculinity. It also leads the sexualization of women and the notion that their bodies are public property. Harari, in his book, Sapiens: A Brief History of Humankind states:

> "Masculine dominance results not from strength but aggression. Millions of years of evolution have made men far more violent than women. Women can match men as far as hatred, greed, and abuse are a concern, but when push comes to shove…men are more willing to engage in raw physical violence. Consequently, throughout history, warfare has been a masculine prerogative. In times of war, men's control of the armed forces has made them the masters of civilian society too. They then use their control of

> civilian society to fight more and more wars. …Recent studies of the hormonal and cognitive systems of men and women strengthen the assumption that men indeed have more aggressive and violent tendencies…" (Harari, 2011).

In Africa, gender roles also lineate from the binary heterosexual characteristics found throughout the globe. However, on the African continent, gender roles are more complex, manifold and diverse as they are thousands of African cultures and religious practices. In North Africa, for instance, many communities are Islamic, but there is a great deal of diversity concerning women's roles in families, the opportunities afforded to them in education, politically, and economically (Yusuff, 2018).

In West Africa, ethnic groups and religion determine gender. Kinship systems distinguish ethnic groups. Kinships have access to various resources and hierarchies of decision-making power. Concerning religion, there are a variety of numerous religions in West Africa, but, the main religions are Islam and Christianity (Yusuff, 2018).

In East Africa, ethnicity and religion also predetermine gender. Though, some nationstates in this region like Kenya, Sudan and Somalia, geography plays a considerable part in heteronormative gender roles. In Nairobi and surrounding urban areas, gender equality is higher than the rural and most remote areas of Northeastern Kenya, which are known to have more have stringent gender roles and norms (Yusuff, 2018).

The heteronormative socialization process in Africa and the rest of the world normalized the subjection and oppression of women in many societies, which is why gender

inequality is so widespread. It is also why normalization of GBV has been so prevalent (Yusuff, 2018).

However, over the last decade, traditional gender roles have been challenged and are gradually changing, but discrimination, social exclusion, stigma and violence due to gender is still rampant (WHO, 2019).

Sexual violence

Sexual violence is a broad term that refers to:

> "any sexual act, attempt to obtain a sexual act, or other act directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting" (WHO, 2017).

Consent means that an individual has given explicit and clear verbal indication that they agree to engage in sexual activity. A person cannot be pressured, coerced or threatened, drugged, or manipulated into giving consent, and a person can withdraw consent at any given time, this means that consent is an ongoing process (Rape Crisis Cape Town Trust, 2015). Although consent as a term is commonly used when discussing sexual violence, the term is not always written in legal documents but rather it is subtly implied. In fact most international legal documents and instruments such as CEDAW 1979, the Declaration on the Elimination of Violence Against Women 1993, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women1994, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, and other international legal papers do not define sexual violence and when they do, the term consent is

not mentioned. This ambiguity not only makes prosecution difficult, but it also informs the myths and stereotypes that surrounds sexual violence in many societies. One of the myths and stereotypes that surround sexual violence especially rape, is whether force was used to overpower the victims over the role that consent plays in this crime. The common misconception is that the level of force rather than the of role consent is what defines the crime as sexual violence but the truth of the matter is that any sexual act is done without the consent of the parties involved in sexual violence (Dowds, 2018).

Secondly, sexual acts classified as sexual violence include rape, incest, sexual assault of women, men, girls and boys, sexual abuse of children, drug-facilitated rape and corrective rape against an LGBTQ individual. According to the World Health Organization, one in three women, which is about thirty-five per cent of women around the world, has experienced sexual violence in their lifetime. Sexual violence is usually done by an intimate partner or someone close to the victim (UNWomen, 2018). In Kenya it has recently been reported, that 32% of women between the ages of 18 to 24 and 18% of the male population have experienced sexual violence in their lifetime (UNAIDS 2014). Contrary to popular belief, both women and men are victims of sexual violence, but men tend to be the highest reported perpetrators of sexual violence (Rape Crisis Cape Town Trust, 2015). Although both men and women can, be victims of sexual violence, this study will focus on sexual violence against women, and sexual violence in this study will refer to rape and sexual assault.

Third, sexual violence is an aggressive act that is done to exert power and control over women (Barcc, 2019). Sexual violence is not about passion, lust or the sexual act itself but rather an act that intends to degrade, humiliate and dominate women. This aggressive attitude

can be traced back to how girls and women have been traditionally viewed and treated in societies around the world (A Call to Men", 2019). From an early age, men are taught to view women as subordinates, objects and communal property and these patriarchal notions normalize disrespecting women and abusing their bodies (Matua, 2009).

Lastly, sexual violence seriously hampers a victim's ability to fully participate and benefit from political, economic and social development because it is a legal and human rights violation that has short and long-term physical, reproductive, sexual and psychological effects on its victims (WHO, 2019). Article 3 of the UN Declaration on the Elimination of Violence against Women 1993, says that women are entitled to

> "equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field" (UN, 1993).

These rights include the right to life, equality, liberty and security of person, equal protection under the law, freedom from all forms of discrimination, highest standard of physical and mental health, and the right to be free from inhumane, unjust, cruel and degrading treatment and punishment. Sexual violence violates all these human rights. (UN, 1993).

Human rights and gender rights

Human rights are inherent rights entitled to all people based on the fact that they are a human being ("Human Rights", 2019). Human rights were first officially written into law after the Second World War when the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations in 1948 ("History of the Document", 2019). There are thirty human rights protected in the UDHR this includes

> “right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more…” ("Universal Declaration of Human Rights 70 years: 1948 - 2018", 1948).

These rights have then been elaborated in various international laws and treaties and adopted into national laws around the world ("Human Rights", 2019). Currently, one hundred and thirty countries have signed the UDHR and most African countries have currently signed and ratified the UDHR ("Universal Declaration of Human Rights 70 years: 1948 - 2018", 1948). While human rights are recognized and protected by law in most countries in the world, human right advocates and organizations agree that the realization of these rights continues to be more of a dream than a reality. Violation of human rights around the world continues to a problem ("The Human Rights-Based Approach", 2014). One of the biggest violations of human rights is gender inequality and violence. To deal with human rights violations human-right based approaches were formulated by international human right organizations to ensure that international standards of human rights were implemented and respected universally around the world ("United for Human Rights: Right to Exist, Humanitarian Groups, Universal UN

Declaration", 2019). Human-right based approaches are at the center of human development,

> ‘it aims to deal with inequality, redress discriminatory policies and unjust distribution of power that impedes development progress’ ("The Human Rights-Based Approach", 2014).

A human rights-based approach is ‘a conceptual framework’ that aims to educate people on their rights and empower them to claim and exercise those rights by increasing the

capacity and accountability of individuals and institutions tasked with promoting, protecting, fulfilling and respecting human rights (UNICEF, 2016). This means creating opportunities for individuals to participate in decision making that may affect their human rights, as well as increasing the knowledge of individuals and institutions responsible for defending human rights so they know how to a perform their responsibilities. The fundamental principles that should lineate any human rights-based approach is 'participation, accountability, non-discrimination, equality, empowerment, and legality' (Scottish human rights, 2019). Although numerous organizations, nation-states and individuals use human right-based approaches for different objectives the fundamental principles do not vary when creating a comprehensive model.

There are four theoretical human right-based approaches that are used to develop human right policy and evaluate the realization of these rights; justice over rights, justice through rights, rights over justice and justice through rights. Some of these approaches partly overlap but for the most part, they are used for the different strategic purposes (Lettinga &Troost, 2015).

Justice over rights approach refers to a policy and legislative model where social justice is adopted as the mission and goal of the policy. The organization or state that adopts this approach aims for an ambitious 'egalitarian agenda' rather than its economic and social strategies. Non-human-right based policies may be implemented if 'legalistic strategies do not suffice' (Lettinga& Troost, 2015). To be clear, in this approach, the state or organization:

> "Work with a (broad) moral concept of human rights to circumvent the limitations and indeterminacies of law, but also with other values such as dignity, justice and equality.

> The flexibility that this might entail will be beneficial for its work with rights-holders and with other movements and activists. Social justice issues might thereby invigorate Amnesty's (or any other organizations or state's campaigning and mobilization capacities" (Lettinga& Troost, 2015).

Therefore, the guiding principles of justice over rights is human rights are a means to an end not an end in themselves, human rights are important instruments in achieving higher goals, 'notably distributional or substantial equality…' (Lettinga& Troost, 2015). Although this approach is an important way of achieving social and legal justice it falls short as it may not be the most consistent and coherent approach when it comes to policy and practices (Lettinga& Troost,2015).

Secondly, this approach requires an organization or government to be very outspoken and confrontational which may alienate supporters who are more traditional and conservative (Lettinga& Troost, 2015).

Justice through rights approaches the attainment of "social justice insofar as realizing human rights contributes to it." (Lettinga& Troost, 2015). In this framework, human rights law is the beginning and end all of this approach. Human rights legal framework dictates other values such as dignity, social justice, social, economic and political rights, and policies. This approach significantly limits the economic, social and political policies that a state can follow. Although this approach ensures for consistent and coherent policymaking, it limits a state's ability to contextualize their economic, social and political policies (Lettinga& Troost, 2015).

Secondly, because human rights legal framework is an instrument and end goal of justice through rights approach, it limits the range of social justice that can be achieved under

this framework, as social and legal justice must be defined by international human rights law and not national or regional human rights law. Thus, international human right organizations should monitor nation-states in relation to their economic, social and political policies (Lettinga& Troost, 2015). However, this is should not be used as a part of the neoliberal globalization project to enforce neoliberalism on periphery member states. The Neoliberal globalization project is a political and economic project that is centered on the establishment of laissez-faire capitalism around the world. Laissez-faire capitalism is a term used to refer to free-market capitalism, reduced taxation, privatization of public goods and services, limited state intervention in the market- as the market is self-regulating and any intervention in the market will mess market equilibrium and mechanism, deregulated free trade and promotion of entrepreneurial skills and freedoms (Harvey, 2007).

Third, this approach is very conventional approach that limits 'radical activism and systematic changes' to reduce economic inequality, gender inequality and to increase egalitarianism in gender. The problem with this is promoting and defending the rights of women and fighting gender-based violence requires more than conventional wisdom. It requires more radical and systematic change (Lettinga& Troost, 2015). As previously mentioned, one of the fallacious assumptions of GBV and sexual violence is women are objects that belong to a particular gender. To overturn this assumption radical social, economic and political change has to be implemented that may not always fall in line with human rights legal framework. This is also because currently, women rights are not being treated as human rights.

Rights over justice is the third human rights approach. In the rights over justice approach, the organization or nation-state works within the human rights legal framework for the realization of human rights for all but compromises on other values such as dignity and social justice (Lettinga& Troost, 2015). In this approach, social and economic rights do not take precedence thus often falls short in the relation of these rights (Lettinga& Troost, 2015).

