

# KENYA'S MARITAL RAPE EXEMPTION AS A VIOLATION OF FUNDAMENTAL HUMAN RIGHTS

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## **Abstract**

Kenya's marital rape exemption is a stark violation of fundamental human rights. This paper explores the legal and practical dimensions of this exemption, highlighting its conflict with the Constitution and international law conventions. This paper employs a rights-based approach and delves into the theoretical origins of marital rape exemption and its implications. The paper also addresses the inadequacies in addressing intimate partner violence and their impact on the rights to life, liberty, security and bodily integrity. This research, seeking to examine the rationale behind the marital rape exemption, finds that it is rooted in misconceptions of consent in marriage supported by qualitative and quantitative arguments for the distinction between spousal rape and stranger rape, which are herein debunked. The paper also provides an illustrative historical development of the marital rape exemption informed by the development in both English and Kenyan law.

The research challenges the false justifications of marital rape exemptions and reveals their fallacies. These justifications are premised on three arguments: the privacy of marriage, false charges, and preserving the institution of marriage. This paper finds that these justifications are pervasive and argues that preserving marriage should not supersede the enjoyment of individual rights. Further, the research pits spousal rape against conjugal rights and examines whether the latter is absolute. The paper, borrowing from Pauline and Kantian philosophical underpinnings, concludes that conjugal rights are not absolute.

Finally, the research examines the human rights framework that necessitates criminalizing marital rape. The paper finds that Kenya's marital rape exemption under Section 43 (5) of the Sexual Offences Act violates fundamental human rights vested in international human rights instruments, including CEDAW, GR 19 and the Beijing Declaration. The paper therefore underscores the need for legal reform addressing marital rape.

## 1.1 Introduction

The working definition of marital rape not only applies to legally married persons but also those cohabiting, a separation period or even after divorce.<sup>1</sup> The Constitution<sup>2</sup>, as well as various international conventions<sup>3</sup>, impose on Kenya a positive obligation to protect and safeguard the interests and rights of all its people. This obligation emanates from the highest law of the land and international conventions which Kenya is signatory. These further segue into various statute laws even if not always. Section 43(5) of the SOA, for example, constraints the realization of these rights as it expressly isolates marital rape. This is outrightly discriminatory as it does not afford equal protection to marital rape victims as it does to those other sexual assault victims, thus going against the spirit and tenets of the Constitution.

To determine the role that the law plays regarding marital rape, depends upon a clear and comprehensive conceptualization of the issue. A rights-based approach better illuminates the violation of human rights, as a result of the lack of laws addressing spousal rape. This paper aims at examining the theoretical origins of marital rape exemption, and its application in Kenya both in law and practice. It also attempts to delineate the boundaries between *marital rights* - such as conjugal rights - and *spousal rape* whilst purposing to find a solid legal channel for redress for the latter. It addresses, in a nuanced manner, the weaknesses, the inefficiencies, and the inadequacies of the intimate partner violence systems, and their corresponding effect on the rights to life, liberty, security and that of bodily integrity.

## 1.2 Rationale behind the Marital Rape Exemption

Both justice and conscience dictate that perpetrators of crimes do not go unpunished. But the identification of what constitutes 'crime' is fundamental to the determination of what is to be punished. Many common law countries hold the view that it is impossible for a spouse to sexually assault a person they are married to. This position is anchored on the misguided presumption of consent being irrevocable and absolute as marriage is deemed a license to unlimited carnal knowledge.<sup>4</sup>

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2 P Kihara Kariuki, 'National action plan on business and human rights' June 2019 [https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/2019\\_FINAL\\_BHR\\_NAP.PDF](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF) on 13 October 2023.

