

**ANALYZING THE BOUNDARIES BETWEEN MUTUAL
MATRIMONIAL CONSENT AND MARITAL RAPE IN KENYA**

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DECLARATION

I, **NDUNGU ABIGAIL WATURI**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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LIST OF CASES

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Esther Nangwanaa Nandi v Jones Chewe Bobo (2005), The High Court of Kenya.

G v G (1924), The United Kingdom House of Lords.

S v Modise (2007), High Court of South Africa.

S v Mvamvu (2003), The Supreme Court of Appeal of South Africa.

S v Ncanywa (1998), High Court of South Africa.

S v Moipolai (2004), High Court of South Africa.

R v R (1921), The United Kingdom House of Lords.

LIST OF LEGAL INSTRUMENTS

African Charter on Human and Peoples' Rights, 1981.

Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

Criminal Law (Sentencing) Amendment Act, 2007.

Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

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HIV and AIDS Prevention and Control Act, 2017.

Prevention of Family Violence Act, 1993.

Protection Against Domestic Violence Act, 2015.

Sexual Offences Act, 2006.

The Constitution of Kenya, 2010.

The Constitution of the Republic of South Africa, 1996.

LIST OF ABBREVIATIONS

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

CoK Constitution of Kenya

DEVAW Declaration on the Elimination of Violence Against Women

DVA Domestic Violence Act

NGOs Non-governmental Organizations

PADVA Protection Against Domestic Violence Act

PFVA Prevention of Family Violence Act

SOA Sexual Offences Act

SORMA Criminal Law (Sexual Offences and Related Matters) Amendment Act

ABSTRACT

This research investigates the insufficient legal protection for victims of marital rape in Kenya, despite existing legislation on sexual and domestic violence. Notably, marital rape is not criminalized, hindering access to justice and support for victims. Utilizing a legal doctrinal approach, the study will analyze legal texts and case law to identify inconsistencies within the framework that enable this inadequacy. Additionally, international legal instruments and studies from jurisdictions such as South Africa with established approaches to marital rape will be considered to draw potential best practices. The research aims to inform policymakers and legislators in creating evidence-based legal reforms, empower NGOs advocating for victim rights, and guide healthcare professionals in supporting survivors. Ultimately, it seeks to contribute to a legal and social environment where everyone, regardless of marital status, has the right to bodily autonomy and is free from sexual violence.

CHAPTER 1: RESEARCH PROPOSAL

1.1 INTRODUCTION

Marital rape is a dark and toxic reality that lingers in the sanctified sanctuary of matrimony, an institution which is supposedly based on trust and love.¹ The subtle differences between mutual matrimonial consent and the unsettling lines separating it from the atrocious act of marital rape require careful consideration, particularly within the Kenyan context, which serves as the background to the study.

Like many other countries, Kenya faces significant challenges in reconciling how marriage relates to custom, cultural norms, and the changing ideas of human rights. The struggle lies in balancing traditional views of marriage, where the husband often has assumed rights over his wife, with the modern understanding of individual autonomy and mutual consent.²

According to the 2022 Kenya Demographic and Health Survey, violence against women remains a pervasive issue.³ Among currently married or partnered women, 37% have experienced physical or sexual violence, while this rate rises to 58% among divorced, separated, or widowed women. Overall, 41% of women who have ever been married or in an intimate partnership have endured psychological, physical, or sexual violence from their current or most recent partner. These statistics underscore the urgent need for continued efforts to prevent and address violence against women in Kenya.

To provide a more comprehensive view of intimate partner violence, it's important to acknowledge that men are also victims. This survey indicates that 36% of men who have ever been married or in a close relationship have been abused in the same manner by their current or previous partner.⁴ These statistics show that intimate relationship violence affects both sexes, despite the fact that it disproportionately affects women. This highlights the necessity for interventions that take into account the experiences of all victims.

¹ Elaine J, 'Contest and Consent: A legal history of marital rape' California Law Review, 2000, 4.

² Kamau W, Nyaundi P and Serwanga J, 'The legal impunity for marital rape in Kenya: A women's equality issue' The Equality Effect, 2013, 3.

³ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2022: Kenya's Health Sector Data & Statistics*, 23, – <<https://www.knbs.or.ke/reports/kdhs-2022/#gbv>> on 17 January 2023.

⁴ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2022: Kenya's Health Sector Data & Statistics*, 23, – <<https://www.knbs.or.ke/reports/kdhs-2022/#gbv>> on 17 January 2023.

The scope of intimate partner violence in Kenya is further shown by the significant disparities in this issue's severity throughout counties. Bungoma County has the greatest rate of violence, according to recent data, with 60% of women aged 15-49 who have ever been married or had an intimate partner claiming that their most recent spouse has abused them physically, sexually, or psychologically.⁵ Following closely at 58% each are the counties of Murang'a, Migori, and Embu while Homa Bay reported 55%. Of the women in this category, 34% had experienced similar forms of violence, even in Nairobi, which is a more urban area compared to the others. Stronger legal safeguards and interventions are required, especially in the case of marital rape, as these regional discrepancies highlight a pervasive and urgent concern.

The problem of marital rape is still concealed in taboos and silence, despite great advancements in legal frameworks. This creates a dangerous environment where victims are frequently denied justice. This study assessed the legal nuances and cultural elements that contribute to the ongoing commission of this horrible crime by dissecting the complicated issues surrounding consent in Kenyan marriage contexts.

This paper critically examined the legal definition of mutual matrimonial consent and to distinguish it from the heinous crime of marital rape in Kenya. The study also analyzed the current legal systems and international standards to find the weaknesses and obstacles that prevent and impede the successful prosecution of marital rape. The study's aim in doing this analysis was to make a valuable contribution to the current discussion about safeguarding marital rights and eradicating violence within the esteemed institution of marriage.

1.2 BACKGROUND TO THE STUDY

While marriage is often regarded as a haven of trust, friendship, and understanding, it can also conceal complex and troubling realities, including issues like marital rape. The fundamental basis of married relationships is under threat from the global problem of marital rape, a type of domestic violence.⁶ In the Kenyan environment, with its rich cultural diversity and dynamic legal system, it

⁵ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2022: Kenya's Health Sector Data & Statistics*, 5, – <<https://www.knbs.or.ke/reports/kdhs-2022/>> on 17 January 2023.

⁶ Federation of Women Lawyers-Kenya, 'Gender Based Violence in Kenya' National Crime Research Centre, 2008, 26.

is important to carefully consider the complex nature of mutual matrimonial consent and how it differs from the heinous crime of marital rape.

Non-consensual sexual activities committed by one spouse against the other, commonly referred to as marital rape in other jurisdictions,⁷ are captured under the broader category of sexual violence in Kenya's Prevention of Domestic Violence Act.⁸ It is imperative that this issue be addressed since it not only goes against the fundamental values of human dignity and bodily autonomy but also seriously jeopardizes the mental and physical health of those who participate in the institution of marriage.⁹ The problem takes on greater significance in Kenya, where changing legal frameworks and cultural norms collide, as it reveals the obstacles victims encounter in their quest for justice and the attitudes that contribute to the silence being maintained.

Existing studies or public perceptions may be based on a number of claims or assumptions, such as the idea that consent is presumed in marriage and cannot be broken.¹⁰ The belief that problems in married relationships should be kept private may be influenced by societal expectations, gender conventions, and cultural customs, which can make it more difficult to disclose cases of marital rape.

While marital rape remains undefined in Kenya, many other jurisdictions have explicitly recognized and criminalized it, signaling progress in protecting the rights of individuals within marriage. These legal frameworks acknowledge that marriage does not dissolve a person's right to bodily autonomy, setting a precedent for addressing the issue and offering victims a clearer path to justice. This is seen in the following cases: In *Bradwell vs Illinois*¹¹, the court held that the laws of nature and divine revelation jointly designate the husband as the head of the family. It is for the wife to love, honor and obey and it for the husband to love, cherish, and protect.

⁷ Bennice J and Resick P, 'Marital rape: History, research and practice' *Trauma, Violence and Abuse*, 2003, 229.

⁸ Section 3(a), *Protection Against Domestic Violence Act* (2015).

⁹ Kameri-Mbote P, 'Violence against women in Kenya: An analysis of law, policy and institutions' *International Environmental Law Research Centre, IELRC Working Paper*, 2000, 3.

¹⁰ Chika S, 'Legalization of marital rape in Nigeria: A gross violation of women's health and reproductive rights', *ResearchGate*, 2011, 9.

¹¹ *Bradwell vs Illinois* (1873), The Supreme Court of the United States.

In *G v G*¹², it was held that the courts should not intervene in marital relationships because of its personal and private nature and its capacity of being used by a spiteful wife to get back at the husband. In *State v Moipolai*¹³, which was a case involving a pregnant woman and her long-term boyfriend, the judge reduced the accused person's sentence from ten to five years because according to him, the rape was not as serious as if a stranger had committed it.

The above is not always the position of courts as a different decision was made in the following case which portrays progress in criminalizing marital rape in different jurisdictions. In *R vs R*¹⁴, the defendant was charged with the attempted rape of his wife. At the time of the offense the couple had separated although no formal legal separation existed and neither party had filed for a divorce. The House of Lords overturned the matrimonial exception to rape. His conviction for rape was upheld. Currently, some countries have upheld this decision by criminalizing marital rape.

In Kenya, the case of *Esther Nangwanaa Nandi v Jones Chewe Bobo*¹⁵ shows slight progress. The Kenyan High Court was dealing with a divorce case in this instance. In details that amounted to cruelty on the part of the respondent, the complainant claimed that he had physically abused her, that he had locked her out of their marital home, forcing her to look for other housing at hostels, and that he had unreasonably forced her to have sex with him when intoxicated. The divorce petition was granted by then-High Court Judge Justice Rawal as she found favor in the petitioner. The learned judge upheld the respondent's guilt for the cruelty and adultery, which she claimed were of a very serious nature and caused danger to her life and health. These were actions that weren't appropriate to be written off as normal wear and tear of marriage and sharing a life together through thick and thin.

By exploring the legal, cultural, and societal factors that impact how consent is perceived in married relationships, this study sought to dispel any preconceptions that might obstruct the successful investigation and prosecution of marital rape in spite.

¹² *G v G* (1924), The United Kingdom House of Lords.

¹³ *State v. Moipolai* (2004), High Court of South Africa.

¹⁴ *R v R* (1921), The United Kingdom House of Lords.

¹⁵ *Esther Nangwanaa Nandi v Jones Chewe Bobo* Divorce Cause 84 of 2005 at High Court of Kenya, Nairobi.

1.3 STATEMENT OF THE PROBLEM

The line separating mutual consent from the heinous crime of marital rape is still blurry in Kenya. In addressing the urgent problem of marital rape, this study aims to comprehend and resolve the obstacles that exist in Kenya that prohibit this type of domestic abuse from being effectively prevented and prosecuted. Despite glaring statistics on intimate partner violence,¹⁶ there is currently no specific law addressing marital rape, leaving a significant gap in the legal framework. Even while laws have made progress in identifying and denouncing gender-based violence, closer examination of this practice within the context of marriage requires urgent attention. Laws already in place and cultural norms frequently collide to create a complex environment where victims face obstacles to justice and where social expectations play a role in the underreporting of crimes.¹⁷ Addressing this legal vacuum is crucial in combating marital rape and ensuring justice for victims in Kenya.

The problem at hand is not only how common marital rape is, but also how inadequate the legal systems now in place are to deal with and prevent these kinds of abuses. The objective of this study was to investigate the complex aspects of both mutual consent and marital rape. The research examined the knowledge gaps, controversies, and presumptions that influence the discourse and obstruct efforts to combat this serious human rights violation within the hallowed institution of marriage. By pointing out these nuances, the study hoped to add to the conversation on the legal changes, cultural sensitivity training, and public awareness initiatives that are required to safeguard people's rights and welfare in Kenyan marriage.

