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THE PROFITABILITY OF ENDING THE MARITAL RAPE EXCEPTION: UGANDAN SOCIETAL NORMS IMPEDING WOMEN'S RIGHT TO SAY NO

Ali Roberson

I. Abstract

Gender-based violence (GBV) is a global issue, particularly egregious in developing nations. Social norms often protect men who commit certain GBV offenses. One offense men in developing countries are often protected from is marital rape. In Uganda, married women have no protection from rape committed by their spouses. This leads to a pattern of violence between partners in the home. By empowering married women and providing protection from the impunity of marital rape, social norms surrounding GBV will shift. New generations will emerge with the mindset that violence towards one's wife is no longer socially acceptable. The frequency of violence towards women as a whole would be impacted by this mindset which would empower women. Empowered women raise empowered children, making social change that lasts. The cost of GBV to the global economy is significant. By protecting married women and shifting the social norm surrounding marital rape, there will be an impact on the social norm of GBV and the cost associated with it. Empowered women fuel economic prosperity, which will in turn benefit both the local and global economy.

"As a man, you need to discipline your wife. You need to touch her a bit, tackle her, and beat her somehow, to streamline her. If you leave her unpunished, she may become an undisciplined wife and this practice of not beating women has actually made them stubborn."

*-Onesmus Twinamatsiko, Member of Ugandan Parliament,
March 10, 2017.¹*

II. Issues

In Uganda, the offense of rape carries the maximum punishment of the death penalty.² Currently, marriage is a defense to the crime of rape, but the law is complicated. Despite the fact that marital rape is a widespread issue,³ there is no recorded evidence of a marital rape case ever being brought against a spouse in Ugandan case law.⁴ The basis of the defense is deeply rooted in Ugandan social norms. A woman would never bring a case against her husband for the crime of

¹ U.S. DEP'T OF STATE, UGANDA 2018 HUM. RTS. REP. 23 (2018), <https://www.state.gov/wp-content/uploads/2019/03/Uganda-2018.pdf>.

² Benjamin Odoki, THE CONSTITUTION (SENTENCING GUIDELINES FOR COURTS OF JUDICATURE) DIRECTIONS (2013).

³ Uganda, 31 Ann. Hum. Rts. Rep. Submitted to Cong. by U.S. Dep't St. 593, 606 (2007) [hereinafter Human Rights Report].

⁴ Bart M. Katureebe et al. THE GENDER BENCH BOOK 57 (2016).

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rape, not because the law precludes her, but because society precludes her. Impunity abounds when a Ugandan man rapes his wife, and in addition to the grave violation of human rights and human decency, it is also growing to become a severe detriment to the economy.

Marital rape, in Uganda, as in many other developing countries, is a largely unspoken crime that is a driving factor in the persistence of gender-based violence (GBV). Fifty-six percent of women in Uganda who have ever been married have experienced physical, sexual or emotional violence by their spouse/partner with forty-six percent of ever-married women saying that they live in fear of their spouse some or most of the time.⁵ The issue is making a negative impact on the potential of the economy for many reasons, such as, the costs associated with the after-effects of the crime and the effects it has on female participation in the work force.

Married women are not afforded the right to refuse sexual intercourse with their husbands. Men are not punished for sexual violence towards their wives. Sixty-eight percent of the time when a woman experiences sexual violence in Uganda it is from a current or former spouse.⁶ Women are afraid to report their husbands' crimes for fear of financial instability and community backlash, so they endure it.⁷ Ugandan men are aware of this, and many take full advantage of it, using fear as a motivating factor for housework, cooking and employment.

A married woman in Uganda has no right to say no to her husbands' sexual advances, although this lies in direct contrast to the principle of fundamental rights afforded to women by the Ugandan Constitution.⁸ This also violates the rights set aside and agreed upon by Uganda in the UN Declaration on the Elimination of Violence Against Women (DEVAW), and in the due diligence standard of international law.⁹ Socially motivated factors prevent Ugandan women from attaining this right.

GBV is a global issue. Regardless of gross domestic product or geography, almost all nations tackle the issue in different ways. For many countries, that means complying with the UN mandates in place to protect women, yet violence persists. Certain crimes have become integral parts of society and culture to the point that they are never addressed. For reasons such as their taboo nature or societal norms, the issues become untouchable and unspoken of, and this is what has happened in the case of marital rape in Uganda.

By addressing the unspoken crime of marital rape, it is easier to understand the driving cultural motivations which lie behind the persistence of GBV. From there, steps can be taken to educate citizens and reform legal systems to deal with the root of the GBV issue. A large shift in social norms is needed, and that will require effort from government leaders, law enforcement, grass roots non-gov-

⁵ UGANDA BUREAU OF STATISTICS, Uganda Demographics Health Survey 2016, 313 (2016).

⁶ *Id.* at 329.

⁷ Amy Shupikai Tsanga, *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe* 241 (2003).

⁸ UGANDA. CONST. art. 21.

⁹ *Id.* at 166.

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ernment organizations (NGOs) and international non-government organizations (INGOs).

Additionally, a deeper look will be taken into how fighting for the equality of women benefits the local and global economy. Where women live in homes free from fear of violence, women prosper, and we know that where women prosper, the economy prospers as a result. When married women are seen as human beings, with equal rights and the right to say no to sexual intercourse, the Ugandan economy will reap the benefits and affect the global economy in return.