The reason why this approach is often favored by international human right organizations is it offers a clear methodology to monitor member states or nonmember states in the promotion and relation of human rights in their nation-states. However, because this approach is not as interested in economic and social rights it has been accused of being a Western framework as it does not consider economic and financial circumstances of a nation-state (Lettinga& Troost, 2015).

Lastly, is justice for rights.

> "A Justice for rights approach emphasizes that realizing human rights, which continues to be the end goal, presupposes a certain measure of social justice. In this approach, large differences in income, wealth and primary goods are incompatible with the full realization of human rights" (Lettinga& Troost, 2015).

Thus, in this approach, there is a minimum baseline of human rights and 'maximum ceiling of inequality that the realization of human rights can afford" (Lettinga& Troost, 2015). This means that the realization of basic human rights and a limit on the maximum amount of individual economic prosperity is a prerequisite of this approach. The organization or government that followed this approach would have to formulate how much economic inequality within its society is acceptable and how much economic inequality is not (Lettinga& Troost, 2015).

Most international organizations use justice through rights to develop and evaluate human right legal framework and implementation. Justice through rights is also the framework that is used to fight violence against women because it not only builds women's legal capacity, but it informs them of their rights which empowers them and aims to prevent this crime through awareness and education initiatives. In addition, justice through rights framework ensures that human rights are normatively enacted and implemented universally ("The Human Rights-Based Approach", 2014). Although human right-based approaches and international laws have been used in many international human right development agencies, these policies have come under serious criticism (Mutua, 2008).

African feminism

First, human rights law and movements have been very inattentive to women's rights (Mutua, 2008). CEDAW was signed into law in 1979 and despite the existence of this law women's rights still played a back sit in human right forums up until 1993 when the UN held a conference in Vienna where it was stated that women rights are human rights, and in 1995 when the UN held a conference about women in Beijing when women rights were formally added to the human right discourse (UNFPA, 2006). Since all societies are patriarchal, women are always subject to violations regardless of the level of development and realization of human rights (Mutua, 2008). The actors that formulated UNDHR focused on an individual's relationship to the state, which was rooted in liberal philosophy that echoes androcentric values and heterosexual perspective of human beings (Tamale, 2008). Leading Feminist scholars such as Hilary Charlesworth and Christine Crinkin have rightly accused international human rights

law of male dominance and reinforcing patriarchal ideologies in the construction of law (Mutua, 2008). Mutua states:

> "Women are the pillar on which the fabric of society is built in the home and outside of it. Truly, both the public and private spheres are made possible by women, although in the former their invisibility is obscene. This invisibility pertains to the official public sphere in terms of public power defined as official positions within the state, civil society, and the market." (Mutua, 2008).

Women were particularly invisible when many international human rights laws were being deliberated and written. When the UDHR was constructed and first enacted into international law women were not part of the process, especially African women because all African states were still being ruled by colonial powers, thus no African was present during the construction of UNHR let alone African women (Mutua, 2008). African women were also excluded from the CEDAW deliberations because many African countries had just gained independence and history shows that African women were underrepresented in these governments, thus less likely to be present in these international arenas. In addition, women's invisibility continues to plague transitional justice vehicles that deal with gender-based violence and sexual violence during conflict and peacetime. As Mutua correctly points out violence against women often takes a back seat after civil wars and conflict, the media rarely reports on GBV and transitional justice mechanism often add GBV as an afterthought, even though GBV, particularly sexual violence is one of the highest human right violations during wartime. Thus, Hilary Charlesworth and Christine Crinkin were correct to state that most international human rights laws and movements were dominated by men (Mutua, 2008).

Secondly, human rights have been described as utopian, normative and inflexible terms. Human right discourse has been fashioned after Western political, social and economic culture. Western culture is regarded as superior and the one system of history and knowledge especially in transitional justice discourse and sexual violence, which often intersects with development. Non-Western culture is often deemed irrelevant or as a bipolar opposite to human rights and development (Escobar, 2012). This type of reductionist thinking has made transitional justice an incomplete vehicle to deal with human right violations and sexual violence because it discourages nation-states in the Global South from contextualizing international human right laws and this makes many of these laws ineffective as they do not address the root causes of sexual violence and human right violations (Mutua, 2008). Additionally, international pressure from international states and human right organizations undermines the sovereignty of African nation-states sovereignty as they are forced to embrace western culture and western normative human rights to gain their approval. As aforementioned, non-western culture and policies are not bipolar opposite to human rights, they are just a different and more domestic approach (Johnson, 2010).

Postcolonial Feminist Theory and Human Rights

International human rights and development discourse have always represented African sexuality in a negative light. Throughout history, African sexuality has always been described as dark, immoral, lustful, exotic and bordering on nymphomania and African men were portrayed as violence beasts. These descriptions were then used to categorize African

people and culture immoral, which was used to justify colonialism as a civilizing mission and to justify violating

African women during this time. In modern times, stereotyping African culture has often denied African societies from including traditional and cultural mechanism into transitional justice vehicles, which is a violation of their cultural rights that are protected under UDHR. Culture in contemporary Africa has been understood through the lens of colonial authorities and African male patriarchs (Tamale, 2008). Fanon says:

> ‘‘After a century of colonial domination we find a culture which is rigid in the extreme, or rather what we find are the dregs of culture, its mineral strata’’ (1963).

Many postcolonial feminists such as Sylvia Tamale and Mohanty have shown that this type of African cultural reconstruction has been embedded into restrictive legal and transitional justice frameworks, which prohibit women living in this setting from being able to fight male domination, gender-based violence and human right violations effectively. Makua Mutua summarizes this point well, he said:

> “The exploration of this tension - that existing human rights, by failing to be specific to East Africa, can undermine the conditions for the realization of rights ” (2009).

Firstly, the negative conceptualization of African culture has created tension between the Third world feminists and Western feminists. ‘Western Feminists’ have been accused of looking at African culture through a colonial lens as they often perceive women from the third world as being powerless victims of their culture. This interpretation is myopic and dangerous because it manufactures the ‘the third world woman as a singular and monolithic subject’ dominated by the same patriarchal dominance (Tamale, 2008). Before colonialism, women in

the third world were valued as a 'fabric of society' and given active roles in socio-economic areas, which empowered these women. During colonialism, these structures were replaced by oppressive structures that disempowered these women. Western liberal feminist projects often overlook these historical facts and assume that women in the third world, especially African women, are only fighting against male domination but they are fighting against patriarchy and neocolonialism (Johnson, 2010). Women in the third world have different cultures, identities and experiences with patriarchy. Thus, the framework that Western feminist advocate for in this region would be ineffective and restrictive. This is why some Postcolonial feminist and African legal scholars have argued in favor of using a local understanding of human rights to transform negative cultural norms and practices (Tamale, 2008).

Secondly, transitional justice and international human rights laws has become synonymous with neoliberal globalization project. In the last two decades, non-governmental organizations (NGO), Western governments and international human rights movements have intervened in African domestic affairs. In particular, foreign economic donors have been encouraged African nation-states to reconstruct their political and socio-economic policies and structures to embrace democracy and neoliberal economic policies. Mutua says:

> "…the concept of transitional justice has come to represent the midwife for a democratic, rule of law state" (Mutua, 2008).

Although the political and economic transition is a useful tool in realizing human rights, democracy and the neoliberal globalization project often takes precedence over women's rights and the elimination of sexual violence in Africa. Western political, economic and social actors argue that democratic states respond better to societal pressure to respond to sexual

violence. However, sexual violence is still very prevalent in Western countries and these societies are considered to be very democratic and very developed. If sexual violence is to be properly addressed in Africa and the rest of the world, political and economic actors in nation-states have to recognize that systematic patriarchy has to be eliminated and women empowerment has to be integrated into all spheres of development (Mutua, 2008).

Lastly, in an effort to receive help and get international political, socio-economic approval, many African policymakers and actors end up superficially embracing these policies and norms, which stagnates political and economic development as well as the realization of human rights (Johnson, 2010).

CHAPTER THREE

OVERVIEW ON THE INTERNATIONAL PROTOCOL ON SEXUAL VIOLENCE

Introduction

The international protocol on sexual violence was adopted by the United Nations secretary-general after a meeting of a group of experts was held in Vienna when various stakeholders in collaboration with UNODC were convened by DESA/ DAW. Participants of this meeting included

> "15 experts from around the world, as well as observers, including the Chair of the CEDAW Committee and representatives of OHCHR, UNIFEM, IOM, and the IPU" (UNDAW/DESA, 2009).

The main objectives of this meeting was to analyze and evaluate different legal frameworks used to address violence against women, identify good legal legislations, weak implementation methodology, lessons learnt, and present recommendations on good practices and standards (UNDAW/DESA,2009). After this meeting, the secretary-general launched the 'UNiTE to End Violence against Women'. One goals of this campaign was to encourage that member states adopt UN legislation model addressing sexual violence in accordance with international human right laws and standards. UN legislative framework on sexual violence was mirrored after international human right treaties such as general recommendation no. 19 of the Committee on the Elimination of Discrimination against Women (CEDAW) and concluding observations of the treaty bodies. Non-human right treaties like Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the

United Nations Convention against Transnational Organized Crime, Rome Statute of the International Criminal

Court; and international policy documents such as General Assembly Declaration on the Elimination of Violence against Women (1993), Beijing Platform for Action (1995), and General Assembly resolutions: 61/143, 63/155 (UNDAW/DESA, 2009).

The Best Practice report on the other hand, was prepared and drafted in August 2014 by Legal Action Worldwide(LAW). The report was funded by the United Nations Development Programme (UNDP) and the United Nations Population Fund (UNFPA). The report is divided into eleven sections laid out a detailed and somewhat comprehensive example of what sexual violence legislation should include and what state obligations are (Legal Action Worldwide, 2014). According to the UNDP, sexual offence legislation should include:

> "definition of all forms of sexual violence, a comprehensive human right-based approach, implementation, monitoring and evaluation plans, preventive policies , protection orders, support and assistance to the complaint/survivor, provisions on legal proceedings and evidence collection, sentencing stipulations, civil lawsuit"(Legal Action Worldwide, 2014).

The Best Practice Report provides guidelines on comprehensive legal definition of domestic and sexual violence that should be included in every sexual offence legislation or Act (Legal Action Worldwide, 2014). The Handbook for Legislation on Violence against Women, which the best practices report is based on, refers to all forms of sexual violence as sexual assault and defines it as "a violation of bodily integrity and sexual autonomy" (UNDAW/DESA, 2009). The definition recommended by the Best Practice Report to be used

in national sexual offence acts must include but not limited to marital rape. Even though sexual assault is a specific form of sexual violence, the Handbook says that sexual legislations should

> "replace existing offences of rape and "indecent" assault with a broad offence of sexual assault graded based on harm;" (UNDAW/DESA, 2009).

