When a Rapist is a She: The Quest for gender neutral law in Tanzania

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WHEN A RAPIST IS A SHE: A QUEST FOR GENDER NEUTRAL LAW IN RAPE

"Part of the activism around women’s rights is: ‘Let’s prove that women are as good as men.’ But the other side is you should look at the fact that men can be weak and vulnerable" 1

1. Introduction

Over the past several years, there has been serious dramatic change on perception of women in our society. A 20th century woman is an intellectual being, a leader, proprietor as well as a tool of change. These changes have been brought by feminist movements throughout the globe since early 1960’s which focused on achieving gender equality in all spheres of life, like property ownership, political and civil rights, inheritance, reproduction rights and employment rights, to mention a few.

Legal reforms also have been made with the dictate of these changes. Various jurisdictions in the world including Tanzania, have enacted diverse laws to enhance the status of women.

Remarkably, as the days go by, things have turned to be not what we expected especially in the context of human sexuality. My concern is on offence of rape. Traditionally rape was viewed that only men can rape, but in reality this is not true.

This article tries to look at the contentious question as to whether: there is a need to come up with a gender neutral law in rape offence in Tanzania. The underlying objectives are to provoke a second thought to legal stakeholders that women also are required to be labeled as potential criminals in rape.

After this introduction, the article reviews a brief historical nature of the offence and the context of gender neutrality laws. It proceeds to examine the context of rape in Tanzania and how the offence is applied. The article goes further to analyze empirical case studies from various countries and how they approached the situation. Lastly is a conclusion which suggests what can be done in our country.


1By Dr.Chris Dolan; Director of Refugee law project-Makerere University obtained from www.guardian.co.uk/../The rape of man.,Accessed on 10th August 2011.
2. Historical nature of the offence of Rape and the concept of gender neutral law

Rape is one of the most heinous crimes imaginable. It has long history ever recorded in humankind\(^2\).

During the early days, the crime of rape was not considered so much as an assault against the person of the woman as it was an attack on the property of a dominant male in her life father or husband, as the case may be.\(^3\)

Under common law, from which our laws developed, rape was a crime against property, not person. A woman’s reproductive capacity, in the form of her chastity, was the property and was essential to establish patriarchal inheritance rights.

A woman’s sexuality was owned by her father and transferred to the husband as part of dowry. Rape was the theft of property, which was owned by men. The bodily integrity of the woman was irrelevant. So anmarried woman could only be considered to have been raped if she were a virgin. Under these views, men could not be raped and penetration of other orifice was irrelevant. Rape law at that time protected the economic interest of men.

Rape laws were first codified in what were referred to as statutes, of Westminster enacted in 1285. These statutes no longer drew distinctions based on virginity. They simply provided that it was an offence to rape any woman against her will or any underage girl without her consent. There was no difference in punishment to offending males, and the provisions respecting underage rape. Thus by 13\(^{th}\) century rape was no longer a mere family misfortune and a threat to land and property; it was an issue of public interest and concern, worth of criminal action by the state.

\(^2\)Yet few people know that the Bible often condones rape, see Numbers 31:7-18, Deuteronomy 20:10-14, 22:28-29 and 2 Samuel 12:11-14.

\(^3\)Bruce A. Macfarlane, Q.C “Historical development of the offence of rape” Page : 2 [Originally published by the Canadian Bar Association in a book commemorating the 100\(^{th}\) anniversary of Canada’s criminal code, titled: “100 years of the criminal code in Canada; essays commemorating the centenary of the Canadian criminal code, edited by Wood and Peck (1993)]]
By 18th century the crime of rape consisted of having sexual intercourse, with a woman, by force and against her will. This statutory definition is to a large extent akin to our current legal definition of rape.

2.1 Gender neutrality in Rape

Gender neutrality within rape statutes is the concept that the criminal law should recognize. Both men and women can be rape victims as well as perpetrators. It reflects modern understanding of the nature, effects and dynamics of non-consensus penetrative sexual acts, and is an evidence led means of appropriately labeling criminal conduct.

The advocates of gender neutral laws have recognized that the rate of male victimization in rape is increasing thus making it worth of attention. They attack the archaic common law definition of rape as being too restrictive to be applied in modern world.