1.4 RESEARCH OBJECTIVES

The goal of the study is to perform a thorough investigation of the lines that separate marital rape in Kenya from mutual consent.

The specific objectives are:

¹⁶ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2022: Kenya's Health Sector Data & Statistics*, 5, – <<https://www.knbs.or.ke/reports/kdhs-2022/>> on 17 January 2023.

¹⁷ Randall M, 'Sexual assault in spousal relationships, "Continuous Consent", and the Law: Honest but mistaken judicial beliefs' *Social Science Research Network*, 2008, 150.

- a) to assess the efficiency of current legal frameworks—which include laws, court decisions, and enforcement tactics—in dealing with cases of marital rape and the gaps therein.
- b) to draw lessons from South Africa, where marital rape is criminalized, for potential implementation in Kenya's legal framework.
- c) to formulate recommendations for legal awareness and reforms in order to improve the general safety of spouses in Kenyan marriages.

1.5 RESEARCH QUESTIONS

This research paper aims to answer the following questions:

First, in what ways do Kenya's current legal frameworks tackle the problem of marital rape, and what obstacles, if any, do they pose to successfully prosecuting and stopping this type of domestic abuse?

Secondly, how can lessons from South Africa, where marital rape is criminalized, inform the development of legal frameworks and judicial practices to address marital rape in Kenya?

Lastly, what legal and cultural reforms, along with enhanced legal awareness, can be effectively implemented to improve the overall safety and well-being of spouses within Kenyan marriages?

1.6 JUSTIFICATION OF THE STUDY

Kenya has made great strides in combating gender-based violence, but marital rape is still an unacceptable and unresolved problem.¹⁸ The purpose of this study was to close important knowledge gaps about this common yet under-reported crime.

First and foremost, the study aimed to raise awareness among the general public, policy-makers in government, and healthcare professionals. By illuminating the lived experiences of survivors, the research brought to light false beliefs and detrimental social norms related to marital rape.

¹⁸ Guantai L, 'Towards the legal protection of married women: Combating and criminalising marital rape in Kenya' University of Capetown OpenUCT, 2019, 9.

Policymakers may utilize the study's insightful findings to create evidence-based plans for preventing and dealing with marital rape. This can entail reinforcing legal frameworks, facilitating survivors' access to justice, and funding extensive support programs. In the long run, this study has the ability to empower women by validating their experiences, encouraging a society that does not tolerate marital rape, and opening the door for a time when everyone has the right to bodily autonomy and protection from sexual violence, regardless of marital status.

1.7 HYPOTHESIS

Kenya's existing laws on sexual and domestic violence fail to adequately protect victims of marital rape due to the lack of criminalization for this specific act.

1.8 THEORETICAL FRAMEWORK

The paper presents two theories—feminism and social constructionism—as the most pertinent to the subject matter in order to argue for the criminalization of marital rape.

One of the main tenets of gender studies is the feminist theory, which looks at the social structures that support gender inequality and works to eradicate it. The origins of this theory can be seen in the writings of early feminists like Mary Wollstonecraft, who fought for women's rights and education in the late 18th and early 19th centuries.¹⁹ But in the middle of the 20th century, with the second wave of feminism that arose in the 1960s and 1970s, the feminist theory started to take on a more structured form. This wave addressed many different topics, such as sexuality, family, employment, and reproductive rights, but it placed special attention on how laws and society norms support gender-based discrimination.²⁰

This theory particularly focuses on the concept of patriarchal power structures as described by scholars like Catherine MacKinnon.²¹ According to this argument, men are routinely given precedence over women by societal structures, which gives them authority over a variety of areas of women's lives, including their sexuality.²² One way to conceptualize this patriarchal power

¹⁹ Adhikari A, 'The feminist responses to Mary Wollstonecraft: A reading' ResearchGate, 2022, 2.

²⁰ Yadav M, 'Aspects of feminist writing: A presentation of common issues' ResearchGate, 2018, 60.

²¹ MacKinnon C, *Towards a feminist theory of the state*, Harvard University Press, United States, 1989.

²² Thompson D, *Radical Feminism*, Sage publications, 2001.

imbalance in Kenyan society is to consider the fact that marital rape is not criminalized. The legal system perpetuates the idea that a husband has the right to have sexual relations with his wife without getting her consent by denying women the legal right to claim that marital rape is a crime.²³ This effectively takes away women's autonomy, depriving them of the ability to manage their bodies and possibly fostering an atmosphere of silence and normalcy surrounding marital rape.²⁴

The research furthers our understanding of gender-based power dynamics in marriage and how these dynamics need to be addressed to guarantee that women's rights are fully acknowledged and safeguarded within Kenyan marriage institutions. By analyzing the legal framework and its impact on victim protection through this feminist lens, this study shed light on how power dynamics and societal norms contribute to the inadequate protection of victims of marital rape in Kenya.

The second theory is a sociological theory called social constructionism that examines how social phenomena and concepts emerge in social contexts as a result of human consensus rather than having their origins in an objective reality.²⁵ According to this view, society constructs and upholds many parts of human reality, such as knowledge, social roles, and cultural standards, rather than them being innately natural.

The Social Construction of Reality, an important book written by Peter L. Berger and Thomas Luckmann, is credited with giving rise to social constructionism.²⁶ They stress that our perception of "reality" is actually a result of social interaction and group consensus. This viewpoint creates the idea that social norms and categories, such gender roles or legal systems, are dependent on cultural and historical settings.

Social constructionism offers a potent framework for comprehending how cultural norms and beliefs impact the legal and social definitions of consent and rape, which is useful when examining the lines that separate mutual matrimonial consent from marital rape in Kenya. According to the theory, ideas like marriage and consent are molded by the cultural and social contexts in which they are rooted rather than being static or universally defined. Marriage has historically been

²³Offen K, *Defining feminism: A Comparative Historical feminism approach*, University of Chicago Press, 1998, 123.

²⁴ Hooks B, *Feminism is for everybody: Passionate Politics*, Lute Press London, 2000.

²⁵ Nickerson C, 'Social constructionism theory: Definition and examples' Simply Psychology, 2024, 3.

²⁶ Berger P and Luckmann T, *The social construction of reality: A treatise in the sociology of knowledge*, 1st ed, Penguin Books, England, 1966.

viewed as an institution where the wife's sexual accessibility is considered to be an element of the marriage contract in many nations, including Kenya.²⁷

By using social constructionism to analyze this research issue, it is possible to investigate how Kenyan cultural narratives and societal norms have created and maintained the concept of marital consent. This may have prevented victims from receiving legal protection and acknowledgment.²⁸ Using this theory, the study also investigated how public perceptions of marital rape and judicial interpretations of the crime have changed as a result of societal norms and awareness raising challenges to these constructions.

1.9 LITERATURE REVIEW

This literature review examined the current discussion around Kenya's outlawing of marital rape by drawing on a number of academic writings. The review is organized thematically, highlighting key arguments for and against the issue, while also examining the strengths and weaknesses of each work. The current legal circumstances, international comparisons, and the wider effects of these discussions on Kenyan law and society are explored in the following analysis.

One of the central themes across the literature is the inadequacy of Kenyan law in protecting married women from sexual violence within marriage. The seminal work by Patricia Nyaundi discussing marital rape²⁹ articulates this issue by highlighting the exclusion of spouses from the protection under Section 43(5) of the Sexual Offences Act (SOA), which effectively denies married women legal recourse against marital rape.³⁰ The article presents a detailed historical overview of Kenyan laws and discusses how deeply rooted cultural stereotypes grant men presumed sexual rights over their wives.³¹ It also highlights the Protection Against Domestic Violence Act (PADVA) which provides for the protection and relief of victims of domestic

²⁷ Sampson F, 'The legal treatment of marital rape in Canada, Ghana, Kenya, and Malawi—A barometer of women's human rights' *The Equality Effect*, 2010, 25.

²⁸ Guantai L, 'Towards the legal protection of married women: Combating and criminalising marital rape in Kenya' University of Capetown OpenUCT, 2019, 21.

²⁹ Kamau W, Nyaundi P and Serwanga J, 'The legal impunity for marital rape in Kenya: A women's equality issue' *The Equality Effect*, 2013.

³⁰ Section 43(5), *Sexual Offences Act* (No. 3 of 2006).

³¹ Kamau W, Nyaundi P and Serwanga J, 'The legal impunity for marital rape in Kenya: A women's equality issue' *The Equality Effect*, 2013, 4.

violence.³² This perspective is crucial in understanding the systemic legal barriers that perpetuate marital rape in Kenya.

This article adeptly juxtaposes international standards regarding this issue with regional norms and constitutional provisions. However, it has a limitation in its lack of specific strategies for legal reform, which somewhat diminishes its utility in guiding future policy directions.³³

A recurring argument in the literature is the urgent need for legal reform to align Kenya's laws with international standards. Ngema stresses the importance of abolishing the marital rape exemption to achieve gender equality and reduce the spread of HIV/AIDS.³⁴ According to the article, Kenya has to take some steps aimed at ending a conflict between the Sexual Offences Act and the HIV and AIDS Prevention and Control Act³⁵, in order to achieve its goals of equality and freedom from discrimination. The author argues that Kenya should follow international examples where marital rape is recognized as a form of violence against women and is criminalized.³⁶

This article's strength lies in its advocacy for legal alignment with international norms, offering a clear rationale for why Kenya must change its laws. The author effectively highlights the importance of gender equality and addresses the prevalent issue of violence against women. However, it falls short in proposing concrete steps for implementing these changes within the Kenyan context, leaving a gap in practical application.

The third article mainly focuses on the advocacy for criminalization and human rights protection.³⁷ The literature also discusses the broader human rights implications of failing to criminalize marital rape. Odhiambo presents a compelling case for the criminalization of marital rape by emphasizing that it violates fundamental human rights, including the right to life, liberty, and security.³⁸ The

³² *Protection Against Domestic Violence Act* (2015).

³³ Yllö K and Torres G, 'Marital rape: Consent, marriage and social change in the global contest' Oxford University Press, 2016, 15.

³⁴ Ngema N, 'Marital rape exemption in Kenya: Some lessons from international law' Social Science Research Network, 2015.

³⁵ *HIV and AIDS Prevention and Control Act* (2017).

³⁶ Ngema N, 'Marital rape exemption in Kenya: Some lessons from international law' Social Science Research Network, 2015, 5.

³⁷ Odhiambo M, 'The silent scourge: A call for outlawing marital rape in Kenya' The Platform, 2023 – <<https://www.theplatformke.co.ke/>> on 12 October 2023.

³⁸ Odhiambo M, 'The silent scourge: A call for outlawing marital rape in Kenya' The Platform, 2023, – <<https://www.theplatformke.co.ke/>> on 12 October 2023.

author argues that Kenya should follow the example of other countries that have already criminalized marital rape, aligning its laws with global human rights standards.

This article is particularly strong in its use of local and international jurisprudence to support its argument. It also showcases several strengths, including clear definitions of rape³⁹ and marital rape, as well as the provision of statistics and insights into the prevalence and impacts of marital rape in Kenya. However, similar to the other works, it lacks detailed proposals for how such legal changes could be effectively implemented in Kenya.

An African contribution to the discussion sourced from a joint publication by authors from West and South Africa, provides a comparative analysis that situates Kenya within a broader regional and international context.⁴⁰ By examining legal reforms in other African countries, like Ghana and Malawi, the book offers valuable insights into how Kenya might navigate its own legal challenges regarding marital rape. The comparative approach is a significant strength, as it allows for the identification of potential strategies that could be adapted to the Kenyan context.⁴¹ However, the book's focus on legal frameworks at the expense of exploring the social and cultural norms that influence perceptions of marital rape in Kenya is a notable shortcoming. Understanding these cultural dimensions is essential for a holistic approach to legal reform.

