Beyond the vows: Deconstructing the legal treatment of spousal rape in Kenya

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Abstract

This paper examines the effects of Kenya's exemption of spouses from the definition of rape under Section 43(5) of the Sexual Offences Act. While the law criminalises rape, it denies that possibility within marriage, reflecting deeper assumptions about consent, that once given, it cannot be withdrawn. Building on Jacques Derrida's critique of hierarchical structures, the paper shows how the law treats marital consent through rigid binaries, such as consent and refusal, husband and wife, that ultimately mask a woman's capacity to withdraw consent. Further, Gayatri Spivak's work on subalternity is used to show how the married woman, though formally present in law, is denied meaningful recognition when she attempts to speak against sexual violence in marriage. Rather than treating legal reform as a matter of

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updating language alone, the paper calls for a broader shift in how the law understands consent: as something ongoing and situated. It ends by proposing legal and interpretive strategies that make room for voices that have long been erased or ignored.

Keywords*:* marital rape, consent, subaltern, deconstruction, sexual offences, legal reform, gender-based violence, Spivak, Derrida, logocentrism, différance

Introduction

In most legal systems, rape is characterised as engaging in sexual intercourse or other types of sexual penetration with a victim without their consent.[1] The definition of rape varies among governmental health organisations, law enforcement agencies, healthcare providers and legal professionals.[2] In *Prosecutor v Anto Furundžija*, the International Criminal Tribunal for the former Yugoslavia defined rape as sexual penetration without genuine consent, emphasising that consent must be given freely and considered within the full context of the circumstances.[3] This definition was later upheld in *Prosecutor v Kunarac*, where the Appeals Chamber clarified that the use of force is not required, as long as true consent is lacking.[4] Rape, according to the 1998 International Criminal Tribunal for Rwanda, is a sexual bodily invasion committed under coercion.[5]

In this case, the victim's free will must be evaluated in light of the facts and the consent must be freely provided. The desire to carry out this sexual penetration and the awareness that it takes place without the victim's consent are known as *mens rea*. In certain cases, rape has been substituted in legal terms by phrases such as sexual assault or illegal sexual conduct.[6] Clearly, different bodies and societies define this menacing issue differently.

Finding a universal definition of rape seems difficult given the different legal frameworks that exist in countries; however, the absence

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1 Meril Smith, *Encyclopedia of rape*, Greenwood Press, 2004, 169-170.

2 Shana Maier, '"I have heard horrible stories...": Rape victim advocates' perceptions of the revictimisation of rape victims by the police and medical system', 14(7) *Violence against women* (July 2008) 787.

3 *Prosecutor v Anto Furundžija* (Judgment), ICTY-95-17/1-T, 10 December 1998, para 185 and 271.

4 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeal Judgment), ICTY-96-23 & ICTY-96-23/1-A, 12 June 2002, para 129.

5 *Prosecutor v Akayesu* (Judgment), ICTR-96-4-T, 2 September 1998, para 598.

6 Dawn Beichner, 'Rape or sexual assault as crime' in George Ritzer (ed) *The Blackwell encyclopaedia of sociology*, Wiley-Blackwell Publishing, 2007, 4.

of consent is fundamental to the definition of rape.[7] Sexual consent is defined as the voluntary and informed agreement of all individuals involved in a sexual activity.[8] In marriage, consent could be inferred from mutual actions. However, the fact that there is no objection does not automatically translate to consent, as the silence could be influenced by factors such as fear.

While some cultural or traditional views may treat consent within marriage as implied or irrevocable, from actions like cohabitation, expressions of affection, or general marital intimacy, this assumption is not supported by Kenyan constitutional law. Under Article 43(1)(a) of the Constitution of Kenya, every person has the right to the highest attainable standard of health,[9] which includes the right to reproductive health care. This embeds the right to control over one's body and reproductive autonomy, a concept that necessarily includes the right to give or withhold consent to sexual activity, even within marriage.

Additionally, Article 28 guarantees the right to human dignity,[10] and Article 29(d)[11] affirms the right to freedom and security of the person, including freedom from all forms of violence from either public or private sources, which directly rebuts any legal presumption that silence or passive submission in marriage can stand as valid consent. Drawing from this, affirmative and clear consent is essential.

In 1994, Mexico's Supreme Court of Justice ruled that marital rape should not be classified as a form of rape but rather an undue exercise of conjugal rights. It was further stated that because the purpose of marriage is procreation, forced sex in marriage should be allowed if the end

7 Christina M Tchen, 'Rape reform and a statutory consent defence', 74(4) *Journal of Law and Criminology* (1983) 1519.

8 Sonya S Brady and others, 'Communication about sexual consent and refusal: A learning tool and qualitative study of adolescents' comments on a sexual health website', 17(1) *American Journal of Sex Education* (2022) 2.

9 Constitution of Kenya (2010) Article 43(1)(a).

10 Constitution of Kenya (2010) Article 28.

11 Constitution of Kenya (2010) Article 29.

goal is to realise that purpose.[12] After 11 years, the chamber was petitioned to reconsider its stance, and it subsequently reversed its previous decision.[13] In Canada, before 1893, it was feasible for a husband to engage in non-consensual sexual activity with his wife without legal repercussions or objection.[14] Both Canada and Mexico initially held supportive stances toward marital rape but subsequently revised their positions on the issue.

In Kenya's legal context, rape is defined as the intentional and unlawful penetration of the genitals without the victim's consent, regardless of whether initial consent was given, and whether force or intimidation was used.[15] Furthermore, Section 43(5) of the Sexual Offences Act states that this definition does not encompass individuals who are legally married to each other.[16] This clause may encourage the commission of these crimes, leaving married women with no way to flee the violence they face.[17] Significant proof shows reported 728 rape cases in 2021; with no reports of spousal or marital rape submitted at the time.[18] Thus, gender-based violence and rape committed by alleged trustworthy spouses in married houses can be disguised.[19]

Ostensibly marital rape does not fall within the same scope as rape in our Kenyan society. This is because it is believed that a man cannot rape his spouse. Nalia Sohrat argues that marital rape has historically

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12 Suprema Corte de Justicia de la Nación, Primera Sala, *Contradicción de tesis 5/92* (Tesis 1a./J. 10/94), 1 de mayo de 1994, Gaceta S. J. F. 77 (Mayo 1994) 18 as cited in Alejandro Madrazo and Estefanía Vela, 'The Mexican Supreme Court's (sexual) revolution?', 89 *Texas Law Review* (2011) 1872.

13 Supreme Court of Justice of the Nation (Mexico), Solicitud de modificación de jurisprudencia 9/2005, 16 November 2005 as cited Madrazo and Vela, 'The Mexican Supreme Court's (sexual) revolution?', 1872.

14 Constance Backhouse, *Carnal crimes: Sexual assault law in Canada, 1900-1975*, Irwin Law/ The Osgoode Society for Canadian Legal History, 2008, 144-145.

15 Sexual Offences Act (No 3 of 2006) Section 3(1).

16 Sexual Offences Act (No 3 of 2006) Section 43(5).

17 Sexual Offences Act (No 3 of 2006) Section 43(5).

18 Stephanie Wangari, 'Rift Valley, Nairobi had the highest number of rape, defilement cases last year', *The Standard*, 5 January 2022.