III. Origins

Uganda subscribes to the concept of marriage as a defense to rape because Ugandan legal roots lie in the English Common Law system. The marital rape exception was created in 1736 by Lord Hale, an English barrister, and author of “History of the Pleas of the Crown”.¹⁰ In his thoughts, which were published 60 years after his death, Hale declared women “subservient chattel” who surrender all rights to revoking consent to sexual intercourse once married.¹¹ In his treatise he states,

“But husbands cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”¹²

Because the marital rape exception has its origins in 18th century English Common Law, it has been deeply engrained in Ugandan society since the time of British colonization of Uganda in 1860. The social concept of women being lesser than men has been passed on from generation to generation, creating the societal norm of male dominance. Although the marital rape exception was overruled in England in 1991¹³ in favor of a more modern approach, the opinion is still seen as good law by the Ugandan government which has yet to make definitive law against marital rape.¹⁴

Today, marital rape is mentioned very little within the Ugandan judicial system.¹⁵ A social stigma related to the crime prevents most lawmakers from bringing up the topic, which also keeps women from implicating their husbands. The issue is only discussed a handful of times in recorded Ugandan jurisprudence. Many lawmakers or legal professionals would argue that the country is not socially ready to deal with the issue. Although, it seems that through the “nearly marital rape” cases which will be discussed in Part VII, the Ugandan judiciary is ripe to create change if the opportunity were to present itself. However, social stigma keeps a case from being brought to court.

¹⁰ Sir Matthew Hale, *The History of the Pleas of the Crown: In Two Volumes*, VOLUME 1 628 (W. A. Stokes & E. Ingersoll eds., 1847) (1736).

¹¹ *Id.*

¹² *Id.*

¹³ *R. v. R.* (1991) 93 Cr. App. R. 1 (U.K.).

¹⁴ Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, 41 *BROOK. J. INT'L L.* 172, 172 (2015).

¹⁵ Katureebe et al., *supra* note 4, at 1.

IV. Defining the Concepts

Beginning from a macro perspective, gender-based violence (GBV) encapsulates both domestic violence and marital rape. Violence against women is defined by the United Nations in the DEVAW as,

“Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life.”¹⁶

Domestic violence and marital rape are both forms of gender-based violence which lie under this definition. Uganda ratified the DEVAW, which is a document that came to a consensus on what international law considered to be the fundamental rights of women.¹⁷ Marital rape is classified in the DEVAW as a form of violence against women, and sexual autonomy is recognized as a fundamental human right under international law.¹⁸ The due diligence standard included in the DEVAW is the international legal standard to correct violations of fundamental rights.¹⁹ States are held to the due diligence standard to ensure their active role in the protection of women.

States have an obligation to prevent gender-based violence under international law because of this due diligence standard and because GBV is a violation of a fundamental right. Since Uganda has ratified and signed the DEVAW, they therefore agree to be held to the due diligence standard.

The due diligence standard is a two-prong standard, containing protective and proactive requirements.²⁰ In addition to the obligation of prevention, ratifying states also agree to conduct investigations, enforce punishments, and create remedial measures to further combat the issue of gender-based violence.²¹ The measures are standard regardless of who committed the acts and they are required even if there was state involvement.²² International law is not ambiguous about its requirement to criminalize marital rape.²³

Uganda signed and adopted the DEVAW in 1995, meaning that since 1995 they have been in violation of the due diligence standard, which they agreed to be held to, regarding the prevention of gender-based violence. Uganda has accepted combating domestic violence as its duty. Now it is time for Uganda to act on the influences which are currently preventing real change from happening. Since the due diligence standard is a two-prong standard, the government of Uganda

¹⁶ G.A. Res. 48/104, art. 1, *Declaration on the Elimination of Violence against Women* (Dec. 20, 1993).

¹⁷ *Id.* at art. 3.

¹⁸ *Id.* at art. 2 §(a).

¹⁹ *Id.* at art. 4 §(c).

²⁰ *Id.*

²¹ See Randall, *supra* note 14, at 166.

²² *Id.*

²³ See Randall, *supra* note 14, at 195.

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should be acting to take protective and proactive measures to combat the issue.²⁴ Marital rape is occurring at high rates in Uganda because of the lack of action for both prongs of the due diligence standard. As a country which affirms the DEVAW, Uganda is in violation every day it persists without criminalizing marital rape.

The Ugandan Penal Code Act of 1950, which lays the foundation for the crime of rape, defines it as,

“anyone who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm.”²⁵

The Ugandan constitution affords women the same rights as men, but this equality is an illusion.²⁶ In the eyes of the constitution, men and women are equal, yet without protecting married women from sexual violence, society sees the genders as far from equal.²⁷

V. Spheres of Influence

A. The Plumb Line Effect of Marital Rape

In ancient architecture, before the invention of modern equipment, a tool known as a “plumb line” was used to determine absolute straightness.²⁸ The plumb line was a line or string with a weight attached to the bottom. Gravity would pull the weight down and the tension in the line displayed what perfect vertical was.²⁹ An entire building would be built using the small tool as a guide. The relationship of the line and the weight determined perfect vertical for the entirety of the structure.

²⁴ *Id.* at 169.

²⁵ *Ugandan Penal Code* §123.

²⁶ See Ugandan Constitution, *supra* note 8.

²⁷ *Id.*

²⁸ Laurene Keane, LA TIMES, *Commentary: Biblical ‘plumb line’ remains a relevant allegory* (2016), <https://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-0724-commentary2-20160718-story.html>.

²⁹ *Id.*

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In the social constructs of Ugandan society, the relationship of the average married man and woman is the plumb line which determines the trajectory of how men are expected to treat women in society as a whole. The marital rape exception and the prevalence of marital rape knocks off the necessary verticality of a healthy relationship between a husband and wife. In most cases, young boys are first exposed to the socially acceptable way of treating women by watching their fathers. From there they go on to marry and treat their own wives the way they saw their fathers (or uncles or grandfathers) act. This ripples out into society in the way all men treat women.