3 African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3, article 3.

4 Matthew Hale, "The History Of The Pleas Of The Crown" 629 (S. Emlyn ed.1778).

This view flows from Mathew's Hale's theory of implied consent, which contemporary legislators have used to justify exemption to marital rape. Matthew Hale proclaims the unsound view that, through matrimonial contract acquired mutually, the wife grants consent to her husband's sexual demands, and that that consent is not retractable. The marital rape exception is commonly attributed to him, with his focus being the contractual nature of a marriage. Additionally, marital rape exemptions find theoretically underpinnings in the equally flawed theory of the unities of persons, which was premised on the identities of the husband and wife being one. This theory further fortified Hale's doctrine and solidified the justifications of spousal immunity.<sup>5</sup>

Those defending the marital rape exemption argue that there is a notable contrast, both qualitative and quantitative, between spousal and stranger rape. The quantitative part of the argument seeks to establish that spousal rape does not occur often enough in the society to be recognized as a real problem, an unreasonable grounding as existing data shows evidence to the contrary. Furthermore, numbers alone ought not to determine the criminal nature of any act. The qualitative aspect suggests that the damage caused to a spouse is less severe compared to that which is caused by a stranger, which, again, does not diminish the fact of a criminal event.<sup>6</sup>

In Kenya, through a series of informed dialogue and open discussion, the Sexual Offences Bill was passed into law.<sup>7</sup> The formulation of the bill was due to advocacy by human rights groups led by Fida-Kenya back in the 1990s, who noted the weakness of our legal system in addressing gender based violence. Different actors took part in the law making process including politicians, civil society organizations, the media, government and women's rights activists. The Federation of Women Lawyers- Kenya (FIDA) and the Kenya Anti-Rape Organization both spearheaded the groups that made concerted efforts to comprehensively address sexual violations against women and children. The process of legislation commenced with the tabling of a motion back in December 2004. The overall objective of the bill was to recognize the many sexual crimes that were rampant in the country and address them in a manner that was all-encompassing. The Parliamentary Hansard records the Second Reading of the bill portraying the cross roads between liberals and conservatives, despite it being majorly polarized on the basis of gender.<sup>8</sup> Most MPs had reservations about the perception that the proposed draft bill would advocate for the chemical castration of male sexual offenders. While combing the bill clause by clause, issues around the draft bill, both local and regional brought forth an opposition that was

5 Anne Dailey, "To Have and To Hold: *The Marital Rape Exemption and the Fourteenth Amendment*."

6 Martin D. Schwartz, "The Spousal Exemption for Criminal Rape Prosecution" 7 VT. L. REV. 33, 51 (1982).

7 Onyango-Ouma W., Njoki Ndung'u, Baraza N., Birungi H., 'The making of the Kenya sexual offences act, 2006: Behind the scenes' Nairobi: Kwani Trust 2009.

8 Kenya National Assembly Official Record (Hansard), Second Reading of the Sexual Offences Bill, April 27, 2006 at 780.

more or less organized across the political divide. The regional influence was due to the rape charges against Jacob Zuma in South Africa as well as Kizza Besigye in Uganda on the same timeframe. Local influence was drawn from the street demonstrations that were held by women activists to marshal the bill's support.

In order for the initiators to allow for the bill to transcend the gender fights and strike a compromise, a series of amendments were made that made the bill more acceptable to the members of parliament. The contentious issues, including spousal rape, were female genital mutilation; unwanted advances; intentional exposure of genital organs; chemical castration; burden of proof; definition of a child; age of consent in marriage; and rape shield for victims. The House Committee on Administration of Justice and Legal Affairs ensured that the bill never died naturally and suggested amendments based on the debates held. Consequently, the bill was withdrawn and they incorporated the changes with the compromise of the contents of the bill.

The change in content was influenced mainly by the perception that the said provisions could face difficulty when it came to proof, contradicted culture, were at odds with existing laws, aimed to criminalize sexuality, the controversial nature of it and overall that the provisions would ultimately be a way to settle old scores.