19 Angeline Ochieng and Ondari Ogega, 'Marital rape: Day women refused to suffer in silence', *The Nation*, 10 December 2023.

been regarded as a contradiction in terms, often escaping classification as an offence due to the prevailing belief that defining consent within the confines of marriage presents inherent complexities.[20] However, it is important to note that while Nalia Sohrat accentuates this view, she does not do so in a Kenyan context. Her view was shaped by the climate in Bangladesh. Nonetheless, it still highlights the view which is synonymous with that which operates in Kenya's society.

A comprehensive discussion of spousal rape in Kenya remains restricted. Nonetheless, Winifred Kamau and others provide some perspective, stating that in Kenya's quest of gender equality, combating gender-based violence has surfaced as a major concern.[21] They go on to note that marital rape represents a type of gender-based violence and serves as an indication of the prevailing inequalities in social dynamics between men and women.[22] In her research, Theresa Fus observes that many nations have come to the consensus that rape constitutes a singular offence irrespective of whether it occurs within the institution of marriage.[23] This achievement has been realised through legislative and judicial measures implemented by various countries.[24] Nevertheless, similar actions ought to be undertaken on a global scale to address this issue.[25]

Marital rape is inadequately addressed within Kenya's legal framework, highlighting a critical gap in its recognition and enforcement. This paper seeks to explore the factors underlying this deficiency. Katherine Frank once asked how we might rescue African women like

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20 Tasbiha Nalia Sohrat, 'Marital rape: Victimisation of Bangladeshi women within wedlock', 10(2) *ASA University Review* (2016) 6.

21 Winifred Kamau, Patricia Nyaundi and Jane Serwanga, 'The legal impunity for marital rape in Kenya: A women's equality issue', *Equality Effect,* April 2013, 5.

22 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya: A women's equality issue', 5.

23 Theresa Fus, 'Criminalising marital rape: A comparison of judicial and legislative approaches', 37(2) *Dutch Journal of Legal Studies* (2006) 516.

24 Fus, 'Criminalising marital rape: A comparison of judicial and legislative approaches', 516.

25 Fus, 'Criminalising marital rape: A comparison of judicial and legislative approaches', 517.

Flora Nwapa, Ama Ata Aidoo, and Margaret Ogot from the footnotes of male-authored African literary history.[26] Her critique applies just as sharply to legal scholarship, where women's voices on issues like marital rape are often overshadowed.

As a male author writing on this subject, this work does not claim to speak for women but to engage with the issue from a position of critical awareness, drawing on the voices and frameworks of African women who have long articulated the intersections of gender, law, and power. At the same time, I am mindful of Gayatri Spivak's reminder that when we try to recover the subaltern woman's voice, what comes through is always shaped by the lenses of power and never complete.[27] My task, then, is not to pretend I can fully recover that voice, but to show how law and culture keep pushing back on the silence.

Furthermore, although Section 43(5) of the Sexual Offences Act is gender-neutral, this paper focuses on its impact on married women.[28] This is not because only women experience marital rape, but because the exemption operates within a legal and cultural context in Kenya where marriage has traditionally been shaped by gendered expectations of sexual duty and submission. The analysis engages with how these structures make it especially difficult for women to assert sexual refusal or be heard when they do.

This paper adopts a doctrinal approach and unfolds in five main sections, each building on the last to explore the legal and social treatment of marital rape in Kenya. It is important to note that this is not a philosophy paper with law as a case study. Rather, it is legal analysis that uses Jacques Derrida's deconstruction to expose the structural silencing of married women in Kenyan law. The present section introduces the issue, outlining how Kenya's laws currently handle (or fail to handle) non-consensual sex within marriage, and why this matters.

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[26] Katherine Frank, 'Feminist criticism and the African novel', 14 *African Literature Today* (1984) 44.

[27] Gayatri Spivak, 'Can the subaltern speak?', in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the interpretation of culture,* University of Illinois Press, 1988, 274.

[28] Sexual Offences Act (No 3 of 2006) Section 43(5).

Section two lays out the theoretical foundation, drawing on subaltern studies and African feminism(s). These frameworks help us understand how law, culture, and power shape our understanding of consent in marriage.

Section three forms the heart of the paper. It takes a two-part approach: first, it looks at the beliefs and histories, both legal and cultural, that have shaped the way marital rape is perceived and treated in Kenya. Then, it takes a closer look at how the law itself is written and interpreted. Using Derrida's ideas, it shows how married women are silenced, not just in practice, but in the very language of the law. Section four offers both legal and cultural recommendations. These range from repealing the exemption that protects spouses from rape charges to practical steps like better training for law enforcement and public education around consent. Finally, Section five brings everything together, arguing that addressing marital rape is not just about changing laws, it is about changing how we think about consent, voice, and justice in intimate relationships.

Theoretical framework

The subaltern

Perhaps a suitable point of departure is defining subalternity. The concept of the 'subaltern' was initially introduced by the Italian Marxist theorist Antonio Gramsci in his essay *'Notes on Italian history'*, which was later incorporated into his influential work, *Prison notebooks*, written during his imprisonment between 1929 and 1935.[29] His deft definition succinctly captures the essential contours of the concept. He simply defines subaltern groups as those structurally excluded from political

[29] El Habib Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak: Historical developments and new applications', 4(1) *African Journal of History and Culture* (2012) 5.

power.[30] His reflections on subalternity were shaped by his imprisonment under Mussolini's fascist regime and the failure of the Italian working class to unite as classical Marxism predicted.[31] Gramsci's conception is particularly important for anyone trying to understand the roots of subalternity. This is because it moves away from the rigid, economically-focused interpretations typical of traditional Marxist theory.[32]

He focused on the culture and consciousness of subaltern groups as a way to accentuate their voices and challenge the narratives imposed by the state and ruling classes.[33] He argued that subaltern groups, fragmented by nature, cannot achieve unity or historical visibility until they acquire the capacity to act as a cohesive political force. As such, their history remains entangled with that of civil society and state formations.[34]

This is something that will also be captured in Spivak's critique of Gramsci's conceptualisation of the subaltern. Gramsci's conceptualisation sculpts 'the subaltern' as if they are all the same hiding the diversity of struggles and voices within that category. Reducing the subaltern to one essence allows one to be caught in the trap of ignoring situational realities.

Ranajit Guha drew on Gramsci's ideas from the *Prison notebooks* and pushed them further.[35] He brought attention to the ways marginalised people have acted and resisted, challenging histories that usually only focus on the elites. Guha described Subaltern Studies as a way of understanding the broad condition of subordination in South Asian society, whether that subordination stems from class, caste (a hereditary system that divides people into hierarchical groups), gender, age, in-

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30 Antonio Gramsci, *Selections from the prison notebooks*, Quintin Hoare and Geoffrey Nowell Smith (ed and trans), Lawrence and Wishart, 1971, 52.

31 Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak', 5.

32 Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak', 5.