The high prevalence of sexual assault and rape in the country can be blamed largely in part on how boys were raised watching men treat women, namely their own fathers and mothers. This plumb line relationship of man and wife in Ugandan society affects domestic relationships as a whole and it affects GBV prevalence. The marital rape exception of the law has caused a society to be built based on a crooked principle which places women in a vulnerable position. All of society—religion, government, business—is affected by this relationship. When the plum line is not perfectly straight, then society is built in a distorted manner. By straightening the plum line, and restoring a respectful relationship between man and wife, social norms will shift and women will grow in empowerment. Boys will be raised to respect women's thoughts, ideas and most importantly, their bodies. The creation and enforcement of rigid marital rape laws would straighten the plumb line of Ugandan societal norms regarding the way women are treated.

B. Prevalence

According to the 2006 Annual Human Rights Report of Uganda conducted by the U.S. State Department, seventy percent of Ugandan women (regardless of marital status) have been physically or sexually abused at some point.³⁰ More recent Human Rights Reports are no longer numerical in their findings, but rather they annually report the continuing lack of protection married women have under Ugandan Law.³¹ The social norm of the issue is displayed in the acceptance of the practice across both genders. Ugandan women have come to understand beatings and male dominance as a normal practice in the marital setting. In Uganda, sixty percent of men said they condone wife beating and 70 percent of women agree with the practice.³² The culture has distorted women to believe that domestic violence is normal and that they have less value than their husbands or partners. The most common reasons women justify their intimate partners use of domestic violence include, “a woman going out without telling her husband” and “a woman neglecting the children”, both actions which are normalized if the genders were reversed.³³

³⁰ See Human Rights Report, *supra* note 3.

³¹ Uganda 2018 Hum. Rts. Rpt. (2018), 22, <https://www.state.gov/wp-content/uploads/2019/03/Uganda-2018.pdf>.

³² See Human Rights Report, *supra* note 3.

³³ CEDOVIP. *Economic Costs of Domestic Violence in Uganda*. DFID: 2012, 6.

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Women in Uganda tolerate and accept domestic violence as a social norm.³⁴ They have never known a culture without it and because of it they are suffering physically, financially and mentally. The issue is nationally widespread, but rural areas of Uganda have a higher prevalence of gender-based violence.³⁵ Furthermore, the social norms of rural areas in Uganda, particularly eastern rural areas, tend to be more extreme. Eastern tribal regions are where the practice of female genital mutilation, or female circumcision, is often still a requisite for marriage, even though it is illegal. Additionally, bride prices and child brides are common in some tribal regions of this area.³⁶

In 2010, a Domestic Violence Act (DVA) was instated in Uganda to attempt to combat the prevalence of domestic violence. Four years before the DVA, the prevalence of domestic violence in Uganda was sixty percent for women ages 15-49 years old.³⁷ In Eastern Uganda, specifically, seventy-two percent of women of the same age range say they have experienced physical violence in a domestic context.³⁸ A year after the DVA was instated, domestic violence rates reduced to twenty-seven percent for women ages 15-49.³⁹ With the creation of the DV, one could assume national rate of domestic violence would be on the decline. However, the issue persists, effecting millions of women every year.⁴⁰

The most recent reports to date, a 2016 Uganda Demographics and Health Survey, found that fifty-six percent of Ugandan women had experienced spousal violence and twenty-two percent of women admitted to enduring sexual violence in relationships.⁴¹ These numbers display that even with the efforts taken, there has been no real impact on social norms. The efforts taken have been too insignificant. They have not made the impact necessary for a change in the deeply rooted social structure.

It is also known that women who are victims of domestic violence are likely victims of more than one incident. Fifty-two percent of Ugandan women who say that they were victim to domestic violence say they were victimized on multiple occasions, proving the notion that most intimate partners who are violent typically display a pattern of violence.⁴² Additionally, of the Ugandan women who reported experiencing violence, seventy-four percent reported multiple violent sexual incidents.⁴³

³⁴ *Id.*

³⁵ See Human Rights Report, *supra* note 3, at 607.

³⁶ *Id.* at 606.

³⁷ *Uganda Demographics and Health Survey* (2006).

³⁸ See CEDOVIP, *supra* note 33.

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 21.

⁴¹ *Uganda Demographic and Health Survey* (2016).

⁴² ICRW & UNFPA, *Intimate Partner Violence- High Cost to Households and Communities* (2009).

⁴³ *Id.*

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Marital rape is often paired with many other forms of spousal abuse.⁴⁴ This link to other forms of abuse is another compelling reason why protecting women from sexual violence in the home is pivotal for women's empowerment. Protecting women in their homes would help close the gap between cultural rights that society appropriates to women and those appropriated to them by their own constitution.

The marital rape exception cannot be abolished without enforcing the law, as well. Currently, the Ugandan constitution affords women "equality and freedom from discrimination" by establishing that "a person shall not be discriminated on the grounds of sex."⁴⁵ Additionally, women and men are given equal rights in marriage by the Ugandan Constitution.⁴⁶ It is evident through the statistics, that equal rights in marriage are not occurring in practice.

C. "Nearly Marital Rape" Cases in Ugandan Case Law

Marital Rape was mentioned in Ugandan case law for the first time in the 2002 case of *Uganda v. Yiga Hamidu*.⁴⁷ The second time it is mentioned occurs in 2016 in the case of *Uganda v. Lomoe Nakoupet*.⁴⁸ Both of these cases consist of similar fact patterns where the man raping the woman was the woman's betrothed, but the woman was not consenting to the marriage or the sexual intercourse. In both instances, the future husband, paired with the family, forced the woman to have sexual intercourse to consummate the marriage.