On the issue of marital rape, the records of the debate show that the MPs argued that rape in a marriage setting was non-existent, given the fact that African marriages provided for sexual relations. They further argued that the tabled draft was an attempt to impose the Western values upon African culture and concerned that there would be abuse of the same clause thus the need to protect families. Jimmy Angwenyi was adamant that the ideas fuelling the bill conformed to the western standards and were in the least African. The Hansard records the following;

“... [M]r. Temporary Deputy Speaker, Sir, I am saying that when this Bill is referred to the relevant Departmental Committee, make it an African Bill that accommodates all the cultures of Kenya that improve the atmosphere of marriage between man and woman. I can imagine the scenario. I go at home at night and, maybe, I have taken one or two glasses of wine. By the way, I take them around here. I feel that I am in a good mood. Then my beloved partner says: “No!” I try to attempt a little more. Then she says I have raped her! She runs out crying: “He is trying to rape me!” I will be imprisoned for five years! Would you countenance that in this House? Would you countenance the idea that you can rape your wife? I have paid dowry for my wife and we are formally married. I cannot rape her by any chance.”<sup>9</sup>

The then assistant minister for housing, one Valerian Kilemi vehemently contested the notion that marriage was a license that conferred automatic sexual access to one's spouse. She was further backed by Alicen Chelaite, the assistant minister for gender who argued

9 Kenya National Assembly Official Record (Hansard), Second Reading of the Sexual Offences Bill, April 27, 2006.

that rape in marriage was a common occurrence in Kenya and constituted a violation of human rights.

### 1.3 The False Justifications of Marital Rape Exemptions

Those who subscribe to the Hale's marriage presuming consent school of thought have cited several reasons as to why the marital rape exemption should hold. First, they advance *the privacy of a marriage argument*: that the rights of spouses to privacy are impaired when the state interferes. The argument's pivotal point is the personal nature of sexual relations between individuals in matrimony. In my view, this argument is fallacious, and as Maria Pracher<sup>10</sup> affirms, by failing to recognize the autonomy of an individual, a privacy approach that puts a marital unit above the rights of individuals takes no account of the basic premises of privacy. Additionally, she submits that this conceptualization makes the inclination of privacy unclear.

Second, they advance *the false charge argument*: that there will be recorded an increase in false accusations by married women who are out to take revenge on their spouses.<sup>11</sup> I find this logic faulty as marital rape is not the only crime that is capable of being concocted. The victims of such heinous crimes should not be denied access to justice due to the likelihood of cases being falsified.

The data on the exponential upsurge in domestic sexual violence during COVID lockdown may be used as a proxy indicator of just how pervasive this problem might be. Findings from the first prospective study of GBV trajectories in Nairobi, Kenya demonstrate the consistency in partner violence. Intimate Partner Violence (IPV) prevalence was 17.5% (lifetime) with current/recent partner at pre-pandemic (2019), 17.3% past-year at 12-month follow-up (2020), and 17.5% past-6 months at 18-month follow-up (2021) Among cohabitating couples, increased time at home with a partner due to COVID-19 restrictions increased potential for conflict and in turn, IPV.<sup>12</sup>

Third, they propound the *argument on the imperative of protecting the marriage institution*: that amending the legislation would have an effect of tearing down the marriage unit that is considered sacrosanct, and that it would oust opportunities for resolution of family matters such as through reconciliation is not considered.<sup>13</sup> It is my argument that the conservation of marriage need not overrule the need to protect victims of intimate partner violence.

10 Pracher M, "The Marital Rape Exemption: *A Violation of a Woman's Right of Privacy*" 1981 (11) Golden Gate University Law Review p.751. [if this is a direct quote let's use inverted commas in the main text]

11 Sharma Kirti, "Behind the Locked Doors: *The Evil of Marital Rape*" [www.mightylaws.in/1246/locked-doors-evil-marital-rape](http://www.mightylaws.in/1246/locked-doors-evil-marital-rape) accessed 20th June 2023.

12 Decker MR, Bevilacqua K, Wood SN, 'Gender-based violence during COVID-19 among adolescent girls and young women in Nairobi, Kenya: a mixed-methods prospective study over 18 months' BMJ Global Health 2022.

13 Fiona Sampson, "The Legal Treatment of Marital Rape in Canada, Ghana, Kenya and Malawi- A Barometer of Women's Human Rights" <https://theequalityeffect.org/pdfs/maritalrapebarometer.pdf> accessed on 20th June 2023.