33 Gramsci, *Selections from the prison notebooks*, 52.

34 Gramsci, *Selections from the prison notebooks*, 52.

35 Ranajit Guha (ed), Subaltern studies I: Writings on South Asian history and society, Oxford University Press, 1982; Ranajit Guha, Elementary aspects of peasant insurgency in colonial India, Oxford University Press, 1983.

stitutional position, or other forms of social inequality.[36] For Guha, the subaltern refers specifically to the distinct social group that represents the demographic gap between the entire Indian population and those identified as the elite.[37]

The idea of the subaltern became even more complex with the influential work of Indian-American postcolonial feminist Gayatri Chakravorty Spivak. Her landmark 1988 essay, 'Can the subaltern speak?', questioned the core assumptions of the Subaltern Studies group and challenged how voice, agency, and representation are understood and defined.[38] Spivak rethought the idea of the subaltern in light of changing global conditions, where capitalism suppresses dissent and the global division of labour breaks apart any unified revolutionary voice.[39] She challenged Gramsci's essentialism of the subaltern, arguing that it wrongly assumes the subaltern is a single, unified group with a clear, collective identity. She also critiqued the Subaltern Studies Group for relying on frameworks, Marxist or otherwise, that inevitably fall into essentialism when trying to define who the subaltern is. For Spivak, the strength of the term lies in its situational nature; it cannot be fixed or universally defined.[40]

In trying to unpack what it really means to be subaltern, Spivak focused on the gendered silence of Indian women during colonial rule, particularly through the practice of Sati. She showed how these women were trapped between two powerful narratives: the British portraying themselves as rescuers of oppressed women, and traditional Hindu discourse framing self-immolation as an act of female agency. Trapped

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36 Ranajit Guha, 'On some aspects of the historiography of colonial India' in Guha (ed) *Subaltern studies I*, 5.

37 Guha, 'On some aspects of the historiography of colonial India', 6-8.

38 Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak', 7.

39 Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak', 7.

40 Gayatri Chakravorty Spivak, 'Theory in the margin: Coetzee's *Foe* reading Defoe's *Crusoe/Roxana*', in Jonathan Arac and Barbara Johnson (eds) *Consequences of theory: Selected papers of the English Institute 1987-88*, Johns Hopkins University Press, 1991, 154.

between 'white men saving brown women from brown men' and claims of willing sacrifice, the subaltern woman's voice disappeared entirely.[41]

In her analysis, Spivak showed how women involved in Sati were caught between two conflicting stories. On one side, the British cast themselves as saviours, claiming to rescue oppressed women. On the other hand, traditional Hindu narratives portrayed these women as choosing to sacrifice themselves out of devotion.[42] Ultimately, the Hindu woman does not vanish into silence by mere absence but is consumed by a violent back-and-forth, a symbolic struggle between competing discourses of tradition and modernity.

This 'violent shuttling', as Spivak puts it, captures the fate of the Third World woman, the Kenyan woman, whose identity is not her own, but rather a battleground where opposing ideologies clash.[43] Like the woman in the Sati tradition, she is not given the chance to speak for herself, others speak on her behalf. Her silence is not simply about being erased, but about being pushed aside and replaced by other voices.

By uncovering the forgotten histories of women, Spivak takes the idea of the subaltern further than what Guha and others originally imagined. She brings attention to the ways women's struggles, across class and background, have been silenced. Both colonial and nationalist stories often turned women into symbols, not real people with voices of their own. For Spivak, if the subaltern is already unheard, then the subaltern woman is pushed even further into silence, left out of history not just once, but twice.[44]

In Kenya, married women, especially those living in rural areas or under customary law, often experience what it means to be subaltern. They are frequently denied the legal standing to challenge non-consensual sex within marriage, since the Sexual Offences Act specifically exempts spouses, effectively closing the door to any legal action against

41 Spivak, 'Theory in the margin: Coetzee's *Foe* reading Defoe's *Crusoe/Roxana*', 93.

42 Spivak, 'Can the subaltern speak?', 296-97.

43 Spivak, 'Can the subaltern speak?', 306.

44 Spivak, 'Can the subaltern speak?', 307.

marital rape.[45] This legislative gap stems from the colonial-era inheritance of British common law and Hale's doctrine, which presumed irrevocable consent upon marriage and defined rape as legally impossible between spouses.[46] These doctrines were intentionally retained in Kenyan jurisprudence, effectively criminalising non-consensual sex in marriage only under lesser charges such as assault, rather than rape.[47]

Feminist theory

Feminism encompasses a spectrum of socio-political movements and ideologies to define and achieve parity between genders in political, economic, personal, and social domains.[48] Mary Wollstonecraft is usually considered a feminist pioneer, owing chiefly to her 1792 work, *A vindication of the rights of woman*. In this book, she argues that discrimination against women is based on class differences and private property ownership. She fights for equal rights for women, claiming that they are equally deserving of these rights as men.[49]

Feminist theorists characterise marital rape as a mechanism for exerting social control and dominance over women within the patriarchal family structure.[50] It was well put by Sara Deer, that rape is not merely a metaphorical component of colonisation but an integral aspect of it.[51]

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45 Sexual Offences Act (No 3 of 2006) Section 43(5).

46 Rebecca Ryan, 'The sex right: A legal history of the marital rape exemption', 20(4) *Law & Social Inquiry* (1995) 947.

47 Jurg Helbling, Walter Kälin and Prosper Nobirabo, 'Access to justice, impunity and legal pluralism in Kenya', 47(2) *The Journal of Legal Pluralism and Unofficial Law* (2015) 351.

48 Javeed Ahmad Raina, 'Feminism: An overview', 4(13) *International Journal of Research* (2017) 3372.

49 'The original suffragette: The extraordinary Mary Wollstonecraft', *The Guardian*, 5 October 2015. See generally, Mary Wollstonecraft, *A vindication of the rights of woman: With strictures on political and moral subjects*, Joseph Johnson, 1792.

50 Elaine Martin, Casey Taft and Patricia Resick, 'A review of marital rape', 12(3) *Aggression and Violent Behaviour* (2007) 332.

51 Sara Deer, 'Decolonising rape law: A native synthesis of safety and sovereignty', 24(2) *Wicazo Sa Review* (2009) 150.

Deer here attempts to demonstrate it as a tool of oppression by drawing parallels to colonialism. Some feminists employ various terms, including 'patriarchal terrorism' and 'license to rape', to describe the exertion of social control by men over women.[52]

A branch of feminists that aggressively approach the issue of rape is the Radical feminists. Radical feminism is a philosophical viewpoint that emphasises how patriarchy is fundamental to the unequal power dynamics between the sexes, with a focus on how women are societally subjugated by men.[53] They argue that the subjugation of women is the most fundamental type of oppression, persisting since the beginning of human civilisation.[54] Ti-Grace Atkinson argued that the male class' desire for power drives them to oppress the female class, suggesting that men's perceived necessity to fulfil the role of the oppressor is the root and basis of all human oppression.[55]

In 1984, Katherine Frank questioned how African women writers like Flora Nwapa, Ama Ata Aidoo, and Grace Ogot could be rescued from the margins of male-dominated African literary history.[56] While her critique was important, it focused mainly on male exclusion and did not fully consider how Western feminism also misrepresented African women's voices.[57] Later scholars, such as Mary Kolawole, pointed out that African women are often caught between two dominant frameworks: Western feminist interpretations and African male criticism.[58] Therefore, the question of marital rape in Kenya demands a lens attuned to African realities – one that Western feminism alone cannot provide.