While all the reviewed literature supports the criminalization of marital rape in Kenya, they differ in their approaches and emphases. On one side, the article by Patricia Nyandi⁴² and the other by Odhiambo M.⁴³ focus on the immediate need for legal reforms and the alignment with international human rights standards. They strongly advocate for criminalization as a necessary step toward gender equality and protection of women's rights. On the other side, works from scholars such as Ngema Nqobizwe⁴⁴ emphasize the complexity of simply criminalizing marital rape without

³⁹ Section 3, *Sexual Offences Act* (No. 3 of 2006).

⁴⁰ Nyaundi P, Randall M and Koshan J, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*, 1st ed, Bloomsbury Publishing, Oxford, 2023.

⁴¹ Nyaundi P, Randall M and Koshan J, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*, 1st ed, Bloomsbury Publishing, Oxford, 2023, 32.

⁴² Kamau W, Nyaundi P and Serwanga J, 'The legal impunity for marital rape in Kenya: A women's equality issue' *The Equality Effect*, 2013.

⁴³ Odhiambo M, 'The silent scourge: A call for outlawing marital rape in Kenya' *The Platform*, 2023, – <<https://www.theplatformke.co.ke/>> on 12 October 2023.

⁴⁴ Ngema N, 'Marital rape exemption in Kenya: Some lessons from international law' *Social Science Research Network*, 2015.

addressing the underlying social and cultural barriers. This view suggests that while legal reforms are crucial, they must be accompanied by broader societal changes to be effective.

The research contributed to the existing body of literature by providing a focused legal analysis from an African perspective. While much of the existing work emphasizes the need for legal reforms and alignment with international standards, the study specifically explored the gaps in Kenya's legal framework concerning marital rape. By critically analyzing the existing laws, judicial decisions, and proposed reforms, the research offered targeted recommendations for legal changes that could enhance the protection of married women in Kenya. Criminalization, though necessary, is not sufficient and must be supplemented by additional measures including judicial training as well as public education and raising awareness.⁴⁵ This study aimed to inform policymakers and legal practitioners on how to effectively address the issue of marital rape within the existing legal structures, contributing valuable insights to the ongoing discourse on gender-based violence in Kenya.

1.10 METHODOLOGY

This study relied on legal doctrinal research methodology to examine the legal framework surrounding marital rape in Kenya. The central question driving this research was: how does the absence of criminalization of marital rape contribute to the inadequate protection of victims?

The research carefully examined significant parts and provisions of primary legal sources such as statutes, including the Constitution of Kenya (CoK) and the Sexual Offences Act (SOA), in order to provide an answer to this question. In an attempt to comprehend how courts have interpreted the law in connection to marital rape or other similar cases, significant court decisions in case law was examined. Secondary sources like scholarly articles, theses, research and working papers, journals and reports provided deeper insights and contextualized the legal analysis. Ultimately, the study synthesized the data to draw conclusions about how inadequate the current framework is and provided evidence-based suggestions for legal changes, such as making marital rape a crime and strengthening the legal framework's protections for victims.

⁴⁵ Littleton C, 'Reconstructing Social Inequality' California Law Review, 1987, 17.

1.11 LIMITATIONS

This study acknowledged the inherent limitations of relying solely on a doctrinal research approach. Although this approach offered a strong foundation for comprehending Kenya's legal framework for marital rape, it largely concentrated on legal texts and might not adequately represent the lived experiences and social realities of victims and survivors. Furthermore, focusing only on the analysis of legal documentation may ignore the larger social and cultural setting that shapes how the law is interpreted and how society reacts to this delicate subject.

In the future, the research could use aspects from other approaches to address these shortcomings. This might involve conducting interviews, with appropriate ethical considerations, with legal professionals, non-governmental organizations (NGOs) and survivors to gain deeper insights into practical legal application and victim experiences. Furthermore, examining important cultural and sociological studies can provide an insightful framework for understanding Kenyan societal norms and cultural perspectives on marital rape. Through recognition and efforts to rectify these shortcomings in the future, this research endeavored to further develop a more exhaustive and refined comprehension of the matter at hand.

1.12 CHAPTER BREAKDOWN

Chapter one laid out the background of the study and the statement of the problem. It outlined the objectives of the research, research questions, justification of the study and the hypothesis. This indicated an overview of the study.

Chapter two focused on the legal landscape surrounding marital rape in Kenya. This chapter examined the relevant legal and regulatory provisions, including the Constitution and the Sexual Offences Act and identified any legal gaps or inconsistencies that contribute to the lack of protection for victims.

Chapter three explored best practices in addressing marital rape through a case study. A relevant jurisdiction with a well-established legal framework, such as South Africa, was selected. By analyzing how this jurisdiction approached the issue, emphasizing its legal and social strategies, the chapter aimed to draw valuable insights and potential lessons for Kenya.

Chapter four made recommendations for legal and social reforms to address marital rape in Kenya based on the findings.

Chapter five concluded the research and highlighted areas for further study.

CHAPTER 2: KENYA'S LEGAL GAPS IN ADDRESSING MARITAL RAPE

2.1 INTRODUCTION

This chapter critically analyses the gaps within the legal frameworks of Kenya on marital rape, both nationally and internationally. Though the Constitution of Kenya under Article 45⁴⁶ provides for equality within the context of marriage, no express legal provision concerning marital rape exists in the Kenyan legal framework. Thus, a tremendous shortfall regarding protection to the victim is evident. Domestic legislation, such as the Sexual Offences Act, the Protection Against Domestic Violence Act, and the Penal Code itself, address sexual violence generally, but have not made marital rape a specific criminal offense.

Further, Kenya's commitments under international conventions like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights, and the Declaration on the Elimination of Violence Against Women (DEVAW), place a duty to bear obligations upon the state for protecting women against all forms of violence, including marital rape. These commitments are yet partially untransformed into domestic law. The rest of this chapter will further assess judicial interpretations and other procedural barriers that hinder the prosecution and prevention of marital rape, exemplifying deficiencies in Kenya's criminal justice system regarding the provision of remedies to the victims.

In the following sections, the study will begin by examining Kenya's international commitments, followed by an analysis of the domestic legal framework and judicial interpretations relating to marital rape.

2.2 KENYA'S INTERNATIONAL COMMITMENTS

2.2.1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Kenya ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1984, binding itself to address and eliminate all forms of gender-based discrimination. The CEDAW is a cornerstone international convention in the protection of

⁴⁶ Article 45, Constitution of Kenya (2010).

women's rights in many aspects of life, including protection against violence. Article 1 of CEDAW defines discrimination as any distinction or exclusion made based on sex that impairs a woman's ability to exercise human rights on an equal basis with men.⁴⁷ The breadth of this definition imposes an obligation on state parties, such as Kenya, for full and equal access by women to legal protections, including those involving violence within intimate relationships.

While CEDAW does not explicitly mention marital rape, the provisions make state parties bound by an obligation to eliminate all forms of violence against women, including sexual violence, perpetrated by private individuals such as spouses. Article 2 of CEDAW binds states to adopt all appropriate legislative, policy, and administrative measures for combating gender-based violence, whether such acts have been committed by the state or private actors.⁴⁸ This therefore places an evident responsibility on Kenya to address sexual violence within marriage as part of its broader commitment to gender equality and protection of the rights of women.

General Recommendation 19, adopted in 1992 by CEDAW, goes a step further by clearly and specifically naming gender-based violence as a form of discrimination.⁴⁹ The recommendation takes cognizance of the fact that violence against women, including rape within intimate relationships, severely deprives women of the ability to exercise their rights on an equal basis with men.⁵⁰ While General Recommendations do not have legally binding effect, they represent an authoritative interpretation of what States are obligated to do under CEDAW. General Recommendation 19 advances the expectation of States to treat marital rape as a violation of women's rights due to the serious forms of physical, psychological, and emotional harm it perpetuates. Further, such a reading supports the understanding that Kenya, in failing to criminalize marital rape, is failing in its international commitments.

The failure to explicitly criminalize marital rape in Kenya means non-compliance with its commitments under CEDAW. The marital rape exemption in the SOA sustains the derogatory assumption of automatic consent within marriage, denying women the right to self-determination

⁴⁷ Article 1, *Convention on the elimination of all forms of discrimination against women*, 18 December 1979, 1249 UNTS 13.

⁴⁸ Article 2, *Convention on the elimination of all forms of discrimination against women*.

⁴⁹ *Committee on the elimination of discrimination against women, General Recommendation No. 19: Violence against women*, 1992, UN Doc A/47/38, 6.

⁵⁰ *General Recommendation No. 19: Violence against women*, 23.

and bodily integrity, and violated their rights to equality and dignity.⁵¹ For instance, the SOA defines rape as any form of non-consensual sex.⁵² Failure to grant recognition that a married woman is free to withhold consent within the marriage itself embodies discrimination based on marital status and violates the very basic principle of non-discrimination enunciated under Article 1 of CEDAW.

Consequently, Kenya's ratification of CEDAW places an explicit obligation on the country to enact laws that protect women against all forms of violence, including marital rape. The failure to address this issue in domestic legislation has been a breach of Kenya's commitments under CEDAW. It follows, therefore, that legislative reforms become quite urgently called for in terms of ensuring that married women are given equal legal protection against sexual violence as unmarried women, thereby fulfilling obligations imposed by this international convention. A similar obligation arises under regional instruments, as will shortly be shown, particularly under the African Charter on Human and Peoples' Rights.

2.2.2 The African Charter on Human and Peoples' Rights (The African Charter)

Kenya ratified the African Charter on Human and Peoples' Rights, also known as the Banjul Charter, in 1992. This regional instrument is intended to promote and protect human rights throughout Africa. The Charter requires State parties to protect the principles of equality, dignity, and protection of fundamental human rights of women at both the public and private levels. While Article 18 of the Charter goes on to call for the elimination of all forms of discrimination against women, it thus places it in close conformity with such international human rights instruments as CEDAW.⁵³ This provision underlines Kenya's responsibility under the African Charter and other international conventions on protection of women's rights.

Article 2 of the African Charter provides a right to non-discrimination, stipulating that all individuals shall enjoy rights, including protection from violence, irrespective of sex or marital status.⁵⁴ The provision, therefore, spells it out that women, including married ones, are to be

⁵¹ Section 43(5), *Sexual Offences Act* (No. 3 of 2006).

⁵² Section 3, *Sexual Offences Act* (No. 3 of 2006).

⁵³ Article 18, *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217.

⁵⁴ Article 2, *African Charter on Human and Peoples' Rights*.

equally protected from violence, such as marital rape. Article 3 further reinforces the right to equality before the law and equal protection of the law, extending protection against sexual abuse within their domestic relationships.⁵⁵ Kenya's failure to explicitly criminalize marital rape directly contradicts these guarantees of equality and non-discrimination under the Charter.

The protection of personal integrity and dignity as rights that marital rape directly violates is further enshrined in Articles 4 and 5 of the Charter. Article 4⁵⁶ guarantees the right to life and integrity of the person, while Article 5⁵⁷ prohibits any exploitation, degradation, and inhumane or degrading treatment, including sexual violence. Sexual coercion and violence in intimate relationships, of which marital rape forms part, demonstrably constitute violations of such provisions through the subjecting of women to unwanted sexual acts within marriage. Thus, Kenya's legal framework, which has not criminalized marital rape, is seriously short of meeting Kenya's obligations under the African Charter for the protection of the integrity of the body and dignity of married women.