The quest for industrial and financial revolution in the US and Britain was not a sufficient reason not to stop slavery and its attendant rights violations.

#### **1.4 Are Conjugal Rights Absolute?**

Another fundamental question that this chapter seeks to answer is how we determine whether a particular claim about a right is to be judged valid or invalid. Many philosophers have argued that rights are claims and correspondingly imply duties. The concept of rights presupposes a right-holder who has a justified claim or entitlement. It is universally acceptable that a right is therefore a justified claim on someone or an institution for a thing that is owed to them. Essentially, when a right holder is claiming their right, they are asserting their entitlement to be treated in a manner acceptable to them. It therefore follows that by this definition, there needs to be enforcement of the same rights. This begs the question as to whether the court can enforce a claim where a spouse petitions that they have been denied their right to sexual activity and whether the claim can be substantiated.

The apple of discord whenever marital rape arises is the boundary between spousal rape and conjugal rights. Conjugal rights are the rights of either spouse of a marriage, which include the right to the other's consortium (company), cohabitation (sexual intercourse), and maintenance during the marriage. Conjugal rights arise from that of consortium and also include the right of the wife to use her husband's name or citizenship and a duty to cohabit. Objectively, a right confers upon the holder certain privileges and liberties simultaneously imposing obligations to discharge. This brings forth the concept of positive and negative rights.

A family then in a wider sense is a structure made up of two independent individuals who are self-sufficient; consciously choose a way of life suitable to them and the rules of conjugal life acceptable to them. Adolfo Dacanáy in his commentaries speaks of conjugal rights as a requisite for the consummation of the marriage.<sup>14</sup> He elaborates further by stating that the performance of this right ought to be in a manner that is human. The humanity is threefold. Primarily, the act of marriage must take place in a setting where both individuals are aware of freedom. This is owing to the juridical effects attributable to the same. Furthermore, it should be free from violence or threats of violence since it rids the act of its humanity to both the aggressor and the party that is subdued. Finally, the act should be performed in the spirit of the marriage. The Pauline understanding of the marriage debt in Corinthians espouses that sex is due each partner and thus an obligation. Paul asserts in the same text a three-way proposition of reciprocal rights and duties between the man and his wife, describing relations founded upon mutuality. He

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<sup>14</sup> Adolfo N. Dacanáy, SJ, *Canon Law on Marriage: Introductory Notes and Comments* (Quezon City: Loyola School of Theology, 2000), 8.



also makes an emphasis on the conjugal act being a decision of the couples grounded upon the balance of their rights and not an imposition. He elaborates further by stating that the conjugal right should not be viewed as a chore that is rooted in duty. His whole understanding of conjugal rights is as a debt, constitutively aligning mutual concern and care for one's own partner.

I am inclined to agree with the Kantian underpinnings of conjugal rights<sup>15</sup>. The first principle is that of the dignity of persons, that stems from an individual possessing these rights and further exercising free will. Kant reasons that human beings manifest dignity by rationally choosing a course of action amenable with their conceptualization of the laws. He links rationality with morals and submits that persons should not be a means to an end. The understanding of marriage, according to Kant, is that sexual activity between married persons involves the use of one's body and since persons cannot be owned like objects, they consequently cannot be permissibly used for the satisfaction of another.

Both the Pauline and Kantian understanding of conjugal rights boil down to the protection of partners in a marriage from being the objects of lust, equating mutuality to what is universally acceptable as equality. Conjugal rights are therefore not absolute, and since they cannot be enforced by the courts, one party to the marriage can petition the courts for a divorce and cite the denial of conjugal rights as a ground. This is evidenced in the case of ***RNO v BKJ***, where the court granted a decree absolute since it amounted to immeasurable mental cruelty and agony, thus breaking down the marriage<sup>16</sup>.