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52 Martin, Taft and Resick, 'A review of marital rape', 332.

53 Jone Johnson Lewis, 'What is radical feminism?', *ThoughtCo*, 7 June 2024.

54 Martha Shelley, 'Lesbianism and the women's liberation movement', in Barbra A Crow (ed) *Radical feminism: A documentary reader*, New York University Press, 2010, 305-307.

55 Ti Grace Atkinson, 'Radical feminism', in Crow (ed), *Radical feminism*, 82-85.

56 Frank, 'Feminist criticism and the African novel', 44.

57 John Mike Muthari Kuria, 'The challenge of feminism in Kenya: Towards an Afrocentric worldview', Unpublished PhD dissertation, University of Leeds, 2001, 1.

58 Mary E Modupe Kolawole, *Womanism and African consciousness*, Africa World Press, 1997, 10.

This brings us to African feminism(s). Glory Joy Gatwiri and Helen Jacqueline McLaren, describe it as both personal and political, born out of African women's lived realities and grounded in their cultural knowledge systems.[59] For them, it is a way of challenging colonial thinking while staying rooted in African ways of knowing. Njoki Wane also sees African feminism as part of a broader decolonising journey, one that involves turning inward, questioning dominant Western ideas, and reclaiming indigenous perspectives that better speak to African women's experiences.[60]

Carole Boyce Davies and Anne Adams Graves go further to frame African feminism as a political philosophy that acknowledges the shared struggle with African men against colonialism, but also insists on recognising the specific forms of oppression faced by women.[61] They argue that while African feminism respects traditional roles like motherhood, it questions the rigid expectations around them.[62] What ties these thinkers together is a common commitment to grounding feminism in African realities. As Wane puts it, it is about retrieving and revitalising African indigenous thought to confront social issues from within.[63]

This was further articulated by Sylvia Tamale. For her, African feminism demands the creation of its own theories and discourses rooted in African realities.[64] Her work critiques mainstream Western feminist ideals, such as 'gender equality', for often being disconnected from the African context and argues for an alternative framework in the form of *ubuntu*.[65] The same sentiments are shared by Melissa Mungai as she

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59 Glory Joy Gatwiri and Helen Jacqueline McLaren, 'Discovering my own African feminism: Embarking on a journey to explore Kenyan women's oppression', 17(4) *Journal of International Women's Studies* (2016) 266.

60 Njoki N Wane, 'African indigenous feminist thought: An anti-colonial project', in Njoki N Wane, Arlo Kempf, and Marlon Simmons (eds) *The politics of cultural knowledge*, Brill, 2011, 7.

61 Carole Boyce Davies and Anne Adams Graves, *Ngambika: Studies of women in African literature*, Africa World Press, Trenton NJ, 1986, 9.

62 Davies and Graves, *Ngambika: Studies of women in African literature*, 9.

63 Wane, 'African indigenous feminist thought: An anti-colonial project', 8.

64 Sylvia Tamale, *Decolonisation and afro-feminism*, Daraja Press, 2020, xiii.

65 Tamale, *Decolonisation and afro-feminism*, 15.

notes that Western feminism often operates in a 'cultural vacuum' that silences African feminisim(s).[66]

Awa Thiam reminds us that gender relations in many African societies are shaped by entrenched hierarchies, two social classes, men and women, in a dynamic of domination and subordination.[67] This Derridean lens is essential when examining the experiences of Kenyan women, particularly in contexts where sexual and reproductive violence is normalised.

For instance, as per the work by the Samburu Women Trust, 'girl child beading' is a cultural practice in which Samburu men of 'warrior' age enter into non-marital sexual relationships with underage girls who are not yet eligible for marriage – often between nine and 15 years old.[68] Similarly, practices such as child marriage, female genital mutilation (FGM), and unsafe abortions inflicted on young girls, often before they are considered eligible for formal marriage, continue to enforce strict control over female sexuality.[69] These practices do not occur in isolation; they form part of what Thiam calls a broader culture of gendered violence.

Thiam points out that one does not need to be a feminist to recognise the many forms of oppression women face, both obvious and subtle. Marital rape fits within this continuum of violence: a form of control often masked by culture and overlooked by the law, yet no less harmful in its impact on women's autonomy and dignity.

This author thus believes that this is a menacing issue that must be revisited through a deconstructive lens. The best approach to this

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66 Melissa Mungai, 'An epistemic "imposition" of decolonial ecofeminisms on women and agriculture in Kenya', in John Osogo Ambani and Melissa Mungai (eds) *Harvesting equality: Gender, governance, stewardship, and decolonial futures in Kenyan agriculture*, Kabarak University Press, 2025, 5.

67 Awa Thiam, *Speak out, black sisters: Feminism and oppression in black Africa*, Dorothy S Blair (trans), Pluto Press, London, 1986, 13.

68 Samburu Women Trust, 'Silent sacrifice: Girl-child beading in the Samburu community of Kenya', Samburu Women Trust, 2012, 5.

69 UNICEF Kenya, 'Baseline study report on female genital mutilation or cutting and child marriage among the Rendille, Maasai, Pokot, Samburu and Somali communities in Kenya', UNICEF Kenya, 2017, 93.

would be to first understand how each factor contributes to the prevailing perception and perhaps what we can do about it from there. I have resisted the urge to simply address the issue as unconstitutional as that effectively circumvents the real problem. This analysis will reveal the real issues rather than pasting the classic sticker: 'it is unconstitutional'.

Investigating the perception

Factors

To completely understand the intricacy of Kenya's challenges, we must first consider a few basic variables that are at the root of the current predicament. These elements, while not exhaustive, provide a basic understanding of the complex issues at hand. Exploring these areas allows us to begin to find patterns and linkages that contribute to the country's legal treatment of the matter. This investigation will also assist in building a more diverse perspective, providing insights critical for developing effective solutions.

The contract

To understand why the perception exists, we must recognise how 18th-century legal scholars, who developed and supported this rationale, conceptualised the marriage contract.[70] William Blackstone framed the marital relationship as part of the legal domain of private economic relations. In his analysis, the union of husband and wife was not treated as a purely emotional or spiritual bond, but rather as a structured legal relationship comparable to other domestic hierarchies, such as those between master and servant or parent and child. By placing marriage alongside these other relationships, Blackstone emphasised its role in maintaining social order and legal coherence within the household.[71]

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70 Ryan, 'The sex right: A legal history of the marital rape exemption', 943.

71 William Blackstone, *Commentaries on the laws of England*, George Sharswood (ed), JB Lippincott and Co., 1896, 325.

In modern usage, the terms 'master' and 'parent' often suggest figures of clear and unquestioned authority. However, within the legal context Blackstone operated in, these roles were part of a broader framework of reciprocal obligations and structured hierarchies. Rather than implying absolute control, they reflected a system in which authority was accompanied by defined responsibilities, particularly within the household and other private relationships.[72] In other relationships, there was a discourse of rights, but the ideology shaping this discourse in the marital contract set it apart from other private relationships.[73] Which ideology creates this disparity? Coverture, that is, unity of persons.