It continues to state that the definition should:

> "provide for aggravating circumstances including, but not limited to, the age of the survivor, the relationship of the perpetrator and survivor, the use or threat of violence, the presence of multiple perpetrators, and grave physical or mental consequences of the attack on the victim; (and) remove any requirement that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that" (UNDAW/DESA, 2009).

Although this definition gives a comprehensive understanding on the legal definition of sexual assault, as well as provides a justice through rights human rights-based approach idea of sexual offences, it misleads the reader from understanding the actual definition of sexual assault. Sexual assault is

> "unwanted sexual contact that stops short of rape or attempted rape. This includes sexual touching and fondling. Often sexual assault is used synonymously with rape. However, rape involves some form of penetration and sexual assault does not." (Centresafe, 2013).

Intersectionality of Justice Through Rights Approach and the Best Practice Report

The international protocol for sexual violence and the best practice report advocates for the use of justice through rights approach. We observe this when the author of the best practice report writes on the UN Best Practice table;

> "Legislation should be rights based, apply equally to all women and provide for the prevention, protection and survivor empowerment. It should clarify the relationship

> between customary and religious law and remove all conflicting provisions" (Legal Action Worldwide, 2014).

The sentence 'Legislation should be rights based', applied equally to all women and prevention, protection and survivor empowerment leads us to understand that both the UNDP and LAW are using justice through rights as achieving and protecting human rights should be the guiding principles of sexual offence legislation. According to the UNDP and LAW, KSOA falls short of using justice through rights and any human right-based and comprehensive approach (Legal Action Worldwide, 2014). The next section of this thesis will address this statement. The next principle is the Best Practice report is implementation.

Secondly, in the sections of the report where sexual violence is defined in detail there is a clear nuance associated with human rights protected under the universal declaration of human rights. The report states:

> "sexual violence is a form of gender-based violence which seriously inhibits the ability of women to contribute to, and benefit from, development, and to enjoy human and people's rights and fundamental freedoms, in private or public life…" (Legal Action Worldwide, 2014).

The above definition is clearly using Article 1,3, 5 of the Universal Declaration to info this definition. Article three of the Universal Declaration states, 'Everyone has the right to life, liberty and security of person' and Article one states, 'All human beings are born free and equal in dignity and rights' (United Nations, 1948). This goes hand in hand with the assertion that sexual violence 'inhibits the ability of women to contribute to, and benefit from, development'

(Legal Action Worldwide, 2014). Sexual violence is a violation of an individual's body, security and liberty because by violating that person you infringe on their security, treat them

with indignity and infringe on their ability to enjoy life due to the physical and psychological trauma they will experience.

The Importance of the Sexual Offenses Act

In the past, most nation-states had outdated and inconsistent prosecutor frameworks and systems to deal with sexual violence; this was caused by the spread of legislation between numerous laws. Sexual offence Act changes the judicial and prosecutorial dynamic in a nationstate by consolidating all laws relating to sexual violence and enhances the accessibility of justice. It also ensures that provisions and legal articles are up to date (Legal Action Worldwide,2014).

Secondly, implementation without a sexual offence act is usually inconsistent and challenging because the link between the various actors and organisations is disjointed due to the nature of the law. Sexual Offence Acts safeguard proper implementation and execution of sexual violence laws. Additionally, sexual Offence acts make it easier for states to research, draft and implement national action plans in conjunction with gender-based violence and sexual violence (Legal Action Worldwide,2014).

Third, as previously discussed in previous sections and chapters, sexual violence against women in the past was often regarded as a morality issue or as women's issue. Rarely was it seen as what it is a violation of women and children's human rights, bodies and psychology. Sexual Offence Acts not only ensure that this false perception was dispelled, but

it also offered an extensive definition of rape, sexual assault and all forms of sexual violence against women, children and in more progressive nation-states non-binary individuals (Legal Action Worldwide,2014).

Fourth, Sexual Offence Acts are the first pieces of legislation passed by Parliament that usually vastly explain that sexual violence is a crime that occurs because consent has not been established and freely given by both legal aged adults (Legal Action Worldwide,2014). Although the word and explanation of consent in sexual offence acts is fundamental, to date only eight out of forty-one European countries and less than a third of African nation-states have included consent in their sexual offence acts (Rook&Brimelow,2019).

Lastly, because sexual Offence acts lists exhaustively and criminalises all sexual genderbased crime, sentencing for each of these offences is adequately prescribed which makes sentencing easier for the judiciary as well as consistent throughout the whole judicial system (Legal Action Worldwide, 2014).

Recommended Sexual Offense Acts: Provisions and Structure

After a nation-state has formulated and enacted a comprehensive human rights-based model they have to implement said legislation adequately. LAW states that the state has to formulate a plan of how they plan to implement every section of the Act. This plan should include a sufficient budget and deadline when the Act has to be fully implemented. In addition, the plan should prescribe mandated training for a specialized force, specialized courts, sanctions and regulations that should be followed (Legal Action Worldwide, 2014). Even

though the principles mentioned in this provision are very important, the best practice report and international protocol does not inform us on whether this plan should be a part of the Act itself or a separate legal document. This ambiguity makes it difficult to assess the Act of Kenya or any other nation state, without understanding the methodology that the UNDP uses.

In addition, the international sexual violence protocol and the Best Practices Report should prescribe a time limit that each nation-state has to meet. This forces nation-states from dragging their feet when it comes to implementation, training police forces and creating adequate judicial mechanism and instruments. For instance, Kenya passed its sexual offence act in 2006 yet it has not been fully implemented, which is common knowledge to its citizenry, starting with the lack of rape reporting desks at police stations. If the UNDP and LAW had set a deadline, that Kenya had to have implemented their Act by a particular date. Kenya would have either fully implemented their Act by now or the UNDP would have disciplinary action such as sanctions that it could take. However, the lack a timeline provision by the UNDP leads me to agree with Mukua Mutua;

> "Imagine that in peacetime it is virtually impossible to get most societies to deal honestly with sexual and gender-based violence" (Mutua,2008).

In other words, even in peace times gender based and sexual violence is still not given the attention and focus it deserves (Mutua,2008). Clearly, the international human rights community needs to reexamine the methodology and focus that they implement to GBV and sexual violence before they can evaluate any state. This goes hand in hand with the next provision, monitoring and evaluation.

Monitoring and evaluation is the principle that the legislation should mandate for ample funding to create and oversee the implementation of a Sexual offence Act. The Best Practice report suggested that parliament play the supervisory role to ensure that statistics data is collected (Legal Action Worldwide, 2014). Monitoring and evaluation is important and should be included into any sexual violence legislation implementation plan, however that parliament should oversee the monitoring and evaluation. This mandate should be given to gender and youth or women's ministry, or an independent judiciary committee, because not all nation-states follow parliamentary systems, for nation-states where the parliament has less power than the president and executive i.e presidential system, the aforementioned recommendation bares no water. In addition, the monitoring and evaluation body should not only have profound knowledge of the legislation but have a stake in its success. As mentioned above, GBV and sexual violence is often not treated as a priority and often parliaments are part of the problem as they are embedded in the patriarchal system that regards women as public property (Mutua, 2008).

Prevention is fifth provision set by the Best Practice report. Preventing violence against women is a principle that should be included within the legislation this should include awareness raising, education curricula and media sensitization. Although the instruments of provision are fundamental in the fight against GBV and sexual violence, this provision falls short because it is unclear what the UNDP means when they say the 'legislation should prioritize prevention of violence against women'(Legal Action Worldwide, 2014). This ambiguity invokes questions more than it acts as a guiding principle. What preventative measure does the UNDP want nation-states to take? What measures can be characterized as

preventative? For instance, one could argue that teaching women and girls self-defense is a preventative measure. On the other hand, self-defense does not guarantee women and children safety. In fact, it insinuates that it is the responsibility of women and children to prevent rape, when we earlier discussed that societal norm and attitudes such as the assumption that women are public property are the causes of sexual violence. Therefore, if we are to find preventative measures we need to ensure they deal with economic, social and political norms and attitudes that are not harmful to women (Mutua, 2008).

The sixth provision is protection, support and assistance to complaint or survivor. The Best Practice report states that the Act should provide for funding of support services such as a rape crisis center and financial support for the victim. This provision should also protect the complaint from being discriminated in employment, housing and health care (Legal Action Worldwide, 2014). The problem with this provision is it does not take into account states that have a low GDP per capita. Makua Mutua states:

> "In fact, I would argue that economic powerlessness – which is connected to political powerlessness – lies at the root of sexual and gender-based violence. I regret to say that this blindness of targeting civil and political rights violations while completely overlooking economic, social, and cultural rights is one of the major drawbacks of the human rights corpus" (Mutua, 2008).

if a nation-state does not have the economic power to provide protection and support services than victims are less likely to report sexual violence which will prove the rest of the provisions in this legislation ineffective.

Investigation is the seventh provision. Investigation refers to the effectiveness of the police officers, prosecutor policies and procedures. The report says the legislation should be prosecution and pro-arrest (Legal Action Worldwide, 2014).

The next provisions deal with legal proceedings and evidence. Legal proceedings and evidence refers to the prohibition of mediation, timely and expedient proceedings. The state should offer free legal aid, 'guarantee protection, collection and submission of evidence' (Legal Action Worldwide, 2014). The Act should not have any discriminatory policies such as punish false accusations or allegations. False allegations can be defined as:

> "a reported crime to a law enforcement agency that an investigation factually proves never occurred." (NSVRC, 2012).

Although it has been advertised avidly throughout the globe that false rape and sexual assault accusations are numerous, research has shown that false reporting is only between 2 to 10 percent. Therefore, false reporting occurs in such a minute numbers in comparison to the genuine reports that occur that persecuting this would decrease reporting and increase sexual violence stigma (NSVRC, 2012).

The next provision is sentencing. Legislation should reflect the gravity of the crime and should be implemented coherently throughout. There should be no specification for sentence reduction and stipulations for exceptions. Legislation can offer compensation especially in cases that deal with domestic violence, but compensation is not a substitute for imprisonment.

Additionally, legislation must mandate for continuous monitoring of alternative sentencing. Stating that 'Legislation should mandate that alternative sentencing needs continuous monitoring' (Legal Action Worldwide, 2014). Implies that alternative sentencing is an option, this is an utter contradiction of previous sentences of this provision. I suggest that UNDP and LAW update this provision by removing the aforementioned problematic sentence.

Protection orders is the next provision. The legislation should mandate the judiciary to give the victim/ complaint eyewitness protection during the period of court proceeding. The perpetrator should be order to keep his or their distant from the complaint and provide financial assistance to the complaint. This distance should be specified. If the defendant/ perpetrator should violate the protection order there should be stipulation criminalization measure that should be rendered (Legal Action Worldwide, 2014).