Article 18 of the African Charter defines the family as the natural unit of society and states that States are under a duty to eliminate every form of discrimination against women and ensure the protection and promotion of women's rights in family structures.⁵⁸ By implication, therefore, this article places an obligation upon Kenya to eradicate all forms of violence, including sexual violence, occurring within a marriage. It also underlines the fact that even within the private sphere of the family, the rights of women to autonomy and bodily integrity must be protected. Article 28 further binds a duty on every person to respect another person without discrimination and maintain mutual respect and tolerance, again pushing the necessity to combat marital violence even in relationships within the home.⁵⁹

Furthermore, the African Commission on Human and Peoples' Rights created under the Charter is yet another mechanism in the enforcement of such rights. This gives the Commission a mandate to receive complaints by individuals or organizations relating to violations of rights protected by

⁵⁵ Article 3, *African Charter on Human and Peoples' Rights*.

⁵⁶ Article 4, *African Charter on Human and Peoples' Rights*.

⁵⁷ Article 5, *African Charter on Human and Peoples' Rights*.

⁵⁸ Article 18, *African Charter on Human and Peoples' Rights*.

⁵⁹ Article 28, *African Charter on Human and Peoples' Rights*.

the Charter, including cases related to marital rape. In addition to that, the African Court on Human and Peoples' Rights, established under a different protocol to the Charter, brings into account states for violation of the rights guaranteed by the said Charter. Such violations of rights, such as marital rape, are filed before the Court or the Commission by individuals, organizations, or parties, further putting Kenya's responsibility to ensure protection and uphold the rights of married women accordingly.

In sum, the African Charter places a clear obligation on Kenya to protect women from all forms of violence, including marital rape. The failure to criminalize marital rape is a direct violation of the principles of non-discrimination, dignity, and bodily integrity under the Charter. As the paper progresses into the third part of the chapter regarding DEVAW, it shall become clear how soft law instruments still underscore the harmonization of Kenyan laws with international and regional standards in human rights to protect married women from sexual violence.

2.2.3 Declaration on the Elimination of Violence against Women (DEVAW)

The Declaration on the Elimination of Violence Against Women (DEVAW), adopted by the United Nations General Assembly in 1993, is a critical soft law instrument addressing violence against women, including marital rape.⁶⁰ Not legally binding itself, this instrument serves to guide states in interpreting and implementing their obligations under binding treaties such as CEDAW. It explicitly affirms that violence against women in the institution of marriage, including private spaces, is a violation of their human rights and, as such, falls under the purview of state intervention.

Some of the most important things that DEVAW has done are to clearly define marital rape in Article 2(a) as a form of violence against women.⁶¹ This inclusion is necessary because it points out that protection against marital rape needs to be given by the law, which often has not been discussed in other international conventions. It also confirms that marital sexual violence must be taken as seriously as any other type of violence, hence providing a framework for Kenya to develop an appropriate legal response against it.

⁶⁰ UNGA, *Declaration on the elimination of violence against women*, UN A/Res/48/104, 20 December 1993.

⁶¹ UNGA, *Declaration on the elimination of violence against women*, 2(a).

Article 4 of DEVAW calls upon States to take appropriate and effective measures, whether of a temporary or legislative nature, aimed at eradicating violence against women, including marital rape.⁶² The advocacy is that penal, civil, and administrative sanctions should aim at redressing the harm occasioned by violence committed by private individuals, including spouses. By implication, this places an obligation on Kenya to make provisions for legal mechanisms to investigate and penalize marital rape and thus provide justice to the victims.

In conclusion, even though DEVAW itself is not legally binding, it further reinforces the commitments of Kenya under CEDAW and other international mechanisms. The failure to criminalize marital rape creates a critical gap within Kenya's legal framework. For Kenya to be on par with the recommendations made in DEVAW, it must take tangible steps toward making marital rape a serious manifestation of violence and giving sufficient legal protection to its victims. The next section discusses the domestic legal framework in Kenya with regard to determining how key laws, including the SOA and PADVA, address sexual violence and fall short of offering married women the maximum amount of protection.

2.3 THE EXISTING DOMESTIC LEGAL FRAMEWORK

2.3.1 Constitution of Kenya (COK)

The Constitution of Kenya, promulgated in the year 2010, does substantially provide a conducive foundation for the protection of human rights, including those of women within marriage. Article 45 of the Constitution addresses family matters and directly provides that parties to a marriage have equal rights at the time, during, and after marriage.⁶³ While this provision has become the law on the book of equality between spouses, it makes no mention of marital rape. Therefore, this leaves room for ambiguity on bodily autonomy and consent within marriage. The absence of this explicit mention of marital rape is representative of a bigger chasm within the legal apparatus, failing recognition of sexual violence within a marriage as against these constitutional rights.

⁶² UNGA, *Declaration on the elimination of violence against women*, 4.

⁶³ Article 45, *Constitution of Kenya* (2010).

While Article 28 of the Constitution guarantees the right to dignity,⁶⁴ Article 29 ensures freedom from all forms of violence and inhumane treatment.⁶⁵ In theory, these provisions could include marital rape because coerced or non-consensual sexual relations with a spouse would mean infringement of dignity and personal security. In practice, however, because no specific legal provisions exist that criminalize the act of marital rape, such constitutional guarantees have not been applied in cases involving spouses. In such a case, the married women are practically left without protection against sexual violence in marriage regardless of a wide human right protection entrenched in the Constitution.

Moreover, Article 21 places the State under obligation to undertake legislation and policy directives in order to safeguard women and all vulnerable groups from the threat of violence.⁶⁶ While sexual and domestic violence are covered under the Protection Against Domestic Violence Act and the Sexual Offences Act, these laws are insufficient in that they do not criminalize marital rape. The effectiveness of this constitutional framework to protect married women against abuse is marred by the impact of these constitutional rights, if contrasted with the lack of specific legislation on sexual violence in marriage.

In sum, while the Constitution of Kenya enshrines fundamental principles on equality, dignity, and protection from violence, failing to recognize marital rape as a criminal offense makes these rights little more than theoretical. What this calls for, essentially, are legislative reforms so that constitutional precepts are brought into harmony with legal provisions that deal explicitly with marital rape and afford full protection to married women.

2.3.2 The Sexual Offences Act (SOA)

The main legislation in Kenya dealing with sexual violence is the Sexual Offences Act (SOA). The definition of rape under the said Act indicates unlawful penetration without consent, or where such consent has been obtained through force, threats, or intimidation.⁶⁷ The Act further clarifies that consent is valid only when freely given, and one has the capacity to make such a choice.⁶⁸

⁶⁴ Article 28, *Constitution of Kenya* (2010).

⁶⁵ Article 29, *Constitution of Kenya* (2010).

⁶⁶ Article 21, *Constitution of Kenya* (2010).

⁶⁷ Section 3, *Sexual Offences Act* (No. 3 of 2006).

⁶⁸ Section 42, *Sexual Offences Act* (No. 3 of 2006).

These provisions would seem to be pretty robust in their protection against sexual violence. However, Section 43(5) of the SOA clearly exempts married couples, leaving the occurrence of marital rape unaddressed, therefore creating a huge vacuum in the legal system.⁶⁹

This exemption is perpetuating the assumption that, in marriage, the consent is irrevocable and thus is automatically given, undermining married women's autonomy. Such laws do not take into consideration the balance of power within marriage, in which a wife is often in a much more susceptible place for sexual violence, and leave victims with no legal protection. The SOA uses gender-neutral language; it does not consider the marital dynamic reality where women suffer the most. This loophole allows the criminal, often a husband, to get away while it merely perpetuates the traditional view that marriage protects one from sexual violence.

When the SOA was first introduced, it faced opposition from more traditionalist viewpoints, who saw the bill as "un-African" and thus a culturally intolerable threat to the norms on marriage.⁷⁰ These representations contributed to the marital exemption, reflecting backward views that marriage automatically conveys sexual rights. In spite of the great contributions of the SOA in addressing sexual violence at large, married women are particularly vulnerable since the exception of marital rape means exclusion from its provisions.

In essence, the exemption of marital rape from the SOA, particularly through Section 43(5), is a key loophole in Kenya's legislation.⁷¹ This loophole denies married women protection against sexual violence, and perpetrators are at liberty to commit the same with impunity. In order for full protection against sexual violence to be accorded, the Sexual Offences Act needs revision to explicitly criminalize marital rape and ensure protection, irrespective of one's marital status.

2.3.3 Protection Against Domestic Violence Act (PADVA)

The Protection Against Domestic Violence Act, abbreviated as PADVA, came into being in 2015 to provide relief and protection for victims of domestic violence in Kenya.⁷² It broadly defines

⁶⁹ Section 43(5), *Sexual Offences Act* (No. 3 of 2006).

⁷⁰ Kung'u C, 'Criminalization of marital rape in Kenya' Unpublished LLM Thesis, University of Toronto, Ontario, 2011, 13.

⁷¹ Section 43(5), *Sexual Offences Act* (No. 3 of 2006).

⁷² *Protection Against Domestic Violence Act* (2015).

domestic violence, including physical, emotional, and sexual violence within domestic relationships such as marriage.⁷³ Although the Act recognizes that sexual violence can indeed occur within marriage, it only speaks to such violence but does not categorically describe marital rape as a criminal offense, thereby leaving an important gap in addressing such violence. This omission leaves married women without a clear legal basis to pursue justice for marital rape.

The ranges of protective measures outlined by PADVA for victims are application for protection orders, compensation, and counseling.⁷⁴ As a matter of fact, third parties, family members especially, could apply for protection on behalf of the victim. These measures are also essentially preventive in nature, rather than punitive actions, from a point of protection and reconciliation. While protective orders may afford partial relief, they cannot be the solution for the seriousness of marital rape, the accountability for which needs to be criminal in nature.

Thus, while the conciliatory approach of the Act stresses reconciliation and counseling as a means of maintaining family cohesion, such emphasis often proves at the expense of justice in cases like marital rape, where, for instance, reconciliation may not be appropriate. Although the orders may protect the victim from further harm, the non-criminalization of marital rape keeps perpetrators at large, ensuring continuance of the abuse cycle without real punitive measures.

In sum, while the PADVA represents a milestone in striving to combat domestic violence, the legislation falls far short with regard to protection for victims of marital rape. The focus of the Act on protection without prosecution makes it severely limited in delivering justice to victims of severe sexual violence. Reforms are to be made so as to explicitly criminalize marital rape within the framework of domestic violence, in order to protect the victims and also provide them the means to approach justice. The paper will then explore the Constitution of Kenya for an explanation of how constitutional principles tally with these legal frameworks and those which have failed in their protection for married women.

⁷³ Section 3, *Protection Against Domestic Violence Act* (2015).

⁷⁴ Section 14, *Protection Against Domestic Violence Act* (2015).

2.3.4 Penal Code

Whereas assault, and hence bodily harm or threat of violence, has been criminalized by the Penal Code of Kenya in Sections 250⁷⁵ and 251,⁷⁶ it is quite inefficient in addressing the implications brought about by marital rape, which border on consent, coercion, and emotional or psychological harm. The definition of harm in the Penal Code is, to a large extent, restricted to physical injury, disease, or disorder, with no consideration of the broader forms of harm that victims of domestic and sexual violence commonly face through emotional, psychological, and economic abuse.⁷⁷

Since marital rape is a form of forced sex and physical harm may not always be evident, it is more difficult to prosecute under the Penal Code's current assault provisions. The privacy and intimacy of marital rape make it even more difficult to prosecute because it becomes hard to provide witnesses or evidence to support the claim of sexual violence within marriage. The narrow definition of assault in the Penal Code cannot capture the real extent of harm marital rape inflicts, hence limiting the legal avenues available for victims.