The principle of 'unity of persons' posits that husband and wife are considered a single entity, being one flesh and blood.[74] That through marriage, the legal existence of the woman is suspended or merged into that of the man, rendering them one entity under the law.[75] In essence, coverture restricted the legal status of a married woman by placing her personhood and property under the authority of her husband.[76] A married woman under coverture lacked the ability to enter into contracts, engage in property transactions, initiate legal actions, retain ownership of her earnings, or create wills.[77]

Coverture was more than a mere assumption of women's inferiority to men; it was intended to almost entirely subsume a wife's identity into that of her husband.[78] Medieval European society viewed marriage as a hierarchical structure in which the husband had authority over his

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72 Ryan, 'The sex right: A legal history of the marital rape exemption', 943.

73 Ryan, 'The sex right: A legal history of the marital rape exemption', 943.

74 Henry de Bracton, *On the laws and customs of England*, George E Woodbine (ed), Samuel E Thorne (trans), Harvard University Press, 1968, 335.

75 Blackstone, *Commentaries on the Laws of England*, 441.

76 Tim Stretton and Krista J Kesselring, 'Introduction: Coverture and continuity', in Tim Stretton and Krista J Kesselring (eds) *Married women and the law: Coverture in England and the common law world*, McGill Queen University Press, 2013, 6.

77 Hazem Alshaikhmubarak, R Richard Geddes and Shoshana A Grossbard, 'Single motherhood and the abolition of coverture in the United States', 16(1) *Journal of Empirical Legal Studies* (2019) 94-95.

78 Lisa Forman Cody, 'Marriage is no protection for crime: Coverture, sex, and marital rape in eighteenth-century England', 61(4) *Journal of British Studies* (2022) 810.

wife's financial assets and public conduct, and could also exert his will through physical force.[79]

However, before we proceed, it is important to discern the finer complexities within the Kenyan context. While hierarchical conceptions of marriage were especially pronounced in medieval Europe, where husbands exercised control over their wives' property, conduct, and physical autonomy, similar patterns of male dominance have historically manifested in diverse cultural settings around the world. These structures, though shaped by different social and normative logics, often placed women in subordinate positions within the marital relationship, including in some customary systems in Kenya and in other African communities.

Importantly, we cannot disregard studies that show that in the precolonial era, women could participate in public and domestic spheres even if these societies were not entirely egalitarian; colonialism, however, imposed rigid patriarchal hierarchies that intensified women's subordination.[80] What we observe, then, is a broader historical pattern: marriage functioning as a normative framework through which gendered subordination was institutionalised.

How is it that in one of the most intimate and personal of human relationships, the legal and moral discourse of equality was long eclipsed by an ideology that not only tolerated but entrenched women's systemic exclusion from rights and recognition?

What implications did coverture have for the contract besides restricting the autonomy of a woman? It simply meant that the man had total control over the woman. That the man was supposedly 'more important', dealing with the more complicated issues, while the woman would handle 'less complex issues' like domestic chores. This was reinforced by the separate spheres theory.

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79 Jill Bennett, *Women in the medieval English countryside: Gender and household in Brigstock before the plague*, Oxford University Press, 1987, 103.

80 Tamale, *Decolonisation and afro-feminism*, 21.

The patriarchal concept of distinct spheres, rooted in beliefs about inherent gender roles or patriarchal religious teachings, asserts that women should steer clear of the public sphere, which includes politics, employment, business, and law.[81] The notion that these separate spheres can be understood as a dichotomy, with gender-specific domains perceived as entirely distinct, serves to reinforce the ideology of gender segregation and inequality.[82]

In many historical contexts worldwide, rape was viewed as a crime or harm against a man's property, typically his wife or daughter. This perspective meant that the offence was legally perceived as damage not to the victim herself, but rather to the property of her father or husband.[83] They are property, as evidence suggests, that even after girls are subject to sexual abuse, some guardians are quick to negotiate with the perpetrators so that, in the end, it is a win-win situation.[84] These exchanges include land, livestock, or large sums of money for the sake of their children's dignity.[85] Simply put, women are property transferred from one man's hand to another's. Consequently, under this definition, it was legally inconceivable for a husband to commit rape against his wife since she was his property.[86]

Most African countries, including Kenya, were colonised by European powers. These powers often imposed their legal systems on their colonies,[87] not merely as administrative tools, but as part of a grand Eurocentric makeover.[88] This makeover was handed down from colonial

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81 Ashlyn K Kuersten, *Women and the law: Leaders, cases and documents*, Bloomsbury Publishing, 2003, 16-17.

82 Michelle Z Rosaldo, 'A theoretical overview', in Michelle Z Rosaldo, *Woman, culture, and society*, Stanford University Press, 1974, 17-18.

83 Stretton and Kesselring, 'Introduction: Coverture and continuity', 6.

84 Njeri Rugene, 'Where fathers hash out blood money for their abused girls', *Daily Nation*, 2 December 2013.

85 Rugene, 'Where fathers hash out blood money for their abused girls'.

86 Jonathan Herring, *Family law: A very short introduction*, Oxford University Press, 2014, 35.

87 Richard A Webster and others, 'Western colonialism', *Encyclopedia Britannica*, 11 April 2025.

88 Makau Mutua, 'Savages, victims, and saviours: The metaphor of human rights', 42 *Harvard International Law Journal* (2001) 204.

administrators and later continued by human rights actors promoting Western ideals as if it were the only proper way to govern.[89]

As a result, indigenous legal orders were sidelined in favour of a system privileging European standards and biases; anything outside the 'blueprint' was labelled as primitive.[90] During this era, English law was enforced among the 'native' communities, leading to a legal situation characterised by plurality, where customary law coexists alongside state law.[91] Ideas akin to coverture, while not explicitly codified in law, may have shaped perceptions of marital rights.

Sexual violence is one of the most explicit manifestations of women's subjugation and oppression based on gender.[92] Patriarchy, as a social structure, typically supports male supremacy and control over women, which may result in different types of gender-related violence, such as marital rape.[93] It is intricately connected to the broader subordinate status of women in society.[94]

The continuance of marital rape is also reinforced by general cultural norms and customs that tend to favour male sexual entitlement and privilege. All too frequently, such norms can discourage the victims from denouncing abuse and taking measures in court, as such actions can be perceived to challenge the well-established structure of patriarchy.[95] Some of these women will not see any issue with the case unless there is violence involved.[96] These rooted cultural values make females fail to view their experiences as those of sexual victimisation.[97]

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89 Mutua, 'Savages, victims, and saviours: The metaphor of human rights', 204-05.

90 Mutua, 'Savages, victims, and saviours: The metaphor of human rights', 207, 214.

91 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya' 5.

92 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya' 1.

93 Danielle Cusmano, 'Rape culture rooted in patriarchy, media portrayal, and victim blaming', *Writing across the curriculum*, April 2018, 2.

94 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya' 1.

95 Jeniffer Shore, 'The role of patriarchy in domestic violence', *Focus for Health*, 2 October 2019.

96 Michael Freeman, '"But if you can't rape your wife, who can you rape?": The marital rape exemption re-examined', 15(1) *Family Law Quarterly* (1981) 6.