Gender neutral laws in rape go beyond penile-vaginal penetration so as to make women to be liable under this offence

3. Context of Rape in Tanzania

In Tanzania the offence of rape is governed by Penal Code (cap 16 RE 2002) and Sexual Offences Special Provisions Act (Cap 4, 1998). These laws are not gender neutral law in respect of the offence of rape, as more emphasis is put on protecting victimization of women by men.

Section 129A (chapter XV) starts by giving a statutory definition of who a ‘woman’ is in the context of crime against morality (sexual assaults and rape). This is a clear indication of gender bias provison, protecting women under this offence.

Moreover, section 130(1) provides; that is an offence for a” male” person to rape a girl or a woman. Here a woman is recognized as a probable victim.

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4A good example is a SusanBrowmiller (Feminist Activist) in her book; Against our will: Men, Women and Rape: argued that: “while penis may remain the rapist’s favorite weapon, his prime instrument of vengeance….it is not in fact his only tool. Sticks, bottles and even fingers are substituted for the natural things….similarly the gravity of offence ought not to be bound by the victim’s gender. That the law must move in this direction seems so clear”(page257-68, and 378)
Section 130(2) a male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances falling under any of the following descriptions:

(a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of sexual intercourse;
(b) with her consent where the consent has been obtained by the use of force, threats or intimidation or by putting her in fear of death or hurt or while she is in lawful detention;
(c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;
(d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom she is, or believes herself to be, lawfully married;
(e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

The above provisions specify for those situations where a woman or a girl can be raped by a man.

(3) Whoever—

(a) being a person in a position of authority, takes advantage of his official position, and commits rape on a girl or woman in his official position, and commits rape on a girl or woman in his official relationship or wrongfully restrains and commits rape on the girl or woman;

[ similar provisions apply to persons on the management or staff of a remand home or other place of custody, established by or under law, or of a woman’s or children’s institution, or of a hospital, traditional healers, and religious leaders] see provision b,c, d, and e of section 130(3).

is liable to imprisonment for a term prescribed under subsection (1) of section 131[imprisonment is for life and in any case no less than thirty years with corporal punishment, plus compensation for injury caused].
(4) For the purpose of proving the offence of rape-

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and

(b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent.

Section 130(4), carries more weight in determining whether a woman was raped by a man, and due to the fact that a woman or a girl cannot penetrate a man, she cannot be liable for this offence.

The Act don’t provide for the definition of what can amount to penetration; however it is quite clear that penetration in rape is limited to the act of man to insert his genital organ (penis) inside a woman or girl’s vagina during sexual intercourse.

At common law, any penetration of the female genitilia was enough. It was not necessary to prove that the hymen was raptured or that the vagina in its proper since was penetrated.

In Tanzania the requirement of penetration was judicially considered by the late Justice Onyiuke in Fundi Omari Madege v. R he said that in a charge of rape there must be evidence of penis penetrating into vagina and “once penetration is established, there will be no need to prove the emission of semen or even rapture of hymen”.

The need to prove penetration was also raised in the case of R v. SalimAbdallah, where the accused was charged with and convicted of rape by a subordinate court. The complainant was asleep. She work up to find someone on top of her, there were semen on her thighs and vagina thus suspected that the accused had raped her. On appeal against rape conviction, Justice Mustapha as he then was, held that the evidence adduced in the subordinate court did not point to the fact of penetration. Conviction was as a result substituted for indecent assault.

However, scholars have criticized traditional rape laws that only proscribe penile-vaginal intercourse arguing that these laws exclude “a great deal of behavior which is remarkably similar to the act legally designated rape and .....Such exclusion appears to rest on no logical or justifiable grounds”.The critics have emphasized the similarity in the

5Smith and Hogan, Criminal Law ,7th edition, Butterworth page 523

6[1972] HCD n 98.

7[1970]HCD no 38

8Calllen Halls; Rape; the Politics of Definition ,105.s AFR LJ 67 1998.
physical and psychological trauma caused by non-consensual penetration of the vagina, anus, and mouth by the penis or other objects.\(^9\)

Such criticism has been bolstered by the fact that traditional justifications for a narrowly defined actus reus in rape to appear to have lost their persuasiveness. Thus definition of penetration should not be limited to penis but expanded to even foreign objects like sticks, fingers, and alike. With such expanded definition women also are capable of sexually assaulting men.\(^10\)

4. How other countries have responded

Gender neutral law reforms have been viewed as a means of appropriately labeling conduct that is similar in nature and effect. Jurisdictions that have adopted gender-neutral laws include:

4.1 India

During the past decade the need to widen the definition of rape which hinged on patriarchal premise of penal-vaginal sexual act has become evident in India. Child activism was among the first to pierce the shroud of silence and question the rigid demarcation of the gender divide within rape laws.