Furthermore, the Penal Code does not relate particularly to violence based on gender or violence occurring within domestic relationships. Treating violence in general terms, the code does not take into consideration power imbalances and complexities occurring in marital rape. The lack of specific provision in law renders victims of marital rape with little protection through the law, as they have to refer to the assault provisions that are hardly able to describe the peculiarities of sexual violence within marriage.

Put succinctly, while the Penal Code criminalizes assault, it does not go all the way to protect victims of marital rape. With the narrow scope that the Code has given to physical injury, besides the inability of the same Code to consider the special component of domestic relationships, there is a definite need for more specific legal provisions. The specific recognition of marital rape as a crime will ensure justice and protection for the victim. The study will proceed to focus on

⁷⁵ Section 250, *Penal Code* (2010).

⁷⁶ Section 251, *Penal Code* (2010).

⁷⁷ Section 4, *Penal Code* (2010).

analyzing how judicial interpretation and enforcement have dealt with marital violence and coercion where explicit domestic legal provisions against marital rape do not exist.

2.4 JUDICIAL INTERPRETATION AND THE CHALLENGE OF MARITAL RAPE IN KENYA

The courts in Kenya very often interpret marital violence and coercion, shying away from the issue of marital rape. Courts more often than not emphasize physical and emotional abuse within marriage, framing instances of sexual coercion under broader categories of cruelty rather than as acts of sexual violence. Such reluctance is indicative of a broader legal framework that does not explicitly criminalize marital rape, hence leaving big gaps in enforcement and protection of victims.

However, the 2022 KDHS reports that 41% of ever-married women have experienced physical, emotional, or sexual violence from their spouses.⁷⁸ This means marital rape is common, with the acts barely appearing in official records. Most women are culturally and socially constrained from reporting sexual violence, further compounded by legal frameworks that do not protect them at all.

A landmark case, *Esther Nangwanaa Nandi v. Jones Chewo Bobo*, illustrates how the courts address spousal violence.⁷⁹ The petitioner in this divorce matter had accused her husband of physical abuse and forced sex. Justice Rawal found in favor of the petitioner and held the husband to be guilty of cruelty. Coerced sex was not specifically identified as marital rape by the court but fell within the broader category of cruelty. This case eloquently speaks to the unwillingness of the judiciary to address marital rape because of the total absence of any legal provisions that criminalize it.

Most importantly, a serious consequence of a lack of explicit legal recognition of marital rape is its consequence on prosecution and conviction rates. Since marital rape is not criminalized, victims do not have a clear legal trajectory, translating into cases of sexual violence going underreported

⁷⁸ Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2022: Kenya's Health Sector Data & Statistics*, 23, – <<https://www.knbs.or.ke/reports/kdhs-2022/#gbv>> on 17 January 2023.

⁷⁹ *Esther Nangwanaa Nandi v Jones Chewo Bobo* Divorce Cause 84 of 2005 at High Court of Kenya, Nairobi.

and unpunished. This judicial gap in interpretation duly calls for immediate legal reform explicitly criminalizing marital rape and ensuring protection and access to justice to victims of such crimes.

2.5 CONCLUSION

The fact that marital rape is not explicitly addressed within Kenya's legal regime seriously defeats protection for married women and violates their constitutional rights to dignity, equality, and security of the person. Although international obligations under CEDAW, the African Charter, and DEVAW clearly require Kenya to enact comprehensive laws that prevent and punish all forms of violence against women, including marital rape, these obligations have not yet been fulfilled under Kenyan domestic law. For example, key legislation in place, such as the SOA and the PADVA, do not criminalize marital rape, thus leaving a critical gap in the legal protection afforded to married women.

The legislature's failure is further exacerbated by an unwillingness of the judiciary to address marital rape head-on because of the lack of law provisions. For instance, in *Esther Nangwanaa Nandi v Jones Chewe Bobo*,⁸⁰ courts addressed spousal cruelty and coercion but avoided framing non-consensual sex within the marriage as rape. This approach of the judiciary upholds the deficiencies in the existing legal setup, where married women do not get access to justice and protection under the law regarding their fundamental rights.

However, because the current law does not criminalize marital rape, Kenya is failing to fulfill its obligations both in its domestic and international law to protect women against violence. In reality, through existing loopholes in the law, perpetrators are able to get away scot-free at the expense of victims' rights to justice and security. It is crucial to close this legal gap in order to guarantee that all women, regardless of marital status, have equal protection under the law and are not subjected to sexual abuse in marriage.

⁸⁰ *Esther Nangwanaa Nandi v Jones Chewe Bobo* Divorce Cause 84 of 2005 at High Court of Kenya, Nairobi.

CHAPTER 3: MARITAL RAPE IN SOUTH AFRICA: A COMPARATIVE ANALYSIS WITH KENYA

3.1 INTRODUCTION

Gender-based violence has long reflected the deeply entrenched inequality between men and women, with many societies treating women as subordinates within marriage. Historically, marriage implied a permanent grant of consent to sexual relations, limiting a married woman's autonomy and disregarding her right to refuse sex with her husband. Although the world has changed its views on marital rights, making rape in marriage a legal offense, it is still very challenging due to cultural and legal barriers. Many countries still tolerate marital rape, which is considered under the larger category of intimate partner violence. The World Health Organization estimates that about 30 percent of women worldwide who have had a partner, report experiencing physical or sexual violence by an intimate partner.⁸¹ This shows the need for specific legal

⁸¹ World Health Organization, 'Violence against women: A fact sheet' 25 March 2024
– <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>> on 11 November 2024.

protections against marital rape, addressing an often more hidden form of violence persisting in intimate relationships.

Approaches to marital rape vary widely across legal systems, with some countries making significant strides toward recognizing and criminalizing it. South Africa is one of the first African countries to have explicitly criminalized spousal rape, and thus it presents a unique case for study, especially in comparison with Kenya, where marital rape does not have legal recognition.⁸² This chapter analyzes the legal framework of South Africa and explores how marital rape is addressed within its laws and constitutional protections. Contrasting the approach of South Africa to Kenya, this chapter assesses the effectiveness of criminalizing marital rape for victim protection, legal recourse, and changing societal attitudes toward gender-based violence within marriage. In so doing, the study will highlight essential differences and potential lessons that might be drawn for Kenya in moving toward better protections for married women from sexual violence.

3.2 LEGAL FRAMEWORK IN SOUTH AFRICA

South Africa is a regional leader in the legal recognition and criminalization of marital rape, affording advanced protection to victims of sexual violence within marriage. While in Kenya marital rape is not criminalized, South Africa's progressive legal framework ensures that sexual violence, including within marriage, is recognized as a serious violation of individual rights. This section discusses some of the important legislation related to marital rape and how South Africa's stance affords more protection and possibilities of justice to the victim.

3.2.1 Constitution of South Africa

The South African Constitution remains one of the most progressive in the world and forms a solid basis for human rights, including marital rape. As such, at the core of this structure is the Bill of Rights inscribed in Chapter 2 of the Constitution, assuring the safeguarding of democratic values of human dignity, equality, and freedom.⁸³ Section 7 imposes a direct obligation on the State to respect, protect, promote, and fulfill these rights, ensuring their application in both public and

⁸² Swartz N, 'Is a husband criminally liable for raping his wife? A comparative analysis' ResearchGate, 3, 2015, 10.

⁸³ Chapter 2, *The Constitution of the Republic of South Africa* (1996).

private spheres.⁸⁴ This constitutional mandate has driven South Africa's legislative efforts to address violence against women, including marital rape, through comprehensive laws that recognize and safeguard their autonomy and dignity.

Section 10 in the Bill of Rights serves as a cornerstone in securing the right to inherent human dignity, a non-derogable right entitled to respect and protection under all circumstances.⁸⁵ Human dignity is a basic principle involved in South Africa's approach to handling marital rape, recognizing that sexual acts coerced or in the absence of consent within marriage violate a person's dignity and self-determination. While in Kenya the constitutional protections for dignity remain theoretical for married women, given the lack of explicit legal recognition of marital rape, South Africa's Constitution sets a clear expectation that all individuals, including those in marriage, are entitled to equal protection of their dignity.

Further, Section 12 of the Constitution reinforces these provisions in guaranteeing the right to freedom and security of the person.⁸⁶ It clearly provides for the right to freedom from all forms of violence whether by public or private agents, and thus, no exceptions should be given to domestic spaces. This provision emphasizes State responsibility for violence in intimate relationships, such as marital rape, as a violation of personal security. In addressing public and private violence, South Africa will not exclude victims of marital rape from protection afforded by the constitutional rights.

These rights included in the Constitution have encouraged legislative and institutional measures for the protection of women against violence in the family. The Prevention of Family Violence Act and the Domestic Violence Act were passed as a result of the constitutional dictate to protect citizens against violence by private actors. These laws supplement the larger constitutional structure by giving form and meaning to the notion of dignity, equality, and security in ways that directly target unique vulnerabilities specific to the situations of married women.

⁸⁴ Section 7(2), *The Constitution of the Republic of South Africa* (1996).

⁸⁵ Section 10, *The Constitution of the Republic of South Africa* (1996).

⁸⁶ Section 12(1), *The Constitution of the Republic of South Africa* (1996).

3.2.2 Prevention of Family Violence Act

The Prevention of Family Violence Act was a landmark legislation change in South Africa, where marital rape was recognized as a criminal act. While the Act is no longer in force, having been repealed and replaced by the Domestic Violence Act, 1998, its importance remains undeniable. This is underscored by the preamble of the Act, which states the intention "to provide for the granting of interdicts with regard to family violence; that a husband can be convicted of the rape of his wife; and for matters connected therewith."⁸⁷ This highlights the breadth of the Act's scope, enabling it to cover not just the specific provisions in the preamble but also any related issues in the context of family violence. This flexibility facilitated the courts' application of the Act to a wide range of situations, including procedural protections and support for victims. It underlined the forward-looking nature of the Act in anticipating the complexities of family violence and laying the ground for more comprehensive legislation in the future.

Furthermore, Section 5 of the Act abolished the common law exemption for spousal rape, stating that a husband may be convicted for raping his wife, thus criminalizing non-consensual sexual acts within marriage.⁸⁸ This was a major step to break down the outdated premise that marriage automatically equated to perpetual consent to sex. The PFVA instituted the principle that marriage does not nullify a spouse's bodily autonomy, setting a precedent toward addressing violence within intimate relationships.

The PFVA laid the groundwork for later legal developments, such as the 1998 Domestic Violence Act, which cemented the state's commitment to taking action on behalf of victims of domestic violence. Marital rape was considered violence under the PFVA, a signal of South Africa's awareness of the scourge that spousal sexual violence visited upon the nation and its legal needs for dealing with it comprehensively. Unlike Kenya, where marital rape remains unrecognized and unprosecuted, the PFVA showed that South Africa was not afraid to change the status quo and apply the law to all its citizens, including married women.

⁸⁷ Prevention of Family Violence Act (1993).

⁸⁸ Section 5, *Prevention of Family Violence Act* (1993).

3.2.3 Domestic Violence Act

The Domestic Violence Act (DVA) is the principal legislation in South Africa that addresses domestic violence, expanding and replacing the Prevention of Family Violence Act.⁸⁹ The DVA defined a "domestic relationship" to include relationships between persons who are, or were, married to each other, including those under customary or religious law.⁹⁰ It acknowledged the reality of domestic violence in South Africa and its various manifestations, including sexual abuse within marriage. Section 1 of the Act specifically includes sexual abuse as a form of domestic violence, providing a framework for recognizing marital rape as a serious violation within intimate relationships. The offence of marital rape primarily involves a marital or intimate relationship within the meaning of both custom and religious law; the unwillingness of one spouse to have sexual relations; and such an act of sexual intercourse or penetration by the other spouse when the consent of the one is not given. These elements underscore the violation of bodily autonomy and integrity within a domestic relationship.