97 Susan Brownmiller, *Against our will: Men, women and rape*, Penguin, 1975, 380.

Maybe another 'argument' advanced in support of marital rape is the feeling that the attachment was not for intimacy purposes. In some cultures, marriages are set up to make reproduction possible.[98] In such cases, people are not necessarily allowed to offer their consent in marriage, and this is where forced marriages come in.[99] Adult women face various violations, such as being coerced into marriage and subjected to non-consensual sex within marriage, without the chance to provide their consent.[100] The coercion of one person by another violates numerous human rights guaranteed to everyone but systematically denied to girls in many nations.[101]

Despite the potential impact of various international instruments,[102] the circumstances for many married women remain unchanged.[103] Furthermore, women who exit their marriages encounter a vast array of challenges, from social ostracism and violent assaults, including rape, to economic hardship.[104]

How do these elements relate to the current situation in Kenya? Kenya's legal system has been reluctant to properly acknowledge marital rape as a criminal offence, reflecting profoundly ingrained patriarchal beliefs. These ideas regard marriage as a hierarchical structure in which the husband has authority over his wife, similar to the ancient notion of coverture, in which a married woman's legal rights were subsumed beneath those of her husband. This antiquated viewpoint still

98 Jennifer R Wies and Hillary J Haldane, 'Cross-cultural studies of gender-based violence: Holistic approaches for marital rape research', in Kersti Yllö and M Gabriela Torres (eds) *Marital rape: Consent, marriage and social change in global context*, Oxford University Press, 2016, 29.

99 Wies and Haldane, 'Cross-cultural studies of gender-based violence', 30.

100 Mariam Ouattara, Purna Sen and Marilyn Thomson, 'Forced marriage, forced sex: The perils of childhood for girls', 6(3) *Gender and Development* (1998) 27.

101 Ouattara, Sen and Thomson, 'Forced marriage, forced sex: The perils of childhood for girls', 27-28.

102 Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13.

103 Ouattara, Sen and Thomson, 'Forced marriage, forced sex: The perils of childhood for girls', 27-28.

104 Ouattara, Sen and Thomson, 'Forced marriage, forced sex: The perils of childhood for girls', 28.

exists in Kenya's legal and social structures, influencing how marital rights are viewed. The failure to criminalise marital rape not only perpetuates gender inequity, but also weakens efforts to defend women's rights and dignity in marriage.

Implied consent?

It is Sir Matthew Hale who argued that a husband cannot be prosecuted for raping his wife due to the mutual consent and marital contract wherein the wife has committed herself to the husband in this aspect, an irrevocable commitment.[105] Although this was merely an opinion stated in a legal treatise, and not a ruling or binding precedent, it became highly influential and was widely adopted in common law reasoning, effectively entrenching the marital rape exemption for centuries.[106]

It is vital to appreciate the fact that the doctrine of Lord Hale was never based on legal determinations.[107] The immunity that has traditionally been attached to husbands who physically abuse their wives to force them to submit to sexual acts traces its roots far back in the past, to the time of the archaic Biblical expression 'unlawful carnal knowledge'.[108] According to our biblical ancestors, all sex outside marriage was 'unlawful', and all sex inside marriage was, by definition, 'lawful'.[109]

According to Duran Bell, to offer a universally available concept of marriage, the roles of husband and wife have to be outlined, as well as the difference between a spouse and a romantic partner.[110] There exists an extra layer of obligatory nature within the periphery of marriage compared to that of just being a romantic partner. From this viewpoint,

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105 Ryan, 'The sex right: A legal history of the marital rape exemption', 947.

106 Jennifer A Bennice and Patricia A Resick, 'Marital rape: History, research, and practice', 4(3) *Trauma, Violence & Abuse* (2003) 230.

107 Mark A Small and Pat A Tetreault, 'Social psychology, "marital rape exemptions," and privacy', 8(2) *Behavioural Sciences & the Law* (1990) 143.

108 Brownmiller, *Against our will: Men, women and rape*, 380.

109 Brownmiller, *Against our will: Men, women and rape*, 380.

110 Duran Bell, 'Defining marriage and legitimacy', 38(2) *Current Anthropology* (April 1997) 238.

marriage is an institution that socially legitimises men's rights over women.[111]

He goes on to say that marriage is a social arrangement where one or more men are joined to one or more women, granting the men the entitlement to sexual access within a domestic setting, while designating the women as obliged to fulfil the specific men's sexual demands.[112] Common beliefs in society indicate that women in intimate relationships or marriages typically do not openly communicate their sexual desires, allowing men to dominate sexual decision-making.[113] In fact, in certain cultures, consent is not considered within the individual wife's control. The families organising the marriage guarantee her consent for life.[114]

Although the doctrine of Lord Hale and the arguments from which it has been coined seem archaic, its implications are far-reaching in contemporary life, not just in Kenya. Even though the Constitution of Kenya (2010) guarantees equal rights to men and women,[115] entrenched patriarchal attitudes could still perceive women as being in the position to provide sexual favours to their husbands, again echoing Bell's observation on how society condones male privilege.[116]

According to research, these beliefs contribute to Kenya's culture of silence regarding marital rape.[117] This silence undermines efforts to hold offenders accountable and promotes an environment in which crime goes unpunished.[118] By analysing assumptions and discourses about marriage and gender roles, we can uncover biases and power dynamics that marginalise marital rape in Kenya.

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111 Bell, 'Defining marriage and legitimacy', 238.

112 Bell, 'Defining marriage and legitimacy', 238.

113 Zhenqi Li, 'Marital rape as structural violence in the legal system', 42(1) *Lecture Notes in Education Psychology and Public Media* (2024) 147.

114 Yllö and Torres, 'Introduction', in Yllö and Torres (eds) *Marital rape: Consent, marriage and social change in global context*, 7.

115 Constitution of Kenya (2010) Article 27.

116 Bell, 'Defining marriage and legitimacy', 238.

117 Amnesty International, 'Kenya: Rape – The invisible crime, March 2002, 1.

118 Amnesty International, 'Kenya: Rape – The invisible crime', 1.

Derrida's deconstruction

Before turning to his work, it is pertinent to address the question of why Jacques Derrida? Unlike the other frameworks discussed here, deconstruction is not a theory in the strict sense, but a way of reading that unsettles texts and exposes what they exclude. Derrida himself has found problems completely describing 'deconstruction'; he says that his essays have been an attempt to find that definition.[119]

According to Derrida, deconstruction is not the same as analysis, critique, or technique.[120] He resisted defining it as a theory, emphasising instead its role as a practice of questioning language.[121] This makes it useful for the present paper because the problem of marital rape in Kenya is not only one of enforcement or culture, but also of how the law itself is worded. Deconstruction, therefore, serves here as a 'tool' for examining the language of Section 43(5) of the Sexual Offences Act, without pre-judging what that examination will reveal.

This sub-section operationalises a three-stage deconstructive algorithm to interrogate the legal construction of marital consent in Kenya. The first step is to notice how the law treats the wedding vow 'I do' as if it were a permanent grant of consent. This is what Derrida calls logocentrism: the reliance on a single, fixed origin point. The second step is to see how this idea is then written into the statute, turning consent into something static and unchanging. Finally, when we read closely, contradictions begin to appear. Each clause of the law both hides and depends upon the possibility of refusal, revealing gaps that the text itself cannot fully cover up.