### **1.5 Human Rights Law Necessitating Criminalization of Spousal Rape**

Section 43(5) of the SOA violates the norms of *jus cogens*, including the prohibition against torture and crucial fundamental rights and freedoms such as the right to security of persons, the right to life, equal protection under the law, non-discrimination and liberty. Additionally, the essential right to bodily autonomy and equality within the family is contravened. The core international treaties that preserve human rights and are ratified by most states include the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture and the CEDAW. The United Nations (U.N) has repeatedly proclaimed that violence, whether in the private or public sphere, impairs the exercise of the fundamental rights. By ratifying these Conventions, Kenya has accepted the jurisdiction of bodies of these treaties to monitor her compliance as well as lay out significant constituents for the rights and duties via general comments and recommendations.

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15 Immanuel Kant, *Groundwork of the Metaphysic of Morals*, trans. H. J. Patton (New York: Harper Perennial Modern Thought Edition, 2009), 95.

16 ***RNO v BKJ*** [2021] eKLR.

The 1986 Resolution of Violence Against Women was the first international multilateral instrument to call for the legal recognition of marital rape. The preceding 1982 resolution by the United Nations Economic and Social Council (ECOSOC), a human rights forum, designated domestic violence and rape as offences against the dignity of the body but failed to address marital rape thus the 1986 instrument. The passage of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was by far the greatest achievement, as it expanded women rights law with respect to marital rape. Subsequently following were two international instruments that addressed violence against women directly; General Recommendation 19 (GR 19) by the CEDAW Committee and the Vienna Declaration on the Elimination of Violence Against Women (DEVAV). With these instruments as sources of authority, regional and international framework steadfastly set in motion a due-diligence obligation upon states to prevent, combat and sanction marital rape, domestic violence and other acts of intimate partner violence.

Heavy reliance has been put on international human rights law to demand the criminalization of spousal rape in countries where it still retains criminal immunity, with an aim to persuade states to fulfil their obligations under international law.<sup>17</sup> It is a demand for more than just a penal remedy, but fundamentally a demand for equality before the law and autonomy; rights that are pivotal to the definition of international human rights law. Drawing on International human rights law as a source of authority to challenge the exemption allows to seek greater accountability and state action, Julie Goldscheid<sup>18</sup> believes that by explicitly stating the state's obligation in terms of the due diligence framework that requires a wide range of responses would be a more comprehensive approach that would reach globally and ultimately address the social and cultural barriers that permit marital rape to carry on without sanctions.

On account of articles 2(5) and 2(6) of the Constitution of Kenya, international law that is ratified by Kenya forms part of the laws of Kenya. The 1979 CEDAW instruments forms the basic instrument that defines what constitutes discrimination and sets up state action to end discrimination. The convention however makes no mention of rape or sexual assault. The GR 19 made an attempt to fill the gap glaringly omitted by CEDAW by extending the definition of discrimination under article 1 of CEDAW to include gender-based violence. The Recommendation declares domestic violence, including rape within the family a breach of articles 5 and 16 of CEDAW. Marital status is especially registered as a ground that is proscribed.

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17 M McWilliams and FD Ni Aolain, "Moving Slowly to Regulate and Recognize: *Human Rights Meets Intimate Partner Sexual Violence*" Transitional Justice Institute Research Paper no 16-10 (2016).

18 J Goldscheid, "Considering the Role of the State: Comment on "Criminalizing Sexual Violence against Women in Intimate Relationships" ' (2015) 109 AJIL Unbound 202.



The marital rape exemption is clearly a violation of the right to be free from discrimination. The Bill of Rights in the Kenyan Constitution is aimed at protecting human rights and fundamental freedoms while preserving the dignity of individuals; promoting social justice; and realizing the potential of all human beings.<sup>19</sup> Article 27 of the Constitution of Kenya goes a step further to elaborate on the need for equality before the law and freedom from discrimination by the State on such grounds including marital status. The SOA is therefore in direct contravention of the Constitution and as such should be amended appropriately.

Cass Sustein<sup>20</sup> suggests that the expressive function of law largely constitutes a shift from social norms and meaning. He notes that laws against discrimination of persons are more often than not designed to bring about change in norms and guarantee dignity that the discriminatory laws deny human beings. The GR 19 foists a number of obligations to be fulfilled by member states including penal sanctions as well as preventive and protective measures.