Gruesome detail in the *Nakoupet* case displays how the bride's family members physically restrained the bride while the perpetrator forcefully had intercourse with her.⁴⁹ In the *Hamidu* case, which was the first case ever to bring up the concept of marital rape in the Ugandan courts, the bride did not consent to the marriage or the consummation of the marriage because there was speculation that her betrothed was HIV positive. The woman resisted sexual contact because she did not want to contract HIV.⁵⁰

In both cases, acts were committed grossly against the will, and without the consent, of the women. Additionally, they were done in a violent manner, which the judiciary did not turn a blind eye to. In both cases, the men attempted to use the defense of marriage to avoid being convicted of rape. It is important to note that in both instances, the perpetrator had not yet finished paying the dowry or

⁴⁴ World Health Organization, *Global status report on alcohol and health*, Geneva, Switzerland (2014).

⁴⁵ *Ugandan Constitution* (1995) Chapter 4, Section 21.

⁴⁶ *Id.*

⁴⁷ *Uganda v. Yiga Hamidu and 4 Others*, Crim. Case No. 005 of 2002 UGHCCRD 5 at 2 (9 February 2004).

⁴⁸ *Uganda v. Lomoe Nakoupet*, Crim. Case No. 109 of 2016 UGCOMMC 13 at 2 (13 February 2019).

⁴⁹ *Id.*

⁵⁰ See *Uganda v. Yiga Hamidu*, *supra* note 47.

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bride price, which is a cultural step before marriage in most parts of Uganda.⁵¹ This implies that there was, in fact, no marriage yet completed.⁵² Therefore, neither case was factually considered marital rape, because the rape occurred in the consummation of the marriage. This means the marital defense to rape was never officially abolished. These cases established that the woman's right to consent is protected in forced marriage consummation encounters.

When a proper marital rape case is finally brought by the prosecution to Ugandan Court, if no law has been made criminalizing marital rape, then the strongest legal argument lies in the judge's opinion from the 2002 "*Nearly Marital Rape Case*" where Judge V.F. Musoke-Kibuuka states his opinion that rape in the Penal Code Act,

"does not make any exception to a married person. . . It clearly appears to me that the existence of a valid marriage between an accused and a complainant. . . no longer constitutes a good defense against a charge of rape".⁵³

Judge Musoke-Kibuuka then goes on to cite the equal rights in marriage given by the Ugandan Constitution commenting,

"The presumption of consent, even when a man and wife are validly married, in my humble view, appears to be wiped out by the provision of the constitution which I have. Husband and wife enjoy equal rights in marriage. They enjoy equal human dignity. No activity on the part of any of the two which is affront to those rights in relation to the other, can be sustained by a court of law."⁵⁴

Fourteen years after this judicial opinion on equal rights in marriage, the second "*Nearly Marital Rape*" case appeared in court. This time, it was being handled as a case in a special Sexual and Gender-Based Violence session of court. It is evident that the presiding Ugandan judge, Judge Batema, was passionate about the now rampant issue of marital rape through this excerpt of his 2016 judicial opinion where he states that,

"most women and girls in the Karamoja region [the northeastern-most region of Uganda, which is a rural region with the highest rates of marital rape and domestic abuse.⁵⁵] are victims of the old culture of abduction and rape. It is accepted and tolerated as long as one pays cows to the parents. It is common to hear rapists pleading not guilty and saying, "I only made her my wife". The women and girls are never treated as full human beings. They are stereotyped as mere sex commodities or possessions!"⁵⁶

In the same year as this opinion, the 2016 Domestic Violence Act (DVA) was instated in Uganda, which, in effect, created the offense of marital rape. But, according to the 2016 Ugandan Gender Bench Book, the Ugandan Directorate of

⁵¹ Jamil Ddamulira Mujuzi, *Bride Wealth (Price) and Women's Marriage – Related Rights in Uganda: A Historical Constitutional Perspective and Current Developments*, 24 INT'L J.L. POL'Y & FAM. 414, 430 (2010).

⁵² *Id.*

⁵³ See *Uganda v. Yiga Hamidu*, *supra* note 47.

⁵⁴ *Id.* at 10.

⁵⁵ See Human Rights Report, *supra* note 3.

⁵⁶ See *Uganda v. Lomoe Nakoupet*, *supra* note 48, at 4.

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Public Prosecution and law enforcement have yet to put the DVA to the test.⁵⁷ Not a single perpetrator has been accused of the crime of marital rape in recorded history in Uganda. Furthermore, according to the DVA, domestic violence of any kind renders a maximum sentence of two years imprisonment.

If a case was ever brought to a Ugandan court that expressly overturned the marital rape exception, then the current DVA would limit prison time for the guilty husband to two years. Contrast this with the current maximum sentence for the crime of rape in Uganda, apart from marriage, which is the death penalty.⁵⁸ This is cause for new legislation.

These “Nearly Marital Rape” cases show the progression that Uganda is making while contrasting with the blatant opposition to progress seen in the social structures of the country and the sentencing guidelines of the DVA. The cases and the DVA create a weak foundation for future legislation or litigation, but there is, in fact, a small foundation already laid. This foundation should be strengthened so that it can withstand the weight necessary to protect half of the country’s population from violence in their homes.

VI. The Cost of Marital Rape

Evaluating the cost of domestic violence and marital rape and its effect on the local and global economy involves making approximations from multiple data sources which each utilize different variables and figures. The numbers vary within the literature and research and so its main effectiveness should not lie in its exactness, but rather in the sum of sources which all agree on one thing—the cost of domestic violence to the individual, the country and the global economy is great.