These stages are then deployed across four analytical modules: the binary opposition module (sovereign husband v submissive wife and its haunting trace of refusal); the supplement module (logocentric origin,

[119] Jacques Derrida, 'Letter to a Japanese friend', in Peggy Kamuf (ed) *A Derrida reader: Between the blinds*, Columbia University Press, 1991, 270.

[120] Robert Bernasconi, 'The trace of Levinas in Derrida', in David Wood and Robert Bernasconi (eds) *Derrida and différance*, Northwestern University Press, 1988, 15.

[121] Bernasconi, 'The trace of Levinas in Derrida', 15.

necessary addition, and myth of permanent consent); the subaltern trace module (the silenced wife's emergent voice in court); and the différance module (the Janus-faced law promising and deferring protection).

Binary oppositions and the haunting trace of refusal

A suitable point of departure would be defining what binary oppositions are and what would be the binary in this case. Derrida argues that much of Western thought is structured around binary oppositions, pairs of concepts in which one term is privileged while the other is subordinated.[122] In *Of grammatology*, we can extract an example from his explanation, where he critiques the speech and writing binary, where speech is seen as natural, present, and authentic, while writing is treated as artificial, derivative, and secondary.[123] These oppositions do not merely describe differences; they create hierarchies.[124] One term is elevated as original or self-sufficient, while the other is cast as a lesser copy; necessary but denied equal value.

However, this shall be further elaborated on in the next sub-section. For the sake of this paper the pertinent matter that brings out this structure, though not directly, is the exemption clause, which has been cited numerously in this paper. Section 43(5) of the Sexual Offences Act excludes spouses from the rape provision.[125] To bring out the implicit binary opposition, we also have to consider the culture. The effect intersection of the two, law and culture, cannot be ignored and to do so would be to err. The culture of patriarchal dominance and the silence on the matter further reinforces the opposition.

These oppositions are not innocent; they are hierarchical structures that enforce authority by marginalising what they depend on.[126] This hierarchy is not natural; it is built on the suppression of the wife's agen-

[122] Jacques Derrida, *Of grammatology*, Gayatri Chakravorty Spivak (trans), John Hopkins University Press, 1997, 35.

[123] Derrida, *Of grammatology*, 35.

[124] Derrida, *Of grammatology*, 11, 16.

[125] Sexual Offences Act (No 3 of 2006) Section 43(5).

[126] Derrida, *Of grammatology*, 35.

cy. Yet, as Derrida teaches, the dominant term in any binary depends on what it excludes for its coherence.[127] It is here that the trace emerges: not as a presence nor a full absence, but as the mark of the other within the structure of the sign. Derrida suggests that the trace does not merely signal the fading of an original source; rather, it reveals that what we consider an origin was never pure or self-contained in the first place.[128] The so-called origin only comes into being through its relationship with what it excludes or defers, its 'non-origin'. In this way, the trace destabilises the very idea of an independent beginning.[129]

The trace thus inhabits both terms of a binary, undermining their opposition by showing that each is contaminated by the other. The privileged term (such as speech or the masculine subject) only appears autonomous because it effaces the trace of its supplement (which we shall discuss below), yet that trace is always already there, making the binary itself unstable and open to deconstruction. The husband's legal authority assumes the wife's submission, but that submission only has meaning if refusal is possible. In this way, the law's attempt to erase the wife's 'no' leaves a mark, it creates what Derrida calls the *trace*, the remainder of a refusal the law cannot admit but cannot fully eliminate either.

Logocentrism, the supplement and the myth of permanent consent

Derrida's critique of logocentrism, the privileging of speech, presence, and self-sufficient origins, exposes how Western thought, including and especially law in this case, is structured around a fiction: that meaning is immediate, stable and whole. However, before going deep into the critique of the labyrinth that Derrida tries to efface, it is best to define it.

Logocentrism is bound up with the metaphysics of presence, the belief that meaning is fully present, stable, and self-contained when con-

127 Derrida, *Of grammatology*, 35.
128 Derrida, *Of grammatology*, 61.
129 Derrida, *Of grammatology*, 61.

veyed through voice and reason.[130] It is the propensity to attach meaning to a single, authoritative point.[131] This is belief in a foundational moment or meaning, an unmediated 'source' from which truth flows without ambiguity or remainder, sustaining what Derrida calls the illusion of presence; a naive faith in presence.[132]

In the legal context of marriage, this origin is embodied in the wedding vow. The law treats the phrase 'I do' as a definitive speech-act that, once uttered, establishes permanent consent; a self-contained moment of consent. But as Derrida insists, origins are never pure. What seems like a self-contained beginning is always supported by something outside itself, something it needs but tries to exclude. This is what he calls the supplement: 'It is a surplus ... But the supplement supplements. It adds only to replace. It intervenes ... as if one fills a void'.[133] The marital 'yes' appears final, but it relies on what it excludes, such as the possibility of future refusal or ambiguity.

Of course, that brings us back to the idea of trace. Derrida explains that the origin is never pure; it only exists through its relation to what it excludes; what he calls the trace.[134] The marital vow, then, is not a final truth but a moment shaped by absence and uncertainty. When the law treats it as fixed, it erases this trace, the reminder that meaning always depends on what is left out.

This leads to Derrida's claim that writing is violence: not because it is destructive, but because it imposes a structure on fluid meaning.[135] To inscribe consent into law as a once-and-for-all event is not neutral; it is juridical violence that forecloses the possibility of later refusal. The idea that meaning can ever be fully present is, as he puts it, 'a teleological

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130 Derrida, *Of grammatology*, 11-12.

131 Catherine Turner, 'Jacques Derrida: Deconstruction', *Critical Legal Thinking*, 27 May 2016.

132 Derrida, *Of grammatology*, 35-36.

133 Derrida, *Of grammatology*, 144-145.

134 Derrida, *Of grammatology*, 61.

135 Derrida, *Of grammatology*, 112.

and eschatological mythology'.[136] The law operates here as myth-making: it constructs a world where meaning does not evolve, where the subject does not change, and where the possibility of saying 'no', no longer exists.

The trace of the subaltern wife

Gayatri Spivak's question, 'Can the subaltern speak?', remains a useful provocation for understanding the legal position of married women under Section 43(5) of Kenya's Sexual Offences Act. Spivak defines the subaltern not simply as someone who is silenced, but as one whose speech is excluded from dominant frameworks of intelligibility.[137] The wife who says 'no' to her husband in a legal system that does not recognise marital rape becomes such a figure: her refusal exists, but it cannot be heard as legally meaningful. Her voice is not absent, but structurally inaudible.