Lastly, any sexual violence legislation should allow the victim to bring forth a civil suit against a family member, husband or perpetrator, government or non-governmental individual that did not exercise due diligent when investigating and or prosecuting the complaints criminal case (Legal Action Worldwide, 2014).

CHAPTER FOUR

AN OVERVIEW OF KENYA'S SEXUAL OFFENSE ACT

Introduction

The Kenya Sexual Offence Act is a piece of legislation that criminalises the use of sexual violence against women and children solely because their gender. The Bill was passed and enacted by Parliament on the 14th of July 2006 and came into law on the 21st of July 2006. The principal author and mover of the Bill in Parliament, and private sponsor of the Bill was Hon. Njoki Sussana Ndungu who developed this legislation in conjunction and partnership with Women in Law and Development Africa (WILDAF Kenya), Nairobi Women's Hospital, Steadman Group, Scan Ad& Cinearts, Association of Sisters in Kenya, Parliamentary Committee on Administration of Justice and Legal Affairs, Parliamentary Journalist Association, Kenya Women Parliamentary Association (KEWOPA), the commissioner of the Police and the Attorney General (Ndungu,). When the previously named entities together with Njoki Ndungu were researching Sexual offence Acts, they did a comparative study of South Africa's, Tanzania, Ghana, Australia, the United Kingdom and the USA. In the end, KSOA was mirrored after the British 2003 Sexual Offence Act because Kenyan law is the same as British law. Kenya was colonised by the British (Association for Women's Rights in Development,

2007).

Since independence, KSOA was the first piece of legislation to be passed that dealt with gender issues and crimes. Before the enactment of KSOA, sexual violence was a severe epidemic that was very difficult to prosecute because the legislation that criminalised sexual violence was spread between the Penal code, Criminal procedure code, criminal amendment act, and the evidence act. In 2002 it was reported that the youngest victim of sexual violence was a fivemonth-old girl and the oldest victim was 102. In the same year, Nairobi Women's hospital disclosed that they had treated 2329 female victims between 2002 and 2005 for physical and psychological trauma. Furthermore, Kenya police revealed that 2308 women experienced sexual violence in 2003; and between the months of January and July 1653, women were sexually violated. The statistics released by the Kenyan police force is a clear indicator that the number of violated women increased exponentially in the span of a year, and most of the perpetrators went unpunished due to the complex nature of the law which compounded matters for the victims, the police, and the judiciary (Association for Women's Rights in Development, 2007). All four of these laws were minimized and defined rape and sexual violence as an issue of morality instead of a crime against women's human rights. These laws are very prejudicial as rape, sexual assault, and all forms of sexual violence were understood as crimes against women instead of crimes against society (Ndungu, 2016).

Secondly, due to the complex nature of the sexual violence laws, sentencing throughout the judicial system was inconsistent and very lenient, considering the severity of the crime. The sentencing of sexual offence perpetrators fell under the discretion of the magistrate, and this meant that severity of the crime was highly influenced by the culture of the constituency and magisterial convictions (Association for Women's Rights in Development, 2007).

Lastly, all the four different laws were outdated and did not reflect the new social, medical and forensic realities in Kenya as these were laws mirrored on British law and the old Kenyan constitution of 1963 (Association for Women's Rights in Development, 2007). In particular, the Penal code did not account for HIV/AIDS, child sex tourism, sex trafficking, development in forensics such as DNA profiling which did not exist when the laws mentioned above were drafted and passed. KSOA not only considered these new forensic methodologies, but it also introduced 14 new offences such as gang rape, intentional infection of HIV/AIDS, and child pornography. It also added minimum sentences, the set-up of a DNA data bank, paedophile registry and criminalised sexual harassment (Association for Women's Rights in Development, 2007). The primary purpose of the KSOA was to ensure that medical services for all rape victims regardless of their ethnicity, class or geographical location had access to medical care, it made reporting of rape and sexual violence to the police easier, as it mandated the set-up od specialized police units and simplified post-conviction monitoring of repeat offenders and sexual predators, and introduce minimum and maximum sentencing to increase consistency throughout the judicial system (Ndungu, 2016).

The next few sections of this chapter will discuss KSOA in detail and end with repealed and deleted articles of KSOA.

Content of KSOA

KSOA has forty-nine sections and 14 provisions. Although some articles have been deleted or repealed, this thesis section will examine all the relevant articles of the original KSOA.

Chapter one is the title of the Act, Sexual offence act, and article two refers to interpretations of words and phrases used in the Act. Section three is where our analysis begins.

Chapter three of the KSOA defines rape as the intentional and unlawful sexual Act that causes penetration with his or her genital organs. This act of rape takes place without the other person consent. It is my interpretation that by 'other person', the author means the violated person. Consent cannot be obtained through force, threats or means of intimidation (Republic of Kenya,2009). According to this provision, a person found guilty of rape would be sentenced to ten years minimum sentence, and the maximum penalty would be life imprisonment (Ndungu,2016).

Chapter four refers to attempted rape. Attempted rape is as

> "Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape" (Republic of Kenya,2009).

The minimum sentence that a person found guilty of this crime would serve is five years, and the maximum penalty being life in prison (Republic of Kenya,2009).

Sexual assault is addressed in section five. Sexual assault is defined as the unlawful penetration of another person's genital organs with any part of the body of another person or a manipulated object used to penetrate the other person that at the time is not used for the sole

intention of medical or hygienic purposes. If a person manipulates their body or the other person's body to cause penetration, this would also fall under the sexual assault provision (Republic of Kenya,2009).

Chapter five recommends a maximum sentence of life imprisonment or ten years in prison (Republic of Kenya,2009). Compelled or indecent acts are dealt with in section six. Lewd acts according to article two, is:

> "any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration. (It also includes) exposure or display of any pornographic material to any person against his or her will;" (Republic of Kenya,2009).

An individual can be found guilty of this if they 'intentionally and unlawfully' compel, induce or cause another person to engage in acting indecently. The person who is compelling, inducing or causing the other person, or and a third party, or participating in indecent act themselves or using an object including an; 'part of the body of an animal, in circumstances where that other person—' could not and did not give consent, then this person, the one compelling and inducing indecent acts can be prosecuted of lewd acts. The minimum sentence for this Offence is five years in prison (Republic of Kenya,2009).

Chapter seven deals with sexual offences done within the view of a family member, child or person with a disability. A person can be found guilty of this Offence if they are found to have intentionally committed rape or indecent acts with another in the presence of a family member, child or individual with a mental disability. In section two, the Act defines what the author is referring to a person with mental disability.

> " ‘person with mental disabilities' means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act

includes a person affected by such mental impairment to the extent that he or she, at the time of the alleged commission of the Offence in question, was—

a. unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;
b. able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;
c. unable to resist the commission of any such act; or
d. unable to communicate his or her unwillingness to participate in any such act;" (Republic of Kenya,2009).

A person found guilty of this Offence will face a minimum sentence of ten years. This article does not have a maximum penalty for this Offence; thus, this was left at the discretion of the judge (Republic of Kenya,2009).

Section eight to section sixteen deal with the attempted defilement and defilement of a minor (Republic of Kenya,2009). These sections are beyond the scope of this thesis.

Section seventeen deals with the exploitation of prostitution. Any person who intentionally incites or makes another person for engaging in acts of prostitution and deliberately controls acts of that person's prostitution will be found guilty of this Act and either fined half a million Kenya Shillings or imprisoned for no less than five years (Republic of Kenya,2009).

In section eighteen, is trafficking of sexual exploitation. A definition of this Offence is not available as this provision was repealed by children's Act No.8 of 2010, section 6. However, when this section was still a part of this Act, a person convicted of this Offence could either be fined not less than 2 million Kenya Shillings (Njoki,2016). As discussed, above my reasons of contention towards penalising a perpetrator still stand.

Section nineteen is an in-depth and comprehensive provision that discusses the prosecution of a person with a mental disability. Any person found to cause, induce, threat, mislead, persuade or induce a person with mental disability to engage in an act or and acts of prostitution will be found to have committed an offence under this provision (Republic of Kenya,2009).

Secondly, any individual who transports, harbour, or receives a person with a mental disability within or across the border of Kenya for committing an offence covered in this Act, will also be considered to have intentionally and lawfully intended to commit a crime that has been criminalised in this Act (Republic of Kenya,2009).

Third, a person who knowingly allows the commission of any sexual offence covered in this provision done to a person with a mental disability will also be considered to have committed a crime under this Act (Republic of Kenya,2009).

Also, an individual who owns, leases or manages a property that is used to take sexual advantage of a person with mental disability and said person knew or intentionally allowed for these criminal acts to take place in their premise will also violate this article and its provisions (Republic of Kenya,2009).

Lastly, a person who uses force, threats, coercion, abuse of power and authority to violate a person with a mental disability or to compel another person to commit offences mentioned in this Act will also be found to have willing and lawfully violated the provisions of this Act (KSOA,2006). An individual or persons found guilty under this provision will be sentenced to no less than ten years' incarceration or fined a sum of two million Kenya Shillings (Ndungu, 2016).

Incest by a male person is section twenty of the KSOA. A person of male sex that acts indecently sexually, attempts to penetrate or penetrates any member of his family that is female I.e. a grandmother, aunt, niece, cousin, sister, mother or granddaughter will be guilty of committing a sexual offence of incest, and this person will be incarnated for a minimum of ten years. The person accused of committing this Offence must have known that the female person or persons they were attempting to violate was their relative (Republic of Kenya,2009).

Moreover, if the female person that the perpetrator tried to violate is under the legal age of eighteen, the offender will be sentenced to life in prison (Republic of Kenya,2009).

Section twenty-one addresses incest by a female. Incest by a female is when a female person knowingly and intentionally acts in a sexually indecent way or attempts to penetrate a male person that they are related to sexually, this female will be liable to the same legal sentence stipulated in provision 20 of this Act (Republic of Kenya,2009).

Section twenty-three deals with sexual harassment. The KSOA states:

> "(1) Any person, who being in a position of authority, or holding a public office, who persistently makes any sexual advances or requests which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the Offence of sexual harassment and shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both. (2) It shall be necessary to prove in charge of sexual harassment that—
> (a) the submission or rejection by the person to whom advances or requests are made is intended to be used as basis of employment or of a decision relevant to the career of the alleged victim or of a service due to a member of the public in the case of a public officer;
> (b) such advances or requests have the effect of interfering with the alleged victim's work or educational performance or creating an offensive working or learning environment for
> the alleged victim or denial of a service due to the member of the;
> (c) public from a public office." (Republic of Kenya,2009).

Section twenty-four addresses sexual offences relating to the position of authority and person in a position of trust. A person who is in a position authority and trust that tries to use their power or position of trust to induce, threaten, trick or coerce another person into a sexual act or relationship will be found guilty of violating this provision and will be sentenced to a minimum of ten years in person (Republic of Kenya,2009).