Rape is the most costly of all domestic violence and gender-based violence crimes.⁵⁹ Because of the severity of the immediate injuries, the injuries which sustain long after the incident and the mental/emotional trauma associated with the crime, it is both costly to the individual and the economy. HIV is an expensive additional financial factor for victims of marital rape and domestic violence.⁶⁰ Additional negative effects of marital rape and domestic violence include miscarriage, reproductive health problems, and depression.⁶¹

GBV in Uganda costs the Ugandan economy approximately USD 22 million (UGX 77 billion) annually.⁶² Domestic violence specifically costs healthcare providers, other service providers and duty bearers USD 15.5 million annually (UGX 56 billion).⁶³

⁵⁷ Bart M. Katureebe et al. *The Gender Bench Book*, §3.2.1, n. 50 (2016).

⁵⁸ See Sentencing Guidelines, *supra* note 2.

⁵⁹ See CEDOVIP, *supra* note 33, at 16.

⁶⁰ *Id.* at 3.

⁶¹ See IPV Cost, *supra* note 42, at 12.

⁶² See CEDOVIP, *supra* note 33, at 4.

⁶³ *Id.*

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Among Ugandan women who experienced domestic violence of any kind in a yearlong time span, the average woman had to take off 11.8 work days as a result.⁶⁴ From days lost, the estimated value lost to the economy is estimated to be USD 8.7 million (UGX 22 billion).⁶⁵ Additionally, a study from the World Bank shows that in 2011, USD \$87.76 million Dollars total productivity was lost in Uganda as a direct result of domestic violence.⁶⁶

These out of pocket expenses for women affect their immediate needs and their economic potential. In 2011, it is estimated that Ugandan women spent over USD 7.8 million (UGX 19.5 billion) in out of pocket expenditures.⁶⁷ This money is being spent on things like additional healthcare and seeking safe shelter. Women are forced to spend money seeking medical help for the injuries sustained in their own homes, instead of investing in a business or education for themselves or their children. The high cost of domestic violence and marital rape is holding abused women back from achieving their economic potential.

Another negative effect of GBV is a link between sexual violence and the spread of HIV.⁶⁸ Because of the prevalence of HIV in Ugandan society, many couples are often faced with HIV as a daily battle. Often, marriages include one HIV-positive partner and one HIV-negative partner. Marital rape in this case threatens any effort to remain HIV-free on the part of an uninfected wife. In the Ugandan National Action Plan on Women, Girls, Gender Equality and HIV & AIDS, a strategic action plan was formed to address GBV.⁶⁹ The strategic actions included the necessary education and training to combat not only GBV but its violent after-effects, namely an increase in HIV victims.⁷⁰ Yet, marital rape, the arguable social root of the domestic violence and GBV issue, was not addressed in this action plan.

There are non-monetary costs associated with domestic violence as well. Of Ugandan women aged 15 years and above, 44.5 percent claim to have been victimized by domestic violence at one point in their lives.⁷¹ That is over a quarter of the 15 and older population in Uganda. Additionally, of female domestic violence victims, 65.2 percent of women found it difficult to enjoy daily activities, 8.3 percent said their daily work suffered as a result and 11.1 percent considered taking their own lives as a result of the violence they experience.⁷² The lawless nature of marital rape and domestic violence affects society in many ways. Mon-

⁶⁴ *Id.* at 11.

⁶⁵ *Id.* at 15.

⁶⁶ Nata Duvvury et. al., *Intimate Partner Violence: Economic Costs and Implications for Growth and Development* 39 (Women's Voice, Agency, and Participation Research series No. 3, Report Number 82532, 2013).

⁶⁷ See CEDOVIP, *supra* note 33, at 15.

⁶⁸ Karen Stefiszyn, *A Brief Overview of Recent Developments in Sexual Offences Legislation in Southern Africa*, UNDAW (May 12, 2008), at 1.

⁶⁹ THE WHITE HOUSE, THE UNITED STATES NATIONAL ACTION PLAN ON WOMEN, PEACE, AND SECURITY 9 (June 2016).

⁷⁰ *Id.*

⁷¹ See Duvvury, *supra* note 66.

⁷² See CEDOVIP, *supra* note 33, at 11.

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etary figures point to one of the most tangible effects the violence has, but the non-monetary costs of domestic violence also affect the economy and women's economic potential.

VII. Barriers

A. The Woman's Role

Women in developing countries often do not want to leave abusive spousal situations for many reasons. A consistent abusive relationship creates low self-esteem in a woman, along with loss of self-trust and the ability to trust others, which makes leaving her home difficult.⁷³ Most women hold on to the hope that things will eventually get better. Women do not want to risk giving up all they have to leave the home if their circumstances will eventually turn around and recover.⁷⁴

The social stigma in Uganda related to women sets girls at a disadvantage from the day they are born. Women are given the aspiration to be wives, mothers and housekeepers, which limits their educational ambitions. This stigma is encouraged by teaching young girls the importance of passivity and emotional dependence. Girls are taught to believe they are inferior to boys. It is often women who resist this male dominance dichotomy who are frequently the victims of domestic violence in the home.⁷⁵

Social norms put men in a position of sexual dominance, teaching women that their role is passive and insignificant. Overt levels of masculinity are taught and displayed to young boys in social settings by older men who display inappropriate sexually dominant behaviors. Extra-marital affairs and violence against women are behaviors Ugandan men often take pride in.⁷⁶

The concept of the bride price is a widely-used concept in Uganda that requires a man to pay the parents of the woman he wants to marry before her can marry her.⁷⁷ This concept dehumanizes women and is a further example of the societal notion of women as chattel. The tradition of the bride price is dwindling but remains prevalent, particularly in rural areas of Uganda.⁷⁸

For example, in sexual assault cases where the victim is an unmarried minor, the dispute is often never taken to court. Instead, when young girls are raped, their perpetrator will pay reparations to the father of the daughter.⁷⁹ This is because many girls are seen to only be as valuable as their bride price. Deflowering a young girl would make her less valuable. Therefore, the violent act is not seen as a crime committed against the young girl, but rather an act of dishonor, effec-

⁷³ AMY SHUPIKAI TSANGA, *TAKING THE LAW TO THE PEOPLE: GENDER, LAW REFORM AND COMMUNITY LEGAL EDUCATION IN ZIMBABWE* 241 (2003).