A central aspect of the DVA is victim protection. Section 2 allows the South African Police Service to help victims get medical attention or alternative accommodation.⁹¹ Victims can also request protection orders, which may restrain the perpetrator from further acts of violence, entering the victim's home or workplace or their shared residence,⁹² or engaging in other specified actions.⁹³ Importantly, the DVA does not prevent victims from seeking prosecution of criminal offenses, meaning that sexual abuse, including marital rape, is thus prosecutable under general criminal law.

While the DVA represents significant progress in addressing domestic violence, studies suggest that protection orders for sexual violence, including marital rape, are infrequently granted.⁹⁴ This is often because of societal stigma, legal complications, and the challenges faced by victims in proving sexual abuse within marriage. If granted, in a majority of the cases, the order just instructed

⁸⁹ Domestic Violence Act (1998).

⁹⁰ Section 1, *Domestic Violence Act* (1998).

⁹¹ Section 2, *Domestic Violence Act* (1998).

⁹² Section 4, *Domestic Violence Act* (1998).

⁹³ Section 7, *Domestic Violence Act* (1998).

⁹⁴ United Nations, 'South Africa: Failure to tackle domestic violence a violation of women's rights- UN experts' 17 May 2021

—<<https://www.ohchr.org/en/press-releases/2021/05/south-africa-failure-tackle-domestic-violence-violation-womens-rights-un>> on 11 November 2024.

the abuser to sleep in another room in the same house, reflecting systemic shortcomings in providing adequate protection for survivors. Critiques of the system point to the reluctance of state actors to take sexual violence in intimate relationships seriously. Despite these challenges, the DVA sets a very strong precedent for acknowledging and addressing marital rape as part of a broader commitment to protecting victims of domestic violence, providing a model that Kenya could emulate in improving its domestic violence framework.

3.2.4 Criminal Law (Sexual Offences and Related Matters) Amendment Act

The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, popularly known as SORMA, is the anchor of the legal framework in South Africa regarding sexual violence.⁹⁵ It has a more progressive and comprehensive approach to the issues of sexual offenses, including marital rape. Section 3 of the SORMA defines rape as an act of sexual penetration without the consent of the victim, committed unlawfully and intentionally.⁹⁶ The Act defines sexual penetration broadly to include penetration of the genital organs, other body parts, or objects into or beyond the genital organs, anus, or mouth of another person. This ensures that any non-consensual act of a sexual nature is covered under the law.⁹⁷

SORMA addresses marital rape by going a long way to remove marriage as a defense for sexual offences explicitly. Section 56(1) categorically states that a marital or intimate relationship between the accused and the complainant shall not be a defense against rape or sexual assault.⁹⁸ This provision, which builds upon the earlier reforms under the Prevention of Family Violence Act (1993), ensures that married women receive the same legal protection as unmarried individuals. In contrast, Kenya's Sexual Offences Act exempts married couples from its rape provisions, leaving victims of marital rape without legal recourse.

SORMA also eliminates the various forms of discrimination that prevented justice from being delivered to survivors of sexual violence. Section 60 repeals the "cautionary rule," which meant that evidence of sexual offence survivors needed corroboration to be considered credible.⁹⁹

⁹⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007).

⁹⁶ Section 3, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

⁹⁷ Section 1, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

⁹⁸ Section 56(1), *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

⁹⁹ Section 60, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

Previously, courts would often call for corroborative evidence or handle the testimony of a victim with caution because of their obsolete notions about sexual offences. The courts must not approach the evidence of complainants with undue caution at the outset solely by reason of the nature of the offence. Further, Section 59 precludes the courts from making adverse inferences because of delays in reporting sexual offences, considering that there are unique psychological and social obstacles in reporting such incidents by survivors.¹⁰⁰ These reforms ensure that survivors of marital rape are not subjected to secondary victimization during the prosecution process, an area where Kenya is still significantly lagging behind.

SORMA is, therefore, a milestone in the fight against sexual violence in South Africa, including marital rape. Criminalizing spousal rape, abolishing discriminating legal practices, and providing all-inclusive definitions of sexual offences, SORMA offers far-reaching protection to victims. This framework sets a clear standard that Kenya could emulate to ensure that married women are fully protected under the law and have equitable access to justice.

3.2.5 The Criminal Law (Sentencing) Amendment Act

The Criminal Law (Sentencing) Amendment Act of 2007 provides a very critical backbone for the legal system of South Africa in the line of ensuring that the penalty is applied consistently, equitably, and free of discriminative prejudice against persons found to have committed sexual-related cases, including marital rape.¹⁰¹ This Act reinforces the Criminal Law (Sexual Offences and Related Matters) Amendment Act regarding provisions which, if applied leniently, could compromise sentencing and defeat justice for victims of sexual violence.

Section 3A of the Sentencing Amendment Act clearly enumerates the factors that do not warrant a lesser sentence for rape.¹⁰² These are based on an attack on the complainant's past sexual experience, absence of injury, cultural or religious considerations of the offender, and previous relationship between the accused and the complainant. The meaning of this provision is that, especially in marital rape, the fact of a marital or intimate relationship cannot be advanced as mitigating factors. This is a departure from the traditional view that rape within marriage was not

¹⁰⁰ Section 59, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

¹⁰¹ *Criminal Law (Sentencing) Amendment Act* (2007).

¹⁰² Section 3A, *Criminal Law (Sentencing) Amendment Act* (2007).

as serious as other forms of rape, and it emphasizes that all rapes are serious and should attract appropriate sanctions, irrespective of the relationship between the parties.

By removing these possible excuses for leniency, the Act reinforces South Africa's commitment to holding perpetrators of sexual violence accountable and providing justice for survivors. In contrast to Kenya, where marital rape is not criminalized, South Africa's Sentencing Amendment Act shows a progressive and survivor-centered approach that eliminates biases rooted in cultural or relational contexts. This ensures that survivors of marital rape are treated with dignity and that their rights are prioritized in sentencing decisions.

In sum, the legal framework in South Africa dealing with marital rape is comprehensive and progressive, providing substantial protection to victims through constitutional guarantees, specific legislation such as the Prevention of Family Violence Act, Domestic Violence Act, and SORMA, and rigorous sentencing provisions under the Criminal Law (Sentencing) Amendment Act. These laws demonstrate South Africa's commitment to addressing sexual violence within marriage, ensuring that marital status does not shield perpetrators from accountability. In contrast, Kenya's legal framework falls short, leaving married women vulnerable to sexual violence without adequate legal recourse.

The next section will discuss the judicial interpretation and case law in South Africa, focusing on how the courts have interpreted these legal provisions to address marital rape and the related issues of spousal violence and coercion.

3.3 JUDICIAL INTERPRETATIONS AND CASE LAW

The judiciary in South Africa has played a very important role in shaping the application and enforcement of laws addressing marital rape. The courts, by interpreting and applying key provisions from the Prevention of Family Violence Act, the Domestic Violence Act, and the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA), have reinforced the constitutional values of dignity, equality, and freedom. This section discusses landmark judicial decisions and interpretations which indicate the courts' commitment to deal with sexual violence in marriage and illustrates how the progressive stance in South African jurisprudence compares with Kenya.

South African courts have played a critical role in interpreting and enforcing the laws addressing marital and intimate partner rape, though earlier rulings often reflected societal biases and perpetuated myths surrounding sexual violence in intimate relationships. Before the enactment of modern sexual offences legislation, courts frequently downgraded rape cases involving intimate partners, treating them as less severe than cases involving strangers. Judges perpetuated damaging "rape myths," such as the idea that it was improbable for a woman to be raped by someone with whom she was in a trusting relationship.

The leading example of such judicial bias can be observed in *S v Moipolai*.¹⁰³ The Appellant and complainant had a seven-year-old relationship which resulted in the birth of two children. At the time of committing the offense, the couple was expecting their third child. The applicant claimed that he could not rape her because of their close relationship. While the conviction was upheld, the sentence was reduced from fifteen years to ten, with the court holding that the appellant and complainant were "no strangers to one another" and, in effect, this should be treated as a different kind of rape than that committed by strangers. The judgment thus operated on the implication of consent based on pre-existing relations, which helps to reinforce harmful stereotypes that discredit the autonomy and rights of survivors.

This case illustrates the difficult issues that arose in addressing intimate partner rape under the earlier legal framework of South Africa, where social sentiments influenced judicial reasoning. But with the advent of progressive laws like the Criminal Law (Sexual Offences and Related Matters) Amendment Act, courts have now moved to adopt the best interest of the survivor and ensure that all acts of non-consensual sex are treated as equally serious, regardless of the relationship between the parties involved.

One landmark case is *S v Ncanywa*, which was among the first to prosecute marital rape under the Prevention of Family Violence Act.¹⁰⁴ The court explained that marriage does not confer a license to commit sexual violence, holding that the abolition of the marital rape exemption reflected the constitutional principles of equality and human dignity. This case set an important precedent,

¹⁰³ *S v Moipolai* (2004), High Court of South Africa.

¹⁰⁴ *S v Ncanywa* (1998), High Court of South Africa.

making it clear that consent is a fundamental requirement in all sexual relationships, regardless of marital status.

Another important case in South Africa's legal development concerning marital rape is *S v Mvamvu*.¹⁰⁵ In this case, the accused, who was customarily married to the complainant, was convicted of multiple counts of rape, abduction, and assault. The complainant had left the matrimonial home after their marriage deteriorated, assuming the union had effectively ended. However, the accused, adhering to customary norms, believed the marriage was still valid since the lobola which he had paid had not been returned. He kidnapped the complainant and raped her under the belief that he retained the right to conjugal relations.

The court sentenced the accused to 10 years' imprisonment on each count of rape, plus additional sentences for abduction and assault, running concurrently. This case was a strong statement of South Africa's legal system in rejecting injurious customary practices that degrade human dignity and violate individual autonomy. Whereas the actions of the accused were influenced by his cultural beliefs, the court stressed that such beliefs could not justify the violation of the complainant's rights under the law.

The *S v Mvamvu* ruling showcases the commitment of South Africa to the constitutional principles of dignity and equality, which stand firm even against entrenched cultural beliefs. The judgment demonstrates that the judiciary is very active in taking down the tradition of perpetrating sexual violence within marriage on the basis of its criminal nature, regardless of any cultural or customary justification. This is quite an opposite and progressive approach compared with Kenya, where the culture tends to justify marital rape exceptions in law.

Despite impressive legislative progress in South Africa, there is still a strong sense among a large sector of the population of entrenched patriarchal attitudes. These are often reflected in judicial decisions, such as that seen in *S v Modise*, in which the complainant's husband attempted to rape her.¹⁰⁶ On this, Judge Gura said that the accused's intense eagerness to have sexual intercourse with his wife was one probable motive for the accused's violence. He added that the use of "minimum force" to overcome the complainant's resistance was necessary. The judge finished

¹⁰⁵ *S v Mvamvu* (2003), The Supreme Court of Appeal of South Africa.

¹⁰⁶ *S v Modise* (2007), High Court of South Africa.

saying that the marital relationship must be brought into consideration by the court. This case amply demonstrates how such deep-rootedness of perspective at both social and judicial levels can lead to an influence on legal outcomes when it comes to marital rape.

In conclusion, although the judiciary in South Africa has worked extensively in interpreting and implementing the law regarding marital rape, the presence of deep-rooted patriarchal views cannot be completely avoided. Although there has been some legislative progress and the introduction of liberal frameworks, such as the Criminal Law (Sexual Offences and Related Matters) Amendment Act, previous jurisprudence often perpetuated destructive social attitudes that minimized the seriousness of intimate partner rape. However, landmark cases such as *S v Ncanywa*¹⁰⁷ and *S v Mvamvu*¹⁰⁸ have become turning points in the South African legal approach, emphasizing that human dignity and equality need to be upheld in all sexual relationships. While these cases represent progress, the continuing influence of traditional beliefs and judicial biases remains a significant challenge. The subsequent section will discuss how the offense of rape has been addressed by the South African government and look into what is constitutionally and legally provided in practice to curb sexual violence, especially in intimate partner and marital rape cases.