Section twenty-six comprehensively covers the intentional and deliberate transmission of HIV or any life-threatening sexually transmitted disease. A person convicted of this crime will sentence to a minimum sentence of fifteen years in prison, and this sentence can be increased to life in prison (Republic of Kenya,2009).

Section twenty-seven deals with the unlawful administrating of substance with the intent. Any person found to have administer or cause another person to take a substance so he or she can overpower or stupefy the other person to unlawfully and intentionally violate and penetrate the other person's genitals without the other person's consent will be found to have knowingly violated this section of this Act and be liable to no less than ten years in prison. During the legal proceedings, the complaint must prove to the judge that the defendant intentionally or knowingly administered or caused the alleged victim to take a substance to violate and assault the alleged victim sexually. Therefore, the onus of proof falls under the shoulder of the victim and their legal team (Republic of Kenya,2009).

Section twenty-eight covers the distribution of a substance by a juristic person. A juristic person is an individual who is well-versed with the law such as a lawyer or barrister, judge, or scholar. A juristic person that intentionally and knowingly administers or caused another person to take a substance that will disorient and overpower another person for the sole

purpose of sexually taking advantage of them will be sentenced to a minimum of a term no less than ten years or five million Kenya Shillings. The burden of proof in this section falls under on the defendant to prove that they did not distribute or cause the other person to take the substance that overpowers the victim of sexual violence (Republic of Kenya,2009).

Section twenty-nine covers cultural and religious sexual offences. Any person found to have tried to compel, threaten or force another person to engage in sexual activity without the other person's consent for religious or cultural reasons will be found in contravention of this section. The accused person if found guilty, will be liable to pay a fine of no less than five million Kenya Shillings or serve a prison sentence of no less than ten years. The burden of proof in this section falls under on the defendant to prove that they did not distribute or cause the other person to take the substance that overpowers the victim of sexual violence (Republic of Kenya,2009).

Section thirty criminalises the non-disclosure of conviction of a sexual offence. Any person who has previously been convicted of any crime covered in this Act fails to disclose this conviction to an employer while said person is attempting to apply for a position that gives them authority or entrusts them with the care of children or vulnerable persons, if found guilty under this section will legally responsible to pay a fine of no less than fifty thousand Kenya Shillings or incarcerated to a term no less than three years or upon conviction sentenced to both these terms of punishment (Republic of Kenya,2009).

A vulnerable person is defined as:

> "'vulnerable person' means a child, a person with mental disabilities or an elderly person and 'vulnerable witness' shall be construed accordingly." (Republic of Kenya,2009).

Lastly, section forty-one addresses the extradition of a Kenyan citizen or permanent residence who is accused of committing any act of sexual violence that is covered in this Act. Section forty-one of KSOA clearly states:

> "(1) A person who, while being a citizen of, or permanently residing in Kenya, commits an act outside Kenya which Act would constitute a sexual offence had it been committed in Kenya, is guilty of such an offence and is liable to the same penalty prescribed for such Offence under this Act.
> (2) A person may not be convicted of an offence contemplated in subsection (1) if such a person has been acquitted or convicted in the country where that Offence was committed."

Repealed and Deleted Sections of KSOA

Since the enactment of KSOA, some provisions in this Act have been deleted or repealed. This section will briefly discuss what \ abolished and eliminated articles and why.

Section eighteen was repealed and replaced by Act Number 8 of 2010, section 3 to article 5. Act 8, which is also known as Trafficking in Persons, defines and sufficiently prescribed adequate punishment for the crime (Republic of Kenya,2009).

Section thirty-eight that addressed gang rape was deleted by Act Number 7 of 2007. Act number 7 of 2007 is also known as the employment act (Republic of Kenya,2009). Gang rape should not have been removed from the Sexual Offences Act and added to the employment act. As my examination of the employment law has led me to conclude that gang rape is not being addressed and prosecuted sufficiently.

Implementation of KSOA

Throughout the first forty-five sections of KSOA, there is an implicit undertone that the national government of Kenya would be liable for the implementation of this Act. In Section forty-six and forty-seven, the author makes it explicitly clear that the state is responsible for the implementation of this Act. According to Section forty-six, the minister has to prepare national policy framework

> 'guide the implementation, administration of this Act to secure acceptable and uniform treatment of all sexually related offence including treatment and care of victims of sexual offences;' (Republic of Kenya,2009).

The minister is also responsible for review the policy framework at least every five years and when required, must amend the national policy framework. The minister that the author is referring to is; "the Minister for the time being responsible for matters relating to legal affairs and public prosecution" (Republic of Kenya,2009).

Section forty-seven deals regulations. In consultation with the ministries of Internal Security, Prisons, Social Services, Education and health, the minister can make regulations in 'any matter which is required or permitted by this Act...', inter-sectional coordination between sectors and any other matters that need to be addressed to achieve or promote the objectives of this Act (Republic of Kenya,2009).

Section forty-seven A, states that the Chief justice may make court rules to ensure that this Act is implemented sufficiently (Republic of Kenya,2009).

Lastly, the Act explains very proficiently in section thirty-five to thirty-nine how the victim of any sexual offence covered in this Act should be supported, it tells the importance of witness protection and states how it should be carried out. It says that medical treatment for the victim will be publicly funded. Thus this ensures that every victim ideally has access to a rape kit, gynaecological care and any other mental or physical treatment they require within stipulated bonds. There is clear description on the particular rules that should be followed for the judicial and prosecutorial process including and not limited to, intermediaries, rape shield, intimidation of a witness, and withdrawal of cases can only be permitted by the state (Ndungu,2011).

Also, the Act stipulates that all medical, criminal and judicial personnel that will come in contact with the victim of a sexual offence or the crime scene must undergo specific training to ensure coherent and seamless coordination between medical and legal instruments responding to sexual crimes (Ndungu,2011).

Critiques of KSOA

The Best Practice report critiqued Kenya from deviating from the UNDP model because no provision mentioned what entity or individual would be responsible for monitoring and evaluation in the KSOA. This thesis contends that the Best practice report is incorrect because there is an individual who is mandated with the responsibility of monitoring and evaluating the Act's implementation. In section forty-seven, the Act states that the minister will be responsible for reviewing and amending the national policy framework if need be. Thus, it is an intelligible

deduction that the minister of health in consultation with the departments of Internal Security, Prisons, Social Services, Education and Health is responsible for the monitoring and evaluation of this Act's implementation (Republic of Kenya,2009).

Moreover, since the Act was enacted while the old constitution of 1963 was still in effect, the minister mentioned in the Act would automatically report back to Parliament, as the executive was accountable to Members of Parliament, who act as the people's representatives.

Secondly, the Best Practice report falls short of assessing the monitoring and evaluation provision of the Act because when the Best Practice report was published, Kenya had passed a new constitution of 2010. This constitution prescribed for one-third gender representation led to the creation of women representatives in all forty-seven counties and a new ministry known as Ministry of Public Service, Youth and Women Affairs (Republic of Kenya, 2014). These newly created positions are now mandated to ensure efficient implementation, monitoring and evaluation of KSOA. However, this has not been the case, and the Best practice report does not mention or acknowledge this fundamental fact. (Republic of Kenya,2010)

Third, according to the Best Practice report, KSOA falls short of not integrating an education and awareness framework. According to the Best Practice report, a Sexual Offence Act should ' prioritise the prevention of violence against women and should include' awarenessraising, education curricula and sensitisation of media (Legal Action Worldwide, 2014). The Best Practice report is correct that KSOA does fall short in this area as there is no section in the Act that introduces those provisions. However, although prevention and raising awareness is essential part of fight against sexual violence, therefore, policy and legislation dealing with this, KSOA main objective was to consolidate all the sexual violence laws that

were spread between four pieces of legislation, provide for the needs of victims and survivors and prevent rape and sexual violence from taking place through stringent punishment (Ndungu,2016)

Additionally, KSOA of 2006 was the first gender-related piece of legislation to be passed since independence, which means that a great deal of compromise and negotiation had to take place (Ndungu,2016). According to the news article written by Wedhkar, Kenya has struggled with conservatism and perspective of section education being a taboo subject. Religious leaders have been a hindrance to the drafting and addition of sexual education to public school's curriculum. Considering this fact and the fact that religious leaders influence the voting populous, it is no coincidence that Ndungu and Parliament have not added sexual education, in the Act or implemented it yet (Wedhkar,2016).

Moreover, the authors of the Best Practice report disregard the fact that this Act is a working document. Meaning that it can be an amendment and corrected every five years; even though it has not been amended or updated in this respect since its enactment. Mukua points to this when he states that international human rights law is meant to be normative and not universal (Mutua, 2008).

Fourth, prescribing a fine be to any sexual offence in this Act cheapens the severity of this crime as it symbolizes a slap on wrist rather than an actual punishment of the crime committed. The sections that the author prescribes a fine, she recommends a sum of about half a million Kenya shillings, this amount does not reflect the severity of the crime neither does it factor in inflation, which may make this amount very little for some middle and upper class families.

Also, placing a fine on this Offence creates a monetary discrepancy between the haves and have nots, which implies that wealthy individuals can easily avoid incarnation while lower class and lower-income earners cannot.

Moreover, it creates a lack of consistency within the judicial system as the decision where to imprison or levy the offender will fall under the inclination of the sitting judge (Republic of Kenya, 2009). In a nation-state like Kenya, where there are 47 counties, which limits the probability that all the judges in these different counties will be inclined to prosecute the offender the same way.

Fifth, the authors of the Best Practice report have accused the Act of not having a section that deals with Martial rape (Legal Action Worldwide, 2014). Marital rape is the engagement of sexual relations with your spouse that results in penetration without the explicit and precise consent of your partner (Legal Action Worldwide, 2014). The lack of provision that deals with Martial rape can be explained once again by the conservative and taboo nature of Kenyan culture. Njoki Ndungu in here interview to Association for Women's Rights in Development, explains that marital rape was a contentious issue that she had to compromise on to get the Sexual Offence Bill off the ground and enacted. Under no circumstances does Ndungu express that the exclusion of this provision is because marital rape is not a crime, but instead it was the lack of women's representation and embedded patriarchy in the parliamentary system that forced out this provision (Association for Women's Rights in Development, 2007).

Lastly, KSOA does not explicitly mention a comprehensive human rights-based approach, specifically justice through rights and is critiqued in the Best Practice report for this. According to LAW and UNDP Sexual Offence Acts must mention what human rights-based

approach they are using. It is true that the author of KSOA does not plainly express a human rights-based approach. However, they do (the author) implicitly use the justice over rights approach throughout this Act (Legal Action Worldwide, 2014). For instance, when Njoki Ndungu chooses to compromise on preventative measures being at the centre of this Act, Ndungu chose a justice over rights approach because prevention is a vital part of right-based models, especially in the justice through rights model. It is essential to mention here that Ndungu and majority of the partners she consulted in researching and writing this Act have a legal education and therefore background. Their legal experience impacted their decision-making when they determined what aspect to centre the Act on legal justice or right-based international approach. In many cases, justice for the victim took precedence over right-based global models.