⁷⁴ *Id.*

⁷⁵ See WHITE HOUSE, *supra* note 69.

⁷⁶ *Id.* at 11.

⁷⁷ See Human Rights Report, *supra* note 3, at 608.

⁷⁸ *Id.*

⁷⁹ See Human Rights Report, *supra* note 3, at 607.

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tively stealing from the father. These practices further dehumanize women and make crimes more about the family than the woman.

Women in Uganda are left helpless because of the lack of power they hold in comparison to men. Social norms dictate that the man is the one who holds the power when it comes to land and property. Women often feel trapped in abusive relationships because of their lack of power.⁸⁰ Although legally many of these things have changed in recent years, the after-effects still linger in the social norms which seem to restrict women's access to education, health and credit services, making life without the protection of a man seemingly impossible.⁸¹

B. INGOs Neglecting Grassroots' Vital Role

Improving GBV statistics requires a two-fold approach of engaging local-level grassroots organizations that understand the specific culture's needs, and unifying a global movement to put men and women on the same playing field.⁸² Upon the introduction of a marital rape law and/or tougher domestic violence laws the two-fold approach of local level and national/international involvement is vital. The collaboration of grassroots organizations and INGOs is essential to ensure the education and enforcement of new laws.

Organizations like the UN or international development agency USAID, while financially powerful and capable of change on a global scale, fail to understand the needs at a level required for changing social norms. Social norms are specific, unique and individual to geographical areas as small as a neighborhood.⁸³ The lack of grassroots involvement prevents INGOs from understanding the actual road blocks in the system. By getting in on the ground level, local organizations can see where the real issues lie and enlist the help of larger NGO's who work from a national or global perspective. Local organizations can then formulate change that is effective.⁸⁴ In the Harvard Women's Law Journal, Margareth Etienne discusses how, "international Organizations, despite their lack of formal coercive power, can effectively lobby for internal change by stigmatizing countries that actively or passively encourage abuse against women."⁸⁵

The impact of large organizations is vital, but real change cannot be made without the detailed work of grassroots organizations. The lack of community women's shelters, domestic violence victim support groups or access to psycho-social therapy leaves many victims in Uganda feeling as if they have nowhere to turn. INGO's should be reaching out to, investing in and partnering with grassroots organizations which are the best responders to incidents of violence like

⁸⁰ See WHITE HOUSE, *supra* note 69.

⁸¹ *Id.*

⁸² Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 Harv. Women's L.J. 139, 170 (1995).

⁸³ Margarita Puerto & Bethany Kriss, *An Effective Legal and Referral System is Critical to Addressing Gender Based Violence*, WORLD BANK BLOGS (Feb. 5, 2019), <https://blogs.worldbank.org/nasikiliza/an-effective-legal-and-referral-system-is-critical-to-addressing-gender-based-violence>.

⁸⁴ *Id.*

⁸⁵ See Etienne, *supra* note 82, at 160.

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marital rape. Through the support of small organizations, larger organizations are able to understand the difference in specific needs of communities, both large and small.

Furthermore, organizations with a grassroots case structure are highly sought after by small local resources such as women's shelters and children's shelters. The shelters reach out to the legal organizations, seeking relief for their clients who have come to them often fleeing from threats of imminent abuse or imminent death by their abuser. Grassroots legal work can expedite the Ugandan response to the marital rape issue, by shedding light on the issue and putting pressure on the government to intervene.⁸⁶

The legal entities, such as legal INGO International Justice Mission,⁸⁷ provide assistance to impoverished clients or non-profit organizations attempting to help clients in need. Hands-on experience is an effective resource for understanding how the system could be fixed. By handling actual casework, gaps in the specific community-level systems can be found and addressed. An organization that is on the ground, actively working its way through the legal system to bring victims to justice, is aware of much more than a helicopter organization such as the UN or USAID. Therefore, once the issue is addressed on a national level by the establishment of new laws, there must be follow up on a community level if women are to ever truly be protected.⁸⁸

C. Violence Impeding the Impact of Development Programs

Women who are subject to violence are not able to properly use the resources provided by other organizations. Violence impedes the impact of other development programs when it renders a woman physically injured or in danger for her safety, and this stifles the economy further by wasting foreign aid dollars.

Women without protection from violence cannot take full advantage of organizations that help with basic needs like clean water, free or low cost healthcare, free schooling, etc. A battered wife lives in constant shame of her husband's actions and only seeks medical treatment 10.5% of the time that there is a violent situation.⁸⁹

Micro loan programs for women to start businesses have recently grown in understanding and popularity in the NGO sphere. But a woman recovering from her husband's violent outbursts would be unable to make it to the market to sell the goods she made using her micro loan from the local NGO. A woman who is married to a man who abuses her often lacks the confidence to apply for or take advantage of such programs.

Violence with impunity keeps an injured or fearful woman from being able to safely walk to the closest clean water well. Marital rape prevents a young bride from walking to school the day after a violent assault, and it keeps a fragile

⁸⁶ See Etienne, *supra* note 82, at 161-62.

⁸⁷ See Puerto, *supra* note 83.