3.4 INSTITUTIONAL FRAMEWORKS FOR DEALING WITH MARITAL RAPE IN SOUTH AFRICA

Recognizing this important need for specialized handling in cases of sexual offenses, including marital rape, South Africa has begun reforming both its judiciary and supportive structures. In 1992, a significant undertaking introduced what is known as the Wynberg Project. As part of this project, it set up the country's first Sexual Offences Court (SOC) in Wynberg, Cape Town.¹⁰⁹ The Wynberg Sexual Offences Court was established in response to protests by women's organisations at the insensitive treatment of rape cases in ordinary courts. It was intended to accommodate victim-centred approaches such as the use of women assessors to counteract male bias and specially trained regional prosecutors and police. This approach ensured that the cases of sexual

¹⁰⁷ *S v Ncanywa* (1998), High Court of South Africa.

¹⁰⁸ *S v Mvamvu* (2003), The Supreme Court of Appeal of South Africa.

¹⁰⁹ Nowrojee B, 'Violence Against Women in South Africa: The state response to domestic violence and rape' Human Rights Watch, 1995, 118.

offence received due attention and the rate of prosecution and conviction in cases of rape increased to almost 20% higher than that of conventional courts during its initial operation.¹¹⁰

Following the success of the Wynberg model, South Africa expanded the Sexual Offences Court system nationwide. These courts were to handle sexual crimes with sensitivity and efficiency, drawing from the lessons of Wynberg on how to treat victims in the criminal justice system. Some of the characteristics include private waiting rooms and separate chambers for complainants and witnesses, where the victim would not be exposed to the public or accused persons. Such measures are particularly vital in cases like marital rape, where victims may hesitate to report crimes due to their intimate nature and the associated social stigma. The integrated framework of the Sexual Offences Courts include collaboration between law enforcement, health professionals, and support services in the investigation and prosecution process, while maintaining a focus on victim dignity and privacy. This forward-thinking approach reveals South Africa's commitment to the intricate processes surrounding sexual violence through specialist infrastructure and human resources. It is in the establishment of such courts that a sound model is provided for Kenya, which may then set in place similar mechanisms toward best practice in handling sexual offences, including marital rape, in a culturally sensitive and victim-supportive manner.

These efforts underscore the importance of specialized judicial interventions, such as the Wynberg Sexual Offences Court and the broader Sexual Offences Court framework, in transforming how sexual offences are addressed. In so doing, South Africa has set a precedent for an integrated, sensitive approach to sexual violence that Kenya could emulate by adapting the legal process to prioritize victim welfare.

Another innovative approach has been the Hillbrow Rape Reporting Centre in Johannesburg, initiated by the South African Police Service in 1994.¹¹¹ It aimed to reduce the trauma that often accompanied the reporting process by offering immediate medical examination, social support, and counseling on-site. The Hillbrow Centre introduced a number of measures that included specialized training of police officers in handling sexual offences, collaboration with medical and

¹¹⁰ Nowrojee B, 'Violence Against Women in South Africa: The state response to domestic violence and rape' Human Rights Watch, 1995, 120.

¹¹¹ Nowrojee B, 'Violence Against Women in South Africa: The state response to domestic violence and rape' Human Rights Watch, 1995, 121.

legal professions for a multi-faceted response. Staffed by trained female officers, the center operated 24/7, ensuring that rape survivors received the care they needed. Although the Hillbrow Center eventually collapsed due to resource constraints and systemic issues, its establishment highlighted the need for specialized spaces for reporting sexual crimes, free from the harsh and unsympathetic treatment often experienced in regular police stations.¹¹² The South African government has recognized these shortcomings and is still trying to establish similar initiatives to ensure victims of rape, including marital rape, are treated with dignity.

These progressive steps undertaken by South Africa are a clear indication of the state's commitment to improvement in response to sexual violence. They reflect a broader recognition of the need for a comprehensive, victim-centered approach in combating sexual offenses. To Kenya, these initiatives are important lessons on how the government can improve its response systems, especially on marital rape, which is always complicated by cultural and social barriers that affect reporting and prosecution.

3.5 CONCLUSION

In conclusion, marital rape is not addressed in Kenya, as there is no specific legal framework to protect married women from such abuse. The existing laws on sexual and domestic violence are insufficient and do not recognize marital rape as a crime, therefore, victims lack the needed legal protection. This gap in the legal system perpetuates a cycle of abuse and neglect, as the state fails to protect the fundamental rights and freedoms of married women. Kenya's legal framework must evolve to reflect the fundamental principle that marriage does not grant one spouse the right to violate the bodily autonomy and dignity of the other. South Africa is an inspiring case for Kenya, as the nation has effectively criminalized marital rape and established all subsidiary legal mechanisms to assist such victims in seeking their rightful justice.

While the path toward criminalizing marital rape in Kenya has several obstacles, from legal to cultural and social, experiences from South Africa prove that these are not insurmountable. South Africa's continuous legislative progress and its commitment to upholding the rights of women can be an effective example for Kenya. The Kenyan government should follow suit, not only in terms

¹¹² Nowrojee B, 'Violence Against Women in South Africa: The state response to domestic violence and rape' Human Rights Watch, 1995, 122.

of passing legislation that criminalizes marital rape but also in promoting public awareness to ensure that such laws are upheld and enforced. Public education campaigns will be vital in changing societal attitudes and empowering victims to seek justice. It is only through comprehensive legal reform, coupled with a shift in cultural attitudes, that Kenya can hope to build a society where women, married or otherwise, live free from the threat of sexual violence.

CHAPTER 4: RECOMMENDATIONS

4.1 INTRODUCTION

This chapter presents actionable recommendations for addressing the gaps identified in Kenya's legal framework on marital rape. Based on the analysis done in the previous chapters, this section outlines strategies to enhance Kenya's legal, institutional, and societal responses to marital rape. The recommendations herein are based on a comparative study between Kenya and South Africa, exploring the latter's progressive legal framework that explicitly criminalizes marital rape. This chapter examines the legal and institutional mechanisms in South Africa to outline lessons that Kenya might adapt in efforts to offer more protection for victims of marital rape.

The recommendations herein are multi-faceted: legal reforms, strengthening judicial processes and institutional mechanisms, public awareness, and adopting informal reconciliation models. The proposals go towards changing Kenya's legal framework to international standards while challenging the societal conceptions perpetuating the non-criminalization of marital rape. In using the comparative approach, the chapter provides a way in which Kenya can implement an all-inclusive robust response that places at the center the rights and dignity of survivors for justice and equality within marriage.

4.2 RECOMMENDATIONS

4.2.1 Legal Reforms

Legal reforms that are all encompassing are needed to categorically criminalize marital rape and protect the victims. The Sexual Offences Act should be revised to clearly remove exemptions for sexual violence in marriage¹¹³ and explicitly identify marital rape as a criminal offense. In this way, consent becomes an ongoing and revocable expectation in all sexual relations, including those within marriage.

The revised provisions in the SOA should, therefore, categorically enumerate what amounts to marital rape through definite definition: an act of non-consensual sexual intercourse between spouses. Such should be highlighted, indicating that, as in all other sexual relationships, consent within marriage must be continuous, given free from coercion, and freely revocable. The mechanism of proof in this regard should be oriented to meet the peculiar dynamics of marital rape without placing undue burdens on the survivor. Where in other cases evidence of rape may include but is not limited to lack of consent, evidence of marital rape may include patterns of coercive control, verbal threats, or prior documented abuse. In doing so, the justice system would still be able to address the more complex aspects of marital relationships without necessarily limiting the survivor's right to justice.

The law should also consider the best interests of the children from that marriage when effecting penalties for marital rape. Sentencing provisions should account for the need to safeguard the financial and emotional welfare of the children. For example, courts can pass other forms of sentencing, such as restorative justice models, in addition to punitive sentences, to minimize disruption in the children's lives while ensuring accountability for the perpetrator. For instance, some of the restorative justice models incorporate court-annexed mediation sessions in which the offender accepts their guilt, apologizes to the survivor and makes commitments toward changing their behaviors under close legal scrutiny. One possible example might include court-ordered counseling and attendance at rehabilitative programs geared toward changing the harmful attitudes and behaviors of the offender, with periodic monitoring that ensures the perpetrator will not harm

¹¹³ Section 43(5), *Sexual Offences Act* (No. 3 of 2006).

anyone else. The balancing approach will uphold justice for survivors and at the same time mitigate unintended consequences on the family structure. Only then, with such provisions, can the SOA eventually come up with a comprehensive sensitive legal framework that deals effectively with marital rape.

The Penal Code should also be revised to include wider definitions of harm arising from marital rape, including psychological and emotional abuse, in line with international human rights instruments such as CEDAW and DEVAW. In the same vein, the Protection Against Domestic Violence Act should be amended to include special protections for victims of marital rape, such as emergency protection orders, access to safe housing, and comprehensive support services. These cases should be dealt with in a sensitive and urgent manner by specialized units within law enforcement.

Furthermore, in line with the above, Kenya's legal system should be brought into conformity with its international commitments under such instruments as the African Charter on Human and Peoples' Rights, which demonstrates its commitment to eradicating gender-based violence. Finally, the cultural and customary defenses must be precluded in matters regarding marital rape to stop patriarchal norms that have persisted in weakening the rights of women.

By implementing these reforms, Kenya can create a legal environment that acknowledges marital rape as a serious violation of human rights and provides robust protections for survivors.

4.2.2 Strengthening Judicial and Institutional mechanisms

A strong response to marital rape requires comprehensive reforms in judicial practices and institutional mechanisms for sensitive, effective, and nondiscriminatory enforcement of the law. This would involve specific judicial training, police reform, and specialized mechanisms dealing with sexual violence in marriage.

Judicial officers, judges, and magistrates should have training that specializes in cases involving sexual violence, particularly those of marital rape. These trainings should incorporate an emphasis on the nature of consent and autonomy within marriage and the psychological and social effects of marital rape on the survivors. It is important for the judicial officers to approach these matters

with a victim-centered focus to ensure that the survivor is accorded dignity during the process and harmful stereotypes are not perpetuated in the proceedings.

Police services have a very important role to play in implementing the laws on domestic and sexual violence. However, due to their limited training and insensitive response to victims, the police in Kenya become a huge obstacle in tackling these crimes. The government of Kenya can learn from the South African experience of introducing obligatory courses into the training curriculum of police personnel dealing with cases of domestic violence and rape. The training should not be limited to legal aspects, but also the social and psychological impact of domestic and sexual violence. These reforms will ensure that the police interact with victims with sensitivity and professionalism, thereby minimizing re-traumatization by insensitive practices or an attitude of dismissiveness.

Other institutional mechanisms include provisions for specialized units within the police and the judiciary to deal with cases of sexual violence, including marital rape. These units, modeled on South Africa's Sexual Offences Courts, would be designed with trained personnel to ensure a speedy and sensitive handling of cases. Such mechanisms need to have integrated victim-support services like counseling and legal aid for holistic support to survivors through the judicial process. Furthermore, reporting channels for marital rape cases have to be established and strengthened to ensure that victims get prompt responses and timely access to justice. This would include a confidential hotline and a dedicated desk at police stations, manned by specially trained personnel to handle cases with sensitivity and efficiency.

The principle of equal protection and enforcement of the law should guide these reforms. Police reforms should ensure that officers treat the investigation of cases of domestic and sexual violence as a priority, regardless of the victim's marital status. Embedding accountability measures within law enforcement and judicial systems can help Kenya reduce biases in the pursuit of justice for survivors of marital rape.