DEVAW, although not legally binding upon states, when read together with GR 19, highlights gender based violence as an issue affecting the globe. This instrument clearly portrays international consensus to combat violence against women in all forms. Gendered violence within the private sphere was a matter of international concern under this instrument as it condemned physical, sexual and psychological violence within the home. Marital rape gains the spotlight under article 2 of the instrument as part forming the definition of violence within the family. DEVAW recognizes that the only feature discerning private actors and the states when it comes to violence is the locale. DEVAW asserts that marital rape is a violation of the rights and fundamental freedoms as it impairs and nullifies enjoyment of the same.

The United Nations member states adopted the Beijing Declaration and Platform for Action, an international legal initiative to end gendered violence. The due diligence standard was reiterated by this initiative, recognizing that spousal rape is manifest due to unequal power relations, demanding that states reinforce sanctions to penalize perpetrators and provide access to justice. It addressed how states condoned such violence and exploitation in the family setting and emphasized on the need for governments to take appropriate measures through enactment of legislation that prevent acts such as spousal rape within the family.

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<sup>19</sup> The Constitution of Kenya, 2010, Article 19(2).

<sup>20</sup> CR Sunstein, "On the Expressive Function of Law" (1995) 144 University of Pennsylvania Law Review 2021, 2043.

The right to be free from degrading treatment and torture is inclusive of the right to be free from intimate part violence that is marital rape. Marital rape satisfies the elements of acts of torture under article 1 of the Convention Against Torture. The convention lists the constituents as acts that inflict pain and suffering; for a prescribed purpose to include intimidation, coercion or discrimination; and is acquiesced to or condoned by state actors.<sup>21</sup> This is backed by ***Prosecutor v Jean-Paul Akayesu***<sup>22</sup> that identifies rape as constituting torture when conducted by private actors and condoned by the state.

Whereas international criminal law concerns itself mainly with individual responsibility, the human rights law is defined by the state's responsibility. The point of convergence between the two laws then is the universal damnation of rape along with the need to outlaw marital rape. Kenya in this regard enables the perpetration of acts not permissible under this Convention with impunity as it fails to meet the requisite due diligence by not sanctioning marital rape as well as lack of legal redress to victims of the same. Similarly, the Tribunal in ***Prosecutor v Furundzija***<sup>23</sup>, opined that rape was an atrocity on the personal dignity of human beings and the physical integrity of the person which comprises a fundamental right that is inherent and forms part of customary international law.

## 1.6 Conclusion

All these International Conventions list the violations made against human rights and are to include inter alia the right to equal protection before the law, the right not to be subjected to degrading treatment, the right to life, sexual self-determination, human dignity, effective judicial recourse, integrity of the person and safety. Kenya falls short of its obligations by glaringly excluding victims of marital rape in the SOA. The application of the Bill of Rights is meant to cut across all legislations while binding the State organs as well as all persons. Kenya has a duty to observe, protect, promote, respect and fulfil the rights and fundamental freedoms guaranteed by the Constitution. This can be remedied through the enactment and implementation of legislation that addresses marital rape thereby fulfilling her international obligations in respect of human rights and fundamental freedoms. Section 43(5) is a clear portrayal of Kenya's slackness in matters shielding the victims of spousal rape. The International body of human rights exhibits an underpinning for legal reform and social change when it comes to spousal rape. The due diligence requisite should also push Kenya to find a solid legal channel for redress to not only institute civil proceedings but also pursue criminal remedies.

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21 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10th Dec 1984, 1465 U.N.T.S. 85.

22 The Prosecutor v Jean-Paul Akayesu (Appeal Judgement), ICTR-96-4-A, International Criminal Tribunal for Rwanda, 1st June 2001 [www.refworld.org/cases,ICTR,4084f42f4.html](http://www.refworld.org/cases,ICTR,4084f42f4.html) accessed on 20th June 2023.

23 Prosecutor v Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY) 10th December 1998 [www.refworld.org/cases,ICTY,40276a8a4.html](http://www.refworld.org/cases,ICTY,40276a8a4.html) accessed 20th June 2023.