⁸⁸ See Etienne, *supra* note 82, at 160-61.

⁸⁹ See IPV Cost, *supra* note 42, at 8.

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woman from believing that she has the potential to learn and succeed. Where there is GBV, other development programs cannot be effective. If volunteer doctors offer their services in a village but a mother who suffered wounds during her husband's forced sexual contact is too afraid to leave her home to visit the clinic, then the aid has no impact.

Development programs are vital for providing basic needs to impoverished peoples, but all of the development programs are useless if there is no protection from impunity. The culture of GBV in Uganda starts in the home and extends far beyond it. By making the home a lawless space where sexual and physical violence reigns, the government is perpetuating the social stigma that men have an entitlement to physically control women. By failing to create overt laws which criminalize marital rape, the government is telling women that they are not as valuable as men and they are not worthy of protection.

VIII. Changes to Be Made

A. Looking Comparatively

The global issue of marital rape and GBV means that there are many other countries to look to in reference to past legal discourse regarding marital rape. In the United States, the first marital rape case was upheld by the New York Court of Appeals in 1984, when marital rape was declared unconstitutional.⁹⁰ Anti-Marital Rape Laws were not enacted by all 50 states in the U.S. until 1993. In developing nations, the shift towards following the western lead of abolishing marital rape has had much slower momentum. Countries with specific statutes calling marital rape illegal or unconstitutional often fail to prosecute the perpetrators, or women fail to report the offenses out of fear.⁹¹

The Philippines, a developing nation similar to Uganda, is an example of the lag that exists between the creation of a new law and the implementation, social acceptance, and trusted use of the law. The Philippines abolished marital rape through their *Anti-Rape Laws of 1997*.⁹² Even so, the first court case did not reach the Supreme Court of the Philippines for 17 years. In 2014, *People v. Jumawan* established the validity of marital rape as an illegal offense for the first time in Philippine history.⁹³ Equality takes time, but it also requires action.

While the origins of Uganda's marital rape exception lie in English common law, the marital rape exception was rejected in England by the English House of Lords in 1991. In the case of *R v. R*, an English man was convicted of rape committed against his wife.⁹⁴ Although rejected by its country of origin, it is this

⁹⁰ *People v. Liberta*, 474 N.E.2d 567, 574 (N.Y. 1984).

⁹¹ See IPV Cost, *supra* note 42, at 12 (study compares the rate of abused women seeking care in Uganda, Bangladesh and Morocco; all comparatively show that less than 15% of women seek help of any kind after a violent incident with their incident partner).

⁹² *The Anti-Rape Laws of 1997*, Rep. Act 8353, Philippines (1997).

⁹³ Giselle Jose, *People v. Jumawan: Examining the Law's Silent Treatment of Marital Rape*, 89 Phil. L.J. 328 (2015) (addressing Philippine legal literature in regard to *People v. Jumawan*, G.R. No. 187495, 722 SCRA 108, Apr. 21, 2014).

⁹⁴ *R. v. R.* [1991] 3 WLR 767 (HL).

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precise defense, that continues to be used in countries like Uganda to create a social stigma which knocks equality between genders off balance. Furthermore, due to colonization and the establishment of the English Common Law system as the model for the Ugandan system, the defense of marital rape is now deeply embedded in the social norms of Ugandan society. The impact of marital rape as an accepted social norm, in a broader sense, affects how all women are treated, married or unmarried, young or old.

B. Finding Governmental and Cultural Gaps

Discrepancies between the constitutional backbone of the nation and the cultural norms of a nation are the gaps which must be addressed in order for change to be made. No country is without some size gap in social norms and rights afforded by its constitution. In the developing world, there is a gap in the way women are culturally treated and the way their government prescribe their treatment.

A statement taken from a lead judgement made by Ugandan Justice Alice Mpagi-Behigeine encapsulates this principle well—

“The 1995 constitution is. . . fully in consonance with the international and Regional Instrument relating to gender issues. . . . Be that as it may, its implementation has not matched its spirit. There is urgent need for Parliament to enact the operational laws and scrap all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real, substantial equality based on the reality of a woman’s life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises.”⁹⁵

The current Ugandan law which protects women from rape has a maximum sentence of the death penalty. However, this law is not consistently enforced.⁹⁶ Many rapes are not reported or not properly investigated.⁹⁷ According to a 2008 study, 13% of women who are victims of domestic violence seek help from the police and only 0.19% of domestic violence victims seek legal redress in court.⁹⁸ Corruption also plays a role in keeping women from speaking about and seeking help.⁹⁹ Perpetrators have been known to bribe justice systems and victims to keep quiet. In some cases, the father of the girl violated is bribed into keeping quiet. Threats of violence, intimidation and fear instilled in the victim by the perpetrator also keep victims from seeking justice for their injuries.¹⁰⁰ Corrupt justice systems and the prevalence of perpetrators bribing judges or other officials make

⁹⁵ *Uganda Association of Women Lawyers and Others v. Attorney General*, Constitutional Petition No. 2 of 2003.

⁹⁶ See Human Rights Report, *supra* note 3.

⁹⁷ *Id.*

⁹⁸ See KASIRYE, *supra* note 33, at 13.