The concern over legal lacunae in cases of incest and child abuse was articulated before the Delhi High Court in Jhaku’s case\(^11\). In this case a high ranked government official was charged with sexually abusing his 6 years old daughter. His acts included finger penetration and oral sex, since the police had refused to charge the father with rape. The mother of the child filed a writ petition before the Delhi high court. On her behalf it was argued that when a male penetrate a female with any part of his body or shoved any foreign object such as stick or bottle into woman vagina without her consent, it would amount to rape within the meaning of section.376 of India Penal Code.

The court rejected the argument and held that insertion of a bottle into the vagina would only amount to violation of modest which stipulates a maximum punishment of 2 years imprisonment under section 354 of India Penal Code. While the judge expressed

\(^9\) ibid
\(^10\)Phillips N. Rumney “In defense of gender neutrality within rape” Settle journal for Social Justice, volume 6 issue 1,2007(page 148)
\(^11\)S.J. V. KCJ DLT V0LL XX(1996)563
his inability to expand the scope of s.376 beyond its prescribed confines, he suggested that there is a need to redefine the crime of rape.

This judgment marked the shift in the debate over rape law amendments in India, with its place of complete gender neutrality both for the victim and violator. In 1993, The National Commission for Women had drafted a bill titled ‘sexual valance against women and children’ which advocated deletion of s 354 (violating modest), s 357 (rape), s. 376 (punishment of rape) and s. 377(unnatural offences) of India penal code and brought them under the broad banner of “sexual assault”.

Despite its best intention the bill didnot proceed further. In July 2010, after constant struggle for rape law reforms in India a draft for a new law on sexual assault\textsuperscript{12}, containing gender neutral provisions in offence of rape was submitted to the home affairs minister. This marks a major revolution towards changing face of human sexuality in India.

4.2 Namibia

One of the key features in sexual offences legislation that has been introduced in Namibia is the definition of rape. Rape has been redefined from a limited common law definition where by rape consist only of sexual intercourse with a woman without her consent. The model statutory definition of rape is provided under Namibian Combating of Rape Act\textsuperscript{13}. It provide as follows:

Section 1(1) In this Act unless the context otherwise indicates-

“Sexual act” means-

(a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person;

Or

(b) the insertion of any other part of the body of a person or any part of the body of an animal or of any object into the vagina or anus of another person ,except where such insertion of any part of the body (other than penis) of a person or any object into the vagina or anus of another person is, consistent with sound medical practices carried out for proper medical purpose; or

\textsuperscript{12}Criminal Law Amendment Bill,2010
\textsuperscript{13}No 8 2000
(c) cunnilingus any other form of genital stimulation;

Rape

Section 2 (1) any person (in this Act referred to as perpetrator) who intentionally under coercive circumstances-

(a) commits or continues to commit a sexual act with another person;
(b) cause another person to commit a sexual act with the perpetrator or with a third person.

The definition of rape in Tanzania’s Sexual Offences Provisions Act and Penal Code, contrast with the above characterization whereby a male commits the offence of rape if he has sexual intercourse with a girl or woman under specified circumstances including without her consent qualified by certain coercive circumstances. Rape is thus limited to sexual intercourse and it allows only for females to be raped by males.

4.3 South Africa

South Africa is reported to have one of the worst rape statistics in the world and that just for reported cases\textsuperscript{14}.

In South Africa women are at a greater risk of being raped. In 2005 statistics had showed that one in two women is likely to be raped during their lifetime\textsuperscript{15}. Despite of the higher rates of rape of women, the country had made positive step towards reforming rape laws to include gender neutral provisions.