Additionally, as previously stated, injustice to victims and survivors of sexual violence paramount, because minimal prosecution and lack of adequate coordination between service provision sectors was a severe issue before this Act, was enacted, which means that KSOA had to prioritise justice over rights sometimes in order to fight against sexual violence during this time period.

> In the next section, I will discuss justice over rights in relation to KSOA in detail.

Intersectionality of KSOA and Justice Over Rights

The authors of the Best Practice report accuse the KSOA of not mentioning a human rights-based and comprehensive approach. However, this thesis contends that not only is a comprehensive human rights-based approach used, but it is implied throughout the Act. This thesis argued that Njoki Ndungu and the partners who helped research and draft KSOA used a justice over rights human rights-based approach. There are numerous instances when the reader can identify this human rights-based approach. For example, in section thirty-eight, where false reporting is criminalized. This section perpetuates the notion that a lot of women falsely report rape, which is one of the primary myths pushed in rape culture. It is clear that this section was advocated by the androcentric section of the parliament of the time and because Ndungu was so determined to pass this bill she had to compromise on the inclusion of this section, even though it goes against the intent of this act and its authors. The intent of these authors was to criminalize sexual violence, debunk rape culture and myths that normalize sexual violence (Ndungu,2006).

Secondly, KSOA does not criminalize marital rape even though it is a sexual violence act. As Ndungu explains in her interview with Association for Women's Rights in Development, the majority of parliament, men, did not want martial rape included in KSOA because they did not see it as an act of sexual violence, as it is a common belief in Kenya that consent is given once the marital certificate is signed. In, addition a great number of these men feared that the inclusion would lead to their own prosecution. Thus just like with section 38, Ndungu had to compromise and not include martial rape in KSOA. This does not mean that she does not recognized marital rape as a crime, she just did not have the support need to

include it (Ndungu,2006). This omission goes against the UN sexual violence model and the Best practices report, it also goes against the principles and norms of human rights but because justice over rights is a more flexible and accommodating approach.

Lastly, I contend that this act does not ascribe to preventative measures such as educational curriculum and constant media awareness. During the campaign season of KSOA, before KSOA was passed, Ndungu and her partners engaged in media campaigns and awareness, to bring attention to sexual violence as an issue but also to raise awareness about KSOA. After KSOA was enacted education and awareness building stopped. If a provision was put in KSOA about adding sexual violence into the national education system and the media's rotation, this would not be the case. However, due to the conservative and religious nature of Kenya society Ndungu could not include this in KSOA which goes against sexual violence legislation model prescribed by the UN and other human right activists. Although, this omission weakens these sections, it is clear it is was necessary for Ndungu to pass the Act at the time it was being discussed. Justice over rights based approach allowed Ndungu to omit this because she made this human rights agenda secondary and focused on legal justice (Association for Women's Rights in Development, 2007).

Reasons Behind Justice Over Rights

KSOA was formulated on the ideological principles of justice over rights because the Njoki Ndungu had to negotiate sexual violence in a postcolonial state that was embedded in the ontological paradigm of androcentric and patriarchy. Postcolonial feminist have identified

the state and West as instruments of oppression that 'third women' have to fight and overcome. Mohanty in Under Western eyes, asserts that the oppression experienced by 'third women' is like a double edge sword, it is exerted by both the state, the West and Western feminism (Mohanty, 1988). Mutua summarize this properly when he states:

> "patriarchy uses the law, both statutory and customary, to regulate women's sexuality and their reproductive role" (Branch,2010).

In the postcolonial state of Kenya Ndungu had to maneuver and negotiate this piece of legislation within a male centric and patriarchal space. In this male centric and patriarchal parliament, majority of members of Parlaiment did not appreciate the importance of this Act as a fundamental legal framework that addressed sexual violence as a crime rather than a moral or woman's issue and it also established sexual violence as human rights violation (interview with Ndungu). In order to get the Bill heard, passed and enacted, Ndungu had to choose and work with a human rights-based approach that would provide her human rights language and tools but also give her negotiating space to be able to compromise on some human rights principles if she needed to. Justice through rights would not have allowed Ndungu to do this, as this approach views human rights as the end all goal, whereas justice through rights see human rights as a means to an end but not the end itself (Lettinga& Trost, 2015). Quote Lettinga and Troost:

> "Human rights are instruments for reaching a different, possibly higher goal, notably distributional or even substantive equality, and not merely goals in and of themselves. (Lettinga&Troost,2015).

For this reason, Ndungu chose to work with the justice over rights approach as it gave her a negotiating space within a human rights-based framework. The other three human right-

based approaches might have given Ndungu a human right-based legal framework to work with but would have significantly limited the political and social negotiation space she could work in (Lettinga& Trost, 2015).

Secondly, while drafting and constructing KSOA, Ndungu had to prioritize the needs of the victims, judicial and prosecutorial system as well as the entire nation-state (Association for women's rights in development,2007). The first concern of victims and survivors of sexual violence is access to medical care and legal recourse, Njoki Ndungu had to ensure she prioritized this and attempted to establish an indiscriminatory system that would offer justice and medical care to all who needed regardless of their class, ethnicity, race and religious creed.

Additionally, members of judiciary and police force require a coherent and concrete legal framework that streamlined the investigatory and prosecutory process. She also had to redefine sexual violence as a criminal offense not a moral or woman issue that only affect a certain percentage of the population. Victims and survivors of sexual violence have often expressed that they did not feel supported by the legal and judicial system, which they felt neglected their medical and judicial needs. They also felt that these systems were deeply embedded in patriarchal myths and fallacies that disempowered and silenced them. In unfinished business, Mutua states:

> "The machinery of the state and law enforcement have never been eager in any society to interrupt the lives of perpetrators. This means that civil society must work extremely hard and remain vigilant to make sure that the requisite laws are passed and that enforcement authorities do their job." (Mutua,2008).

This means that in the past the state and the society as a whole did not treat sexual violence with the gravity and commitment it needed to ensure that the needs of the victims were met and the perpetrator were punished to the full extent of the law (Mutua,2008). A perfect example of this, are the former pieces of legislation that criminalized sexual violence in Kenya. Those four pieces of legislation defined sexual violence as a moral issue rather than a crime that violated the victim's physically and psychologically as well as violated their human rights (Association for Women's rights in development,2007). In addition, those laws were neither accurate in their definition of sexual violence or stringent enough when punishing the perpetrators of this crime. It could easily be argued that the authors of those legal frameworks did not want to disrupt the lives of preparators. Whereas njoki Ndungu not only wanted to disrupt the lives of the preparators but she wanted to ensure the rights and needs of the victims were accurately and adequately represented. Ndungu chose justice over rights because it would allow her to represent the needs and rights of the victim's while navigating a hostile masculine-centric parliament and patriarchal society that excused the acts of the perpetrator while blaming the victim.

Third, justice over rights provided Ndungu a legal framework to address victim shaming and victim silencing by comprehensibly defining sexual violence as a criminal offense that has severely traumatized the victim and compromised their ability to adequately participate in the economic, political and social development of the nation-state. As mentioned in previous sections of this thesis, women's bodies are often viewed as communal property, especially when discussing married women. Mutua states:

> "Since women are regarded as property in many cultures, violating them is seen as a diminution of the men who "own" them." (Mutua,2008)

In addition, during colonialism the black woman was not only seen as communal property but as hypersexualized object that belong to all men in society (Tamale, 2011). Like Mutua says:

> "They are socialised by patriarchy – rule by men – to abuse women, and to treat them as chattel" (Mutua,2019).

This Euro-centric interpretation of the African woman sipped into the post-colonial state and caused women to be treated as objects rather than human beings, let alone equal human beings (Tripp, 2017). As Mutua said in the epidemic of gender-based violence:

> "There is a corrosive alchemy between imported colonial beliefs on gender and some homegrown African values." (Mutua,2019).

To effectively dispel these fallacious representations, Ndungu had to establish a strong legal framework that would first and foremost criminalize sexual violence and define it as a human rights violation. Criminalization had to take precedence over human right discourse and language because human rights law is viewed as foreign entity. International human rights law and some human right-based approaches have been described and understood as Western and Euro-centric vehicles of neocolonial states and organizations (Lower, 2013). This is because human rights discourse originated from the West and universality of human rights have not always been applicable to the West especially if one examines the relationship between the West and the

'third world'. This double standard has made some third world political leaders skeptical and hesitant to use human rights discourse and frameworks (Branch,2010). This contestation and

perception of international human rights law could have hindered the progress and enactment of KSOA which is why Ndungu had to prioritize sexual violence as a sexual offence rather than violation of human right which justice over rights approach allowed her to do.

Fourth, justice over rights allowed Ndungu to contextualize international human rights discourse while still maintain the fundamental integrity of international human rights law and human right-based frameworks. International human rights law follows the paradigm of universality and one size fit all mentality. International human rights law does not account for complex and diverse political, social and economic landscapes. To be specific, international human rights law turns diverse cultural and religious communities into monolithic entities, which in itself is a violation of these people human right to freely practice their cultural and religious norms. Mutua says that international law and transnational vehicles of justice:

"transitional justice in normative, inflexible terms that suggest a utopian certainty."

Mutua meant that a unilateral interpretation and implementation of human rights law cannot be applied to all nation-states, regional and continental communities of this world. However, as it stands, Western human right activists and organizations do not seem to recognize this which is why human rights law is not wholly acceptable, adopted and neither is it seen as complete. As Mutua says:

> "Rather, it is to recognize their limitation so that we do not stampede to the temple only to find it empty of the goddess of truth. What is more useful for us to do is to imagine transitional notions as one incomplete vehicle through which we can understand and start the recovery of a tormented society." (Mutua, 2008).

The best way to change the above perception of international human rights law is to contextualize international human rights law so that it reflects the realities and experiences of the populace it is meant to represent and protect. In Kenya for instance, there are approximately seventy distinct ethnic groups. These seventy ethnic groups have sub-ethnic groups and clans. All of which have specific and different cultural practices and norms (Kurian,1992). This makes Kenya a complex and unique political, social, and economic landscape that Ndungu had to ensure KSOA represented, anything short of this would rend KSOA non-void and useless (Mutua,2008). To quote Adam Branch,

> "The exploration of this tension - that existing human rights, by failing to be specific to East Africa, can undermine the conditions for the realization of rights - is one of the strongest points of this volume" (Branch,2010).