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.*

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it unlikely that the new law would be enforced without a protective mechanism in place.¹⁰¹

C. Implementing New Laws

Ugandan law should adapt itself to changing attitudes. A shift in social norms can be propelled by a legal framework which expressly criminalizes marital rape. The status of women has slowly been changing out of recognition of marriage as partnership of equals and no longer one in which the wife must be subservient chattel of the husband.¹⁰² The law should be a reflection of the emerging society it represents. The expressive function of the law reflects the societal views of a country.¹⁰³ As the values of the people adapt, that adaptation should be displayed through new laws tailored to societal needs.¹⁰⁴

By changing the laws, the Ugandan government can lead the way to reformativ social change. Creating new laws that protect all women would overtly and covertly grow Ugandan societies to greater levels of acceptance.¹⁰⁵ Tendencies which are ingrained in a society require transformative policies which can only be created and implemented by a government which is willing to think in a different and more creative way.¹⁰⁶ Through examples like the "Nearly Marital Rape" cases and the DVA, it is evident that the shift has begun within the Ugandan judiciary.

Law and the changing legal discourse of a country shape the conscience which in turn creates the social norms of a place.¹⁰⁷ As mentioned earlier, this must begin by changing the understanding of rape as a crime committed against an individual, rather than how it is currently seen as a crime against the public, or against morality and honor.¹⁰⁸

Uganda agreed to abide by the due diligence standard of international law, which requires protection and proactive measures against the violation of women's rights.¹⁰⁹ By implementing laws and statutes which protect women from rape, even if committed by their husbands, Uganda would be adhering to the due diligence standard for protecting fundamental rights. Ugandan government must first get the protective law instated, then it can move to focusing on other issues that present themselves, like the social barriers that will be slow to adapt.

¹⁰¹ *Id.*

¹⁰² *S.W. v. United Kingdom*, App. No. 20166/92, Eur. Ct. H.R. (1995).

¹⁰³ Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 643 (2009).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 671.

¹⁰⁷ Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 LAW & SOC'Y REV. 769, 772 (1995).

¹⁰⁸ See Randall & Venkatesh, *supra* note 14, at 197-98.

¹⁰⁹ *Id.* at 169.

D. Ensuring the Enforcement of New Laws

In a recent article, The World Bank recognized the specific role local level response structures play for issues to be effectively addressed.¹¹⁰ There is a trust disparity between the public and the response systems in place. As a result, women in Uganda tend to seek help from local councils rather than through formal law enforcement avenues.¹¹¹ This is how issues arise like perpetrators paying off the fathers of rape victims.¹¹² For change to be made, a trust network needs to be built so that citizens believe in the capacity of local government institutions to protect them and take care of their needs. If the police in a village are known for corruption and lack of enforcement, then the villagers are not likely to seek help. If social workers have a reputation for ineffectiveness and inattentiveness, then the public will fear their complaints being pushed to the wayside. If health care workers are known for being under-resourced and showing little compassion to victims of rape, then those victims are less likely to seek medical attention. Most important is the integral necessity that government and community responders collaboratively play.¹¹³

Systematic technical trainings would require working together and would effectively bring change at both a local level and a national level. Trainings like these are expensive and that is where INGO's play a role. Without the financial and educational capacity INGO's bring, the local entities would not be able to effectively prepare for the implementation, enforcement and outcry that will result from changing the social norms which lie around marital rape. Once women are empowered to know they have a voice, incident reporting will increase. All players must have the capacity to handle this increased reporting or the system will continue to fail. This will require the collaborative efforts of law enforcement, government prosecutors, medical professional and psychosocial support professionals. All these measures will ensure that women have the right to seek justice for the wrongs committed against them.

In order for light to be shed on GBV, there must be effective response structures in place to be able to handle the outcry that will happen as a result of new law being instated.¹¹⁴ As the community begins to have faith in the justice system, and as the trust gap between law enforcement and victims is closed, the response and outcry from victims will increase at unprecedented rates. Women will begin to feel protected and empowered in their homes, a shift in the power imbalance will occur and the economy will be affected as women become more educated than ever before and begin to pour in to the work force.

¹¹⁰ See Gomez, *supra* note 83.

¹¹¹ See IPV Cost, *supra* note 42, at 8.

¹¹² See Human Rights Report, *supra* note 3, at 608.

¹¹³ See Gomez, *supra* note 83.

¹¹⁴ *Id.*

IX. Conclusion

Gender-based violence in Uganda is costing the economy at the expense of the woman. The root of the issue lies in the lawlessness of the domestic relationship. This lawlessness does not lie solely in the legal structure, but it is engrained in the social structure as well. Impunity and social acceptance for abusive husbands must end if the economy and society will ever grow in prosperity. There is no ambiguity in the requisite set by international law for all countries to criminalize GBV, and this includes marital rape. Marital rape violates a fundamental right all women possess and, by not criminalizing it, Uganda is in violation of the international agreement to which they are a party.¹¹⁵

The effects of the criminalization of marital rape will ripple out into society and affect perceptions of domestic violence, gender-based violence and gender equality. Protected women are empowered women, and empowered women fuel economic prosperity.

Through the outright criminalization of marital rape, the government would send the message that domestic violence is not tolerated and that women have a voice in Uganda. Men would no longer be able to beat women into submission with social impunity protecting their violent sexual actions. Through the collaborative efforts of grassroots organizations, NGOs and INGOS, and by analyzing the specific needs of communities, reformative change can be made.

Married women in Uganda deserve to be given their voice; they deserve to be empowered. Empowered women will create economic prosperity that will push Uganda forward as a leading country in Sub-Saharan Africa.¹¹⁶

¹¹⁵ See Randall, *supra* note 14, at 195.

¹¹⁶ End Note: After the completion of this paper, its findings were brought to a board comprised of Ugandan Women who work for NGO's as Social Workers and Lawyers. This was done with the hopes of using the Ugandan NGO network to find a Marital Rape case to bring before the Constitutional Court of Uganda. After much discussion and debate, further action was decided against. This decision was made under the belief that Uganda was not socially ready for this magnitude of change. Thus, the women of Uganda remain unprotected from daily violence within their own homes, with the hope for change not yet on the horizon.