The limited common law definition of rape was critised by south African regional court in the case of \textit{S v. Fanuel Sitakeni Masiya}\textsuperscript{16};In this case a 44 years old man was charged with raping a 9 years old girl who was well known to him as a companion of her parents, to whom he normally gave drinks. The evidence during the hearing showed that the penetration by male organ was through the girls anus and not her vagina (the common law offence of rape can only take place through vagina orifice. Penetration through another orifice amounts to indecent assault which is treated as a minor offence with a far lighter sentence than the prescribed sentence for rape. Both the prosecutor and the defense in this case submitted that if the court accepted the evidence of the

\textsuperscript{15}Statistics South Africa 2005 .S.A Statistics; retrieved from \url{http://www.statssa.gov.za}.
\textsuperscript{16}Mpumalanga Regional court case number SHG 94/04 and Lydanburg and TDP case no. CC628/2005
complainant, the accused should rightfully be convicted for indecent assault. Applying the law to the latter, those two lawyers were right, as the current definition of rape doesn’t include non consensual penetration “pa annum”. However, the magistrate typified the common law definition of rape as unconstitutional and in a well reasoned judgment convicted the accused of rape. He found the common law definition of rape to be archaic and discriminatory in that it;

“discriminates arbitrarily (against all males and females, children and adults) with reference to which kind of sexual penetration is to be regarded as most serious. Such discrimination is illogical, unjust, irrational and unconstitutional and negates rights and values of human dignity, equality and freedom (in section 7(2) of South African Constitution.)”

The magistrate was of the view that he had an obligation not only to apply the constitution to every matter he was faced with, but also to develop the common law in terms of s. 8(3) of South Africa Bill of Rights to give victim’s and society’s rights and interest and to limit the rights of the accused. The magistrate’s decision was endorsed by Rancohod, AJ, In Transvaal Provincial division of the high court and referred to the constitutional court for confirmation.

In 2007, the proposed Criminal Law (Sexual Offences and related matters) Amendment Act was assented by the president and thus become enforceable carrying with it completely new aspects of gender neutrality in sexual offences.

5. Conclusion

It is becoming imperative that Tanzania should now consider the need to come up with legal reforms in the offence of rape. The existing definition of rape in our laws is not sustainable in today’s world of feminism, sexual equality, and rising female aggressiveness. To my mind, rape goes beyond just penetration; and that it should have more to do with consent rather than penetration without consent.

Article 13(1) of the United Republic of Tanzania Constitution outlaws discrimination: It states; “All persons are equal before the law and are entitled without any discrimination, to protection and equality before the law”

Section 130(1), (2), (3) and (4) of Penal Code is inconsistent with Article 13(1) of the Constitution to the extent that the former discriminates against men in favor of women. The Code does this by subjecting men to a potential criminal liability from which

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women are exempt. This is a statutory burden contemplated by the anti-discrimination clause. And by excluding women as aforesaid, the Penal Code grants them a statutory benefit not available to men, thus again violating the Constitution.

Article 64(5) of the United Republic of Tanzania Constitution elevates the Constitution above all other law: Being inconsistent with article 64(5) of the Constitution, section 130(1), (2), (3) and (4) of the Penal Code is voided to the extent of that inconsistency, that is, to the extent of its discriminatory repercussions against men. Article 64(5) of the Constitution thus compels a re-reading of section 130(1), (2), (3), and (4) of the Penal Code to incorporate female-on-male, or female rape.

Female-on-male rape is widely, but incorrectly, considered impossible because male arousal is thought to be always voluntary, whereas it is more often involuntary.

Presuming without conceding that arousal implies volition and thus negates rape, what about artificial arousal? A woman can use date rape drugs, or crushed Viagra secreted into a man's beer, to induce the hardness factor and finally have sex with him.

A related point is that the law of rape does not even require penile turgidity. Unlike consummation in matrimony law which requires meaningful penetration only attainable by a stiff penis, in criminal law rape is complete upon the slightest ‘penetration’. The flimsiest contact will qualify in the rape context. A flaccid penis can make such contact. The jurisprudential logic is that the law is aimed at preventing sexual assaults, the mischief against which it is directed. If a woman forces or tricks or drugs a man into that degree of contact, she has raped him.

Finally, sex and therefore rape, need not entail penile penetration of the vagina. So if a woman, by fear, force or fraud, has oral sex with a man, she has raped that man.

Our legal system must grapple with the changing face of human sexuality.

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19 Similar incidence occurred in Russia, where a man who tried to rob a hairdresser’s salon ended up a victim when the female shop owner, a karate black belt, beat him senseless, tied him up naked and used him as a sex slave for three days. He told police he was force fed nothing but Viagra and used as a sex slave for three days. See: [http://www.mirror.co.uk/news/top-stories/2011/07/13/karate-expert-keeps-shop-burglar-as-sex-slave-for-three-days](http://www.mirror.co.uk/news/top-stories/2011/07/13/karate-expert-keeps-shop-burglar-as-sex-slave-for-three-days).
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