While drafting, researching and trying to pass this bill/ KSOA, Ndungu must criminalize sexual violence without criminalizing Kenya ethnic groups cultures and practices. Justice over rights provided Ndungu the flexibility to do this. According to Lettinga and Troost, justice over rights:

> "Amnesty will probably work with a (broad) moral concept of human rights to circumvent the limitations and indeterminacies of law, but also with other values such as dignity, justice and equality. The flexibility that this might entail will be beneficial for its work with rights-holders and with other movements and activists."
> (Lettinga&troost,2015).

In this case, Ndungu used a broader understanding of human rights that in cooperated the Kenyan legal, political, economic and social landscape to represent sexual violence victims and right-holders (Lettinga&troost,2015).

Fifth, KSOA contextualization required consideration and representation of religious sect of the Kenyan population. The Kenya population is a very religious populace. According to

Kurian& Kurian 70% of Kenyans are Christian, 25% practice indigenous religions and 6% are Muslim (Kurian&Kurian,1992). This means that religion informs majority of Kenyan social and political development. In fact, religious leaders play a huge role in political development in Kenya, which means their views had to be respected and considered when drafting KSOA. It also means is religion becomes yet another instrument to control women's bodies and sexualities.

Tyagi states:

> "a 'traditional' ideology wherein female sexuality was legitimately embodied only in marriage, wifehood, domesticity- all forms of controlling women's bodies."

As Johnson and Johnson explained, colonial beliefs and norms, as we know Christianity came with colonialism, become intertwined with traditional norms and the result is increased patriarchy and toxic masculinity (Johnson,2010). The main problem with this that Ndungu had to compromise on criminalizing certain acts of sexual violence such as martial rape, because many Christian do not believe in martial rape because of the verse in the bible that tells wives to submit to their husbands. Christians assumes this includes intimate relations, other go as far as assuming that a wife gives consent to all sexual relations once she signs the martial certificate, which is not the case.

In addition to adhering to these fallacious claims about martial rape, Ndungu had to criminalize prostitution and be care how she framed sexual violence in general (Association

for Women's Rights in Development,2007). Justice over rights helped her do this (Lettinga &Troost, 2015).

Critiques of Justice Over Rights

Justice over rights provided Njoki adequate tools and human rights language to compromise with the political and religious sect of the Kenyan population but she might have compromised too much. The best practice report was incorrect in stating the KSOA did not use a comprehensive and human rights-based approach but it was correct in pointing out that compromising on criminalizing on martial rape, left a percentage of victims and survivors of sexual violence un-representation and violated by the system that is meant to protect them (Legal Action Worldwide,2014). One of the biggest issues that surrounds rape and all forms of sexual violence, is victim shaming and silencing. These two practices come from poor legislation, cultures deeply embedded patriarchal and toxic masculinity beliefs, norms and practices. By not criminalizing martial rape, Ndungu let these practices and norms continue Tyagi,2014).

On the other hand, this was meant to be a foundation document that would be amendment every five years. Prior to KSOA, no gender-based piece of legislature had been passed or discussed in Kenya after independence. Thus, Ndungu had to compromise on this issue to ensure that KSOA was passed and enacted (Association for Women's Rights in Development. 2007).

Secondly, it has been thirteen years since KSOA was enacted and it still hasn't been amended, thus Ndungu cannot bear the blame of not representing the victims of martial rape, her fellow parliamentarians are also to blame. In addition, when Ndungu was a member of parliament women were significantly underrepresented but unlike that time there has been a significant increase in the number of women leaders and parliamentarians, it could be argued that it would be easier to pass the amendments needed to make KSOA more effective and representative (Association for Women's Rights in Development. 2007).

Third, KSOA may have provided the short and medium term protection required to protect victims of sexual violence and disrupt the lives of the perpetrators. However, it did not achieve long term cultural and systematic changes needed to make this Act comprehensive and as effectual as it could be. As Tyagi pointed out there is a patriarchal and androcentric ontology that continually work simultaneously to control women's bodies and sexuality (Tyagi,2014). We trace this ideology and those practices all throughout the world and history meaning in order to effectively fight sexual violence legally, political, and socially, we have to change culture and systems that perpetuate and enforce rape culture and myths that normalize sexual violence. This means that all sexual violence legislation has to criminalize all forms of sexual abuse, and debunk patriarchal myths and rape culture. In Kenya's case, section 38 has to be completely repealed not just deleted. This is the section that speaks on false reporting, although false reporting does happen, it is not a high enough percentage. If rape culture and sexual violence myths are debunked, this number will significantly reduce, if not stop completely.

CHAPTER FIVE.

CONCLUSION

Introduction

This chapter discuss different recommendation that LAW and Kenya should make in order to improve the Best Practice Report and KSOA. Although the recommendation made in this chapter would be highly beneficial, it is important to note that there may be certain variable that may hinder the adoption and implementation of these suggestions. For instance, In order to protect and enhance justice for victims of marital and gang rape, and sexual trafficking it is recommended that Kenya add these crimes to KSOA but cultural disposition may hinder this, which is why Ndungu as an African feminist omitted and deleted these crimes to begin with.

Recommendations for Best Practice Report

The Best practice report does not clearly define what they mean by a comprehensive human right-based approach, neither do they explicitly discuss which human right-based approach they recommend for nation-states to use while constructing their Sexual Offense Act, although they do imply a justice through rights approach. This makes the sections that discuss human right-based approaches ambiguous and incomprehensive. LAW should revise The Best practice report by clearly and coherently defining and explaining why a justice through rights framework is a better approach for constructing Sexual Offense Acts.

Secondly, LAW and UNDP ascribe to a very rigid and homogenous methodology of constructing Sexual Offence Acts. This methodology does not take into consideration

economic, social and political factors that may influence and deter a state's ability to pass or enact their Sexual Offence Act as recommended in the Best Practice report. For instance in Kenya, Ndungu and her partners were unable to pass KSOA as it was originally written as they had to exclude marital rape, gang rape and sex trafficking from the Act due to limited social, political and economic capital. LAW and UNDP criticized Kenya for not including those offenses but does not acknowledge the economic, social and political factors that led to those exclusions. Although LAW and UNDP were correct in this criticism, these organization need to acknowledge that their homogenous methodology cannot work in every nation-state, as each state has different economic, political and social variables to consider. For this reason LAW and UNDP should consider these variables when evaluating states in the developing world.

Third, the Best report and other reports written by international organizations have been criticized for not including the voice of Africans especially African women and women who have been traumatized by sexual offenses. The Best Practice report evaluated four African countries but it is unclear if women from these countries were consulted when this report was being researched and drafted. In the future, LAW, UNDP and other international organizations should consult and include the voices of African women and sexual violence survivors in their evaluation of any nation-state. This will ensure that they convey a complete and contextual evaluation of these states.

Additionally, LAW and UNDP should encourage member states to consult and include African women and survivors of sexual violence in the drafting of Sexual Offense Acts.

Lastly, the Best Practice report does not define and prescribe to a definition of consent.

The report just says that consent should be included in Sexual Offense Acts. Consent as discussed earlier in this thesis, is important because it determines if sexual relations are legal or a crime yet the term consent is rarely found in legal documents. LAW and UNP should update the Best Practice report to include a clear and coherent definition of consent. In fact, LAW and UNDP should encourage their member states to define consent as the informed, ongoing, freely given by all parties before and during sexual intimacy, Consent can be evoked and once evoked any sexual act will be prosecuted as sexual violence.

Recommendations for KSOA

KSOA needs to criminalize all forms of sexual violence that are not included in the current 2006 version. According to KSOA, gang rape was deleted by Act number 7 and is therefore no longer included in this act (Republic of Kenya, 2009). Moreover, KSOA never included marital rape as a sexual offense due to social, religious and cultural reasons. This means that victims of these offense are not protected under KSOA which makes prosecution of this crime difficult, if not impossible, as we have previously discussed in this paper that the separation of legislation leads to incoherent and inconsistent investigation and prosecution of the crime. According to Daniel Howden, gang and marital rape are very predominant forms of rape in Kenya and they are also one of the most underreported and under prosecuted crimes in this nation state (Howden, 2013).

Additionally, trafficking of sexual exploitation is another provision that was included in the original KSOA but repealed in 2010. Human trafficking has been reported as one crime

highest gender based violence crimes and it continues to rise drastically throughout the world. For this reason alone, it all forms of sexual violence should be included in KSOA.

On the other hand, although the aforementioned sexual offense are prevalent and have detrimental effects on Kenyan women, there is no guarantee that these crimes will be added to KSOA, especially marital rape. In the Kenyan society, sexual relations between a husband and wife is considered to always be consensual, as the assumption is that consent was given once the marital certificate was signed. This reasoning is informed by Christianity as well as cultural dispositions (Godia, 2016). However, the best way to change this mind-set is to inform and educate the public on this matter through media campaigns, before attempting to introduce and criminalize marital rape in KSOA.

Secondly, although KSOA has a clear definition of consent it does not include the fact that consent can be revoked at any given point, meaning it is an ongoing process. Including this fundamental point to KSOA will reduce ambiguity around the issue of consent, as it will make it clear that consent can be freely given and freely taken away. Any act after consent is taken away is a sexual offence crime.

Third, KSOA needs to stipulate in the beginning of this act that women are not communal property and that any religion or culture that pushes this claim will be committing a criminal offence. By clearly and articulately stating the above we can start to reform societal beliefs and rape culture that has been shown to be a root cause of rape culture and the normalization of sexual violence. The best strategy to implement this thesis would be using human right-based language. In the Universal Declaration of human rights, it is made clear that no one has the right to violate another person's dignity and security. Although this same

declaration protects the right for people to practice their religions and cultures freely, in this case their norms and beliefs would lead to the perpetration of sexual offenses, as these norms and beliefs would fortify the normalization of sexual violence and rape culture. By using this language with the justice over rights approach, the Kenyan parliament would be adding an extra layer of protection for the victims and fortify KSOA as a human rights legal document.

Fourth, KSOA clearly specifies that medical and legal expenses of victims of sexual violence will be borne by the state, however it does not clearly ascribe a ministry that will oversee this mandate. Medical care should fall under the purview of the Ministry of Health and be added onto the National Hospital Insurance Fund (NHIF). NHIF is a state sponsored insurance fund that ensures all Kenyans above the age of 18 have access to health insurance. This ideally ensures that all Kenyans have access to proper health care. By adding physical and psychological health care services to sexual violence victims, NHIF will make health care more affordable and accessible to all members of the Kenyan society.

Fifth, KSOA does not prescribe a special trained unit to investigate sexual violence crimes. Makua Mutua has made this proposition many a times, it is even proposed in the 2016 KSOA amendment bill. According to Jane Godia, the calls for a gender Crimes unit has been going on for awhile (Godia,2016). This is because, the first point of contact that victims have with the police is very important, a positive interaction will make the survivor feel supported and understood, whereas a negative interaction, which is normally the case, could re-traumatize the woman and make them feel unsupported and violated by the very system that is meant to be supporting them.