These reforms will cumulatively enhance Kenya's institutional capacity to address marital rape, ensuring that survivors are supported and justice delivered in a manner that dignifies and respects human life and equality.

4.2.3 Public Awareness and Cultural Change

Addressing marital rape in Kenya will involve efforts toward changing deep-rooted, culturally and socially driven perceptions that normalize the act. Culture tends to view marriage as a relationship in which the wife owes her husband sexual access; hence, issues of consent are deemed irrelevant. Such harmful narratives must be debunked through public awareness campaigns that show that consent is integral to any sexual relationship, even in marriage. Working with community leaders, religious bodies, and cultural influencers will eventually help change societal attitudes in respect for women's self-determination and rejection of marital rape as acceptable.

Awareness-raising campaigns through accessible radio, social media, and community forums should reach both rural and urban areas. This needs to include debunking several myths about marital rape and the failure of recognition of such crimes as a violation of a woman's rights. In particular, men and boys are strongly socialized by traditional norms; hence, it is of paramount importance to involve them in awareness programs that promote equality, consent, and respect for healthy relationships. Schools should also incorporate these discussions into their curricula to inspire generational change.

Such campaigns are possible to sustain with partnerships involving civil society organizations and media partners which are essential. While the latter can expand outreach through grass-roots level contact, the messages can be amplified on an even wider scale by media partners. Collectively, these initiatives have the potential to change society such that marital rape is recognized as a criminal offense, along with gender equality and the respect and safety that every individual is entitled to.

4.2.4 Adopting Informal Reconciliation Models

While criminal law is an absolute necessity for dealing with marital rape and delivering justice to survivors, most of the time it cannot recognize the complex dynamics and relationships that exist in an incidence of domestic violence, be it physical, sexual, or emotional. The adversarial nature of the legal framework may alienate victims or impede their ability to seek justice, especially in cases where reconciliation or familial relationships remain important. Adopting informal

reconciliation models that prioritize restorative justice can offer an alternative pathway to addressing these challenges while upholding the rights and dignity of survivors.

Restorative justice aims to repair harm and ensure accountability through the direct participation of survivors, perpetrators, and other parties affected by the crime in a controlled dialogue, mediated by trained mediators. In marital rape cases, these models allow survivors to articulate their experiences, have harm acknowledged, and obtain assurances of behavioral change from the perpetrator. This approach recognizes that marital relationships have unique emotional and social complexities, making the resolution more personalized and sensitive, something which criminal proceedings are usually not equipped to address.

Court-annexed mediation offers a formalized structure for integrating restorative justice into the court process. Mediation under the supervision of the court permits a neutral and controlled setting where both parties can discuss the harm done. It also ensures that agreements reached are legally binding and that survivors retain the ability to pursue further legal action if needed. For example, court-annexed mediation may allow the parties to discuss parenting arrangements or financial obligations while the perpetrator is held accountable through the process.

Such models can be implemented only cautiously and with safeguards. Informal reconciliation should never replace criminal accountability in cases where the survivor seeks legal redress, nor should it pressure victims into reconciliation against their will. The process has to be oriented to prioritize the safety and autonomy of the survivor, with full information about their rights and options. Facilitators should be trained to recognize power imbalances and the psychological effects of marital rape to ensure that the process does not become one of re-traumatization of survivors or perpetuation of harmful gender norms.

By integrating informal reconciliation models with legal mechanisms, Kenya is able to provide survivors with more avenues to justice, each suited to the particular context in which they find themselves. This approach will ensure that justice is not merely punitive but restorative, resolving the deep-seated factors that feed into domestic and sexual violence within marriage.

4.3 CONCLUSION

This chapter has recommended specific reforms to bridge the gaps in Kenya's legal and institutional response to marital rape, including clear criminalization and comprehensive support for survivors. The recommendations include an amendment to the Sexual Offences Act to clearly define marital rape and revision of the Penal Code and Protection Against Domestic Violence Act for expanding protection and addressing multi-dimensional harm caused by the crime. In addition, Kenya should couple these reforms with specialized judicial training and police sensitization to really develop the capacity of legal and institutional frameworks for effective delivery of justice, keeping the dignity and autonomy of survivors intact.

Besides legal and institutional measures, it has also identified public awareness campaigns as one of the vital means for dismantling these cultural and societal norms normalizing marital rape. The informal models of reconciliation, like court-annexed mediation, allow for other avenues toward resolution with accountability, ensuring the rights of survivors are prioritized. Collectively, these recommendations enable a holistic approach to handling marital rape, developing both a system of justice and a social framework that protects human rights and guarantees gender equality.

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION

This study undertook an in-depth study of the legal, institutional, and social frameworks regarding marital rape in Kenya and explored the limitations and potentials of reform. The sociolegal context of Kenya was introduced by showing how entrenched patriarchy and archaic legal provisions in Kenya have normalized marital rape to such a level that victims are grossly denied protection and active justice. These gaps were analyzed based on theoretical frameworks like feminism and social constructionism, providing the underlying understanding of how such constructions in society regarding marriage and consent contribute to gender inequality and fail to grant women their rights in the eyes of the law.

Relatively, research with South Africa represented the most important part of this investigation, as it lent substantial insight into the prospect for legal and institutional reform. The explicit criminalization of marital rape and victim-oriented judicial mechanisms instituted within a progressive model were assessed within South Africa. The comparison showed that legal clarity combined with massive support systems and public awareness may change the status quo regarding marital consent to one ensuring justice for survivors. In this section also, it emerges how Kenya's

legal framework has failed to meet international human rights standards on the protection of the rights of women in marriage.

The research since gave way to more general recommendations that might fill in the gaps identified: amendment of the Sexual Offences Act, so as to explicitly make marital rape criminal; further strengthening the Protection Against Domestic Violence Act by providing focused support to victims; and revising constitutional provisions, which affirm bodily integrity as a right independent of marital status. It also called for institutional reforms, including judicial training, police reform, and the creation of specialized courts and victim-support mechanisms as necessary elements for ensuring application and protection under the law on an equal basis. Public awareness-raising campaigns were also identified as being crucial to challenge entrenched social norms that perpetuate harmful attitudes regarding marital consent and sexual violence in marriage.

Synthesizing theoretical insights, comparative analysis, and policy recommendations, this study has identified the urgent need for Kenya to adopt a multi-faceted approach in handling marital rape cases. Emphasizing reforming laws, building capacities of courts and institutions, and societal re-education, Kenya can begin razing the structural and cultural hurdles that have silenced survivors historically and denied them justice. This research gives a call to action and provides evidence that addressing marital rape is a matter of not only legal but also social and moral necessity for guaranteeing equality, dignity, and protection to all.

5.2 CHALLENGES TO IMPLEMENTING RECOMMENDATIONS ON MARITAL RAPE

Despite the comprehensive recommendations in Chapter 4, several challenges may hamper their implementation in Kenya. These include deep-seated cultural beliefs, deficiencies in legal and institutional systems, economic constraints, and political resistance. These barriers have to be tackled through concerted, multi-pronged efforts.

They face cultural norms as a huge barrier to surmount, with family harmony taking precedence over individual rights. In addition, in most Kenyan communities, especially the rural ones, traditional views place a wife's autonomy second to the authority of her husband. The normalization of consent within marriage, supported by customary laws, weakens any attempt to

question marital rape. Public awareness campaigns also receive resistance, especially in cases where cultural or religious leaders perceive such campaigns as an attack on traditional family values.

Other major concerns in Kenya include legal and institutional frameworks. The absence of specialized personnel, such as trained police and judicial staff, weakens efforts toward effectively addressing the issue of marital rape. Given scarce resources and competing priorities, judicial reforms and police training may face delays, while without sustained oversight, reforms can become inconsistent or ineffective.

Matters are further compounded by the economic constraints facing Kenya. Setting up specialist courts, victim support, and other facilities calls for huge financial investment. It is this factor that most of the time leads to placing gender-based violence initiatives below other priorities. Such funding shortfall might jeopardize putting in place essential services, including safe houses and legal assistance, that the survivors could turn to. Therefore, the translation of these recommendations into significant progress for survivors of marital rape will require public education, advocacy, resource mobilization, and continuous political pressure to push through.

5.3 FUTURE IMPLICATIONS OF ADDRESSING MARITAL RAPE

The proposed reforms on marital rape in Kenya might bring about immense changes not only in social perception but also in legal considerations, furthering the country's commitments toward gender equality and human rights. Explicitly criminalizing marital rape and providing stern mechanisms of enforcement could even set a precedent in the region and place Kenya at the vanguard in efforts toward curbing gender-based violence in Africa. These reforms would entrench Kenya's commitment to international human rights frameworks like CEDAW and the African Charter on Human and Peoples' Rights, raising the status of the nation in the world with respect to justice and equality.

On a social level, challenging conventional norms of marriage and consent would create a culture that values and respects individual autonomy, regardless of gender. This could go a long way in diminishing the stigma of reporting marital rape and emboldening survivors to seek justice and

support. Over time, such cultural shifts can dismantle harmful patriarchal attitudes that breed violence and inequality within families and promote healthier, more equal relationships.

Addressing marital rape economically will contribute to the reduction of other social costs associated with gender-based violence, including health care expenses, lost productivity, and emotional tolls within families and communities. In Kenya, a responsive legal and institutional framework would go a long way in the protection, rehabilitation, and therefore resettlement and full participation of survivors into society.

Further, the success of such reforms can have an impact on the development of more comprehensive approaches to other forms of domestic and sexual violence, further cementing Kenya's commitment to justice and equality in all spheres of life. In prioritizing the fight against marital rape, Kenya will be setting a base for creating a society that respects the dignity and rights of all its citizens and ensures longevity in such impacts into generations to come.

5.4 AVENUES FOR FURTHER RESEARCH

This study has therefore explored the legal and socio-cultural frameworks of marital rape in Kenya, but the following areas remain unexamined and need further research to strengthen the understanding and advocacy required for change. The first area is survivors' experiences with marital rape. Capturing their voice, future studies can also give nuanced insights into various psychological, social, and legal barriers faced by them that reforms must address.

Comparative studies with other jurisdictions outside of South Africa may possibly contribute to wider perspectives on how to address marital rape. Other countries with different socio-cultural settings and legal traditions might indicate alternative reform options which can be used to suit particular needs in Kenya. Such a comparative study can be done to focus on effectiveness in victim-support mechanisms, restorative justice models, and community-driven interventions dealing with marital rape.

Furthermore, more research is necessary regarding the roles of cultural and religious institutions in shaping cultural attitudes about marital rape. It is from such an understanding that strategies to engage these critical stakeholders in advocacy for, as well as increasing awareness about, the

elimination of sexual violence within marriage will emerge. Additionally, research on the economic consequence of gender-based violence, marital rape included, might further show the cost of inaction, hence further creating a basis on which to raise demands for resourcing.

Lastly, future research may examine the effectiveness of public awareness campaigns and legal reforms after those are instituted. Longitudinal studies charting the evolution of public attitudes, reporting rates, and judicial outcomes will give much-needed feedback on the impact of these interventions and identify areas requiring further attention.

DURATION OF THE STUDY

This study is expected to take seven months to write starting from July 2024 to February 2025.

| DATE | GOAL |
|----------------|------------------------------------|
| December 2023 | Submission of the concept paper |
| March 2024 | Submission of the proposal |
| August 2024 | Submission of chapter 1 |
| September 2024 | Submission of chapter 2 |
| October 2024 | Submission of chapter 3 |
| November 2024 | Submission of chapter 4 |
| December 2024 | Submission of chapter 5 |
| January 2025 | Compiling and editing of the study |
| February 2025 | Defence |

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