In addition, undertrained and inadequately trained police and investigatory forces tend to destroy crime scenes by either collecting forensic evident incorrectly or tampering with it so much rendering it useless. By mandating the national government to train a special unit in KSOA, it not only ensures it is done properly but it ensures that there is accountability.

Sixth, KSOA should mandate the Ministry of Education to add sexual education to national elementary and high school curriculum. As previous mentioned religious sectors hindered the addition of this curriculum being added to KSOA but sexual education that included learning about sexual violence, what it is, its impact and origins will make fighting against this type of violence easier and more effective. At the moment, all the information about sexual violence is informed by cultural and religious discourse, this discourse as previous mentioned is embedded in fallacious myths and rape culture. The government of Kenya and civil societies need to debunk these fallacies if they really want to reduce the level of gender-based violence that takes place in Kenya. An attempt has been made to debunk these myths and beliefs that normalize rape culture and sexual violence by the 2019 KSOA amendment bill. The Bill states that sexual education is in alignment with right to information, which is a right that is enshrined in the Universal declaration of human rights. The Bill proposes:

> "Every local authority, in collaboration with civil society and the Ministry responsible shall conduct education and information campaigns on sexual offences within its area of jurisdiction." (Republic of Kenya, 2016).

The reason why this proposition would be effective is the county governments together with the ministry of education and civil societies will be accountable for citizens accessing the right information.

Seven, KSOA 2006, has not been amended in thirteen years, there has been a proposed bill made by women representative and members of parliament to change a number of things in

KSOA, unfortunately this bill has been pushed back from parliament agenda numerous of time. This bill should be pushed the same way that 2006 KSOA was pushed, using media campaigns and participation of women leaders. Media campaign will ensure that the ordinary Kenyans will be aware that such a proposed bill exists and it will also inform the public on the content of this proposed bill (Godia,2016). Additionally, using women leaders in political and social circles will put pressure on the national government to take this bill serious and push it further ahead in the parliament listening agenda.

Lastly, KSOA passed four years before the new constitution was enacted, therefore KSOA does not have provisions to deal with the devolution of national and municipal government. Prior to the 2010 constitution, Kenya was divided into provinces and constituencies. This changed when the 2010 constitution became law, the large provinces were broken down to forty seven county's (republic of Kenya, 2010). Each county is led by a governor, senator and woman representative. KSOA 2006 and hopefully 2016 needs to reflect the devolution of function of government so that it can be implemented properly (Godia,2016). In addition, these county governments should be utilized in the push of the 2016 amendment bill and the push, and implementation of sexual education.

Conclusion

Sexual violence is an epidemic that affects one out of three women daily. KSOA is an important piece of legislation that was enacted in 2006 which criminalized numerous forms of sexual violence by using the justice over rights human rights-based approach. Justice over rights human rights-based approach is a different approach from what is prescribed by the UNDP international protocol on sexual offense acts and the Best Practice report. The Best Practice report and the UNDP international protocol on sexual offense acts ascribe a justice through rights, human rights-based approach because this approach primary goal is the realization of human rights as the end goal of any international human rights law. Although justice through rights, is an effective approach to use in legislation that criminalizes sexual violence, it is not the only human rights-based approach that can be used.

Njoki Ndungu and her partner recognized this, and chose to deviate from using justice through rights approach and opted to use justice over rights approach, as it was the best approach to use for Kenya's political and social landscape. Kenya is a rich and diverse nation-state with approximately seventy ethnic groups and numerous sub-tribes and clans, all these cultural groups norms and practices had to be represented in KSOA, as culture plays a fundamental role in the social and political development of the Kenya nation-state. As previous stated, Ndungu had to ensure she criminalized sexual violence without criminalizing Kenyan ethnic groups and subtribes. By contextualizing international human rights law, Ndungu made transitional justice in Kenya less normative and rigid (Mutua,2008).

Secondly, international human rights law has a history of turning complex and diverse cultural and religious communities situated in the third world, especially Africa, into a

monolithic and demonized cultures that are patriarchal and predominately violent entities but as we have discussed patriarchy and androcentrialism norms and beliefs are found in all societies of the world including western societies. Thus KSOA fights this mentality by contextualizing international human rights law to reflect the realities and lived experiences of the Kenyan people (Mutua,2008).

Third, justice over rights allowed KSOA to prioritize the needs of the victims, survivors of sexual violence and the judiciary and prosecutory system. Victims and survivors of sexual violence needed legal justice and medical care. As discussed in previous sections of this thesis, the previous legislation that criminalized sexual violence did not prioritize these needs. This made justice and medical care inaccessible and when accessible inefficient. Ndungu, changed this by using justice over rights framework that allowed her to prioritize legal justice over human rights. This new coherent and comprehensive legislation also served the needs of the judiciary and investigatory branch of the government as it made investigating and prosecuting sexual violence easier and more effective. Prior to KSOA 2006, legislation that criminalized sexual violence was spread out in four different pieces of legislations. This made investigating this crime difficult and ineffective, thus by amalgamating all sexual violence laws into one document Ndungu changed this.

Third, by clearly defining sexual violence as a crime in KSOA, Ndungu provided a legal framework and argument to dispel victim blaming and shaming. Sexual violence is never the fault of the victim but patriarchy and toxic masclunity define women as communal property make it easier to justify this line of thinking. By classifying sexual violence as a crime it makes

it difficult for victim blamer and shamer who label and dismiss sexual violence as a moral and woman issue (Mutua,2008).

Lastly and most importantly, justice over rights allowed Ndungu to negotiate sexual violence in a postcolonial state and parliament embedded in andocentric and patriarchal norms and practices. Postcolonial feminist like Mohanty, describe this form of oppression and suppression as double colonialism because women have to fight against postcolonial domestic patriarchy and neocolonialism from West and Western feminist (Mohanty,1988). Both these entities use statutory and customary laws to control women's bodies and sexualities (Mutua,2008). In this postcolonial state, Ndungu had to negotiate and pass KSOA without completely compromising the intent and purpose of this act and justice over rights approach allowed her to do this.

APPENDIX Figure 1.

Overview Findings from Sexual Offense Act in Africa. Kenya

Human rights-based and comprehensive approach	Legislation should be rights based, apply equally to all women and provide for the prevention, protection and survivor empowerment. It should clarify the relationship between customary and religious law and remove all conflicting provisions.	No
Implementation	Legislation should formulate a plan or a framework; provide adequate budget and a time limit for entry into force. It should mandate training, specialised police, courts and sanctions and also ensure regulations, protocols and guidelines are developed.	Yes
Monitoring and evaluation	Legislation should mandate adequate funding for creation of mechanism to oversee implementation and report back to Parliament regularly as well as ensure the collection of statistical data (there is provision for this but is it actually followed?	No
Definition	Legislation should provide comprehensive Definitions of domestic and sexual	Yes

	violence. Domestic includes, physical, sexual, psychological and economic. Sexual includes sexual assault, including the criminalising of marital rape (not recognized) and sexual harassment Which provides all sexually determined behaviour is unwelcome.	
Prevention	Prevention Legislation should prioritise prevention of violence against women and should include provisions on: a) awareness raising b)educational curricula c) sensitization of media c) sensitization of media ((Kenya fails this practice/provision)	No
Protection, support, and assistance to complainants/survivors	Provide funding for support services, rape crisis centre, prohibit discrimination in employment, housing and health care, financial support for the victim.	Yes
Investigation	Legislation should provide that police officers respond promptly with SGBV investigated and prosecuted	Yes

	properly and pro-arrest and pro-prosecution policies in cases of SGBV. (clearly a problem in Kenya hence the sexual offence bill 2016	
Legal proceedings and evidence	Legislation should prohibit mediation, encourage timely and expedited proceedings with no delay in reporting, free legal aid, guarantee protection, collection and submission of evidence, remove all discriminatory elements including removing the cautionary warning and evidence of complainant's sexual history.	Yes
Sentencing	Legislation should provide that sentencing is consistent with gravity of crime with all exceptions and reductions (such as honour crimes) removed. Enhanced sanctions for repeated/aggravated offence should be provided with fines not being imposed in cases of domestic violence where it will cause financial hardship to survivor. Legislation should order compensation but not in substitution for imprisonment. Legislation should mandate that alternative sentencing needs continuous monitoring	Yes

Protection orders	Protection orders should be issued to all SGBV survivors in addition to and not in lieu of any other legal proceedings enabling them to be introduced as material fact. They should order the perpetrator to stay a specified distance away form the perpetrator to stay a specified distance away from complainant and provide financial assistance. Legislation needs to issue emergency orders with testimonies/affidavits sufficient evidence for issuance. Legislation needs to criminalise violations of protection orders.	Yes
Civil Lawsuits	Legislation should abolish requirements forbidding women to bring lawsuits against a husband or family member and should allow for the bringing of law suits against governmental or non governmental individuals that have not exercised due diligence in prevention or investigation of the law suit.	No (because so far cases are settled out of court, and you need criminal judgement in order to file a civil suit)

Figure 2.

KSOA Sections and provisions

1- Short title.
2- Interpretation.
3- Rape.
4- Attempted rape.
5- Sexual assault.
6- Compelled or induced indecent acts.
7- Acts which cause penetration or indecent acts committed within the view of a child or person with mental disabilities.
8- Defilement.
9- Attempted defilement.
10- Gang rape.
11- Indecent act with child or adult.
12- Promotion of sexual offences with a child.
13- Child trafficking.
14- Child sex tourism.
15- Child prostitution.
16- Child pornography.
17- Exploitation of prostitution.
18- Trafficking for sexual exploitation.

19- Prostitution of persons with mental disabilities.

20- Incest by male persons.

21- Incest by female persons.

22- Test of relationship.

23- Sexual harassment.

24- Sexual offences relating to position of authority and persons in position of trust.

25- Sexual relationship which pre-date position of authority or trust. 26- Deliberate transmission of HIV or any other life threatening sexually transmitted disease.

27- Administering a substance with intent.

28- Distribution of substance by juristic persons.

29- Cultural and religious sexual offences.

30- Non-disclosure of conviction of sexual offences.

31- Vulnerable witnesses.

32- Vulnerable witnesses to be notified of protective measures.

33- Evidence of surrounding circumstances and impact of sexual offence

34- Evidence of character and previous sexual history.

35- Medical treatment orders.

36- Evidence of medical, forensic and scientific nature.

37- Keeping a crime scene secure, etc.

38- Offence to make false allegation.

39- Supervision of dangerous sexual offenders.

40- Attorney-General to decide whether police investigations should be discontinued.

41- Extra-territorial jurisdiction.

42- Consent.

43- Intentional and unlawful acts.

44 - Evidential presumptions about consent.

45- Conclusive presumptions about consent.

46- National policy framework.

47- Regulations.

48- Transitional provisions.

49- Consequential amendments and repeals.

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