Derrida's concept of the trace helps to explain this kind of exclusion. He argues that origins are never pure or complete but always formed in relation to what they exclude.[138] The marital vow, treated in law as a full and final moment of consent, functions as such an origin. But the wife's later refusal is the trace: the remainder that unsettles the apparent completeness of the original 'yes'. The law's refusal to register her dissent preserves what Derrida calls the myth of presence; the belief that meaning, once spoken, remains stable and self-contained.[139]

While data on marital rape reporting and prosecution in Kenya is limited, the legal text itself reveals a discursive structure that displaces the wife's refusal.[140] Without a statutory offence, her experience may be reframed through other legal categories: assault, cruelty, or domestic conflict. This kind of reclassification mirrors Derrida's point that rep-

136 Derrida, *Of grammatology*, 112.

137 Spivak, 'Can the subaltern speak?', 285-287.

138 Derrida, *Of grammatology*, 61.

139 Derrida, *Of grammatology*, 11-13, 36.

140 Sexual Offences Act (No 3 of 2006) Section 43(5).

resentation often seeks to restore a lost presence while denying the instability of the original.[141] The law, in this sense, maintains a teleological narrative: that consent was freely given at marriage and remains unchanged.[142]

Spivak and Derrida remind us that silence is not always the absence of speech; it can be the effect of a system that refuses to listen. The wife speaks, but the law does not understand her. Her refusal lingers as a trace, a quiet disturbance that marks the edges of what the law can name.

Différance and the fluidity of consent

Derrida coins différance to show that meaning arises only through two inseparable movements: difference, each sign defined against other signs, and deferral, its sense endlessly postponed along a chain of signification. Because every sign's identity depends on what it is not and on meanings yet to come, no meaning is ever fully present; each moment of understanding already carries the mark of absence.[143] Applied to law, whether a marriage vow or a statutory provision, différance reveals that legal meaning is never final but always open to new distinctions and delays, giving the law its Janus-faced character of promising both closure and perpetual reopening.

Derrida's concept of différance emphasises how meanings are not fixed, but rather constantly altering and evolving as a result of the interaction of differences.[144] In patriarchal societies such as Kenya, conventional traditions that prioritise male authority and sexual entitlement frequently dictate the meaning of consent in marriage.[145] Such a callous reading does not take into account consent and personal autonomy as they stand today, more specifically concerning marriage.[146]

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141 Derrida, *Of grammatology*, 36.

142 Derrida, *Of grammatology*, 62.

143 Derrida, *Of grammatology*, 63.

144 Turner, 'Jacques Derrida: Deconstruction'.

145 Shore, 'The role of patriarchy in domestic violence'.

146 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya', 3.

There are incongruities and contradictions within the construction of marital consent that is put forth towards promoting the acceptability of spousal rape. The first tension is that between personal autonomy and marital obligation. The concept of 'body autonomy' is that every person has an inherent right to choose their own bodily identity.[147] Marital responsibility was historically construed as meaning that married persons had a duty to perform all obligations of marriage, including sexual intercourse.[148] Assuming that a spouse, typically the wife, gave continued assent to sexual behaviour by becoming married, this thought supported the concept of permanent consent inside the marriage.[149]

In fine, the marital rape exemption in Kenya reflects the government's systemic discrimination against women who experience sexual violence within marriage.[150] The Convention on Equality and Discrimination against Women (CEDAW) defines discrimination against women as any distinction, exclusion, or restriction based on sex that undermines women's equal recognition, enjoyment, or exercise of human rights, regardless of marital status.[151] The marital rape exemption constitutes discrimination by the government, as it creates a 'distinction', 'exclusion', and 'restriction' against victims of spousal rape.[152]

Section 43(5) of the Sexual Offences Act explicitly alienates these victims, denying them equal legal protection afforded to other sexual assault survivors.[153] This disagreement is dangerous because it goes against the transformative goal described in our Constitution's Article 27(3) by denying a spouse the ability to revoke permission at any time.[154]

147 Nina Roxburgh, 'Whose rights are the most right? The dilemma of autonomy in a society: On abortion, women, and human life', *Australian Institute of International Affairs*, 23 July 2016.

148 Martin, Taft and Resick, 'A review of marital rape', 332.

149 Martin, Taft and Resick, 'A review of marital rape', 332.

150 Emma Nyaboke Nyabicha, 'Exploring the boundaries of conjugal rights: Marital rape as a criminal offence in Kenya', Unpublished undergraduate dissertation, Strathmore Law School, 2017, 27.

151 Convention on the Elimination of All Forms of Discrimination against Women, Article 1.

152 Nyabicha, 'Exploring the boundaries of conjugal rights', 28.

153 Sexual Offences Act (No 4 of 2006) Section 43(5).

154 Constitution of Kenya (2010) Article 27(3).

Recognising marital rape as a breach of the right of persons, regardless of their marital status, to have control over their own bodies forms the basis for the argument that each one should be allowed to make autonomous decisions regarding their bodies.

From Derrida to Paglia: Restoring body to interpretation

Camille Paglia offers a very important reminder of what can slip out of view when we rely too heavily on a purely textual method. She argues that post-structuralism sometimes turns into 'pernicious' 'word-worship' that forgets the real people whose lives sit behind any text.[155] For her, 'behind every book is a certain person with a certain history'.[156] How do this matter for marital rape? The offence is about a violation of the body. If interpretation focuses only on the instability of language, it risks losing sight of the lived harm the law is supposed to address. Paglia helps bring back that embodied reality.

Even if Paglia positions herself as a critic of post-structuralism, her refusal to let interpretation drift away from the body makes her a vital companion in thinking about marital rape. Derrida shows us how the law's language slips; Paglia insists we remember the bodies that suffer when it does. The challenge to be confronted, or rather the opportunity to be seized, is to let these two sit at the same table, each correcting the other, so that the critique of Section 43(5) can speak both to text and to lived harm.

In search of a way forward

We do not have to choose between black letter fixes and perpetual uncertainty. Drawing on Derrida's idea of *différance*, that meaning only

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155 Camille Paglia, *Sexual personae: Art and decadence from Nefertiti to Emily Dickinson*, Yale University Press, 1990, 34.

156 Paglia, *Sexual personae*, 34.

emerges through both difference and delay,[157] we can chart a path that protects women now while keeping the law open to new voices later. In practice, that means pairing straightforward legal reforms with more ambitious, deconstructive measures that make visible the very *supplements*[158] and *traces*[159] the current statute erases.

General reforms

The application of the existing laws, as currently in force in Kenya, most probably due to the still prevailing patriarchal beliefs and attitudes, needs a complete overhaul in dealing with marital rape. This specifically applies to the exemption clause in Section 43(5) of the Sexual Offences Act. Real change requires not only fixing the law but also addressing the cultural norms that continue to excuse marital rape. This may be in the form of revising legislation that weakens women's autonomy and indirectly normalises marital rape. Doing away with the discriminatory exemption found in Section 43(5) of the Sexual Offences Act would be one step in the right direction.[160] This would allow the realisation of the two prerequisites highlighted above.

In light of the foregoing and given the difficulty of proving the absence of consent, some of the legal and procedural steps that may be taken with respect to marital rape cases are as follows: in-camera trial in cases of marital rape to facilitate the deposing of the victim without the fear of public exposure and stigma. The laws of evidence can also be modified to permit indirect corroboration, such as testimony of prior threats of violence or violence in the marriage, physical evidence of injury or coercion, or expert testimony of counsellors or medical personnel. This shift is supported by the Supreme Court's recent ruling in *Ruth Wanjiku Kamande v Republic*, where the Court held that while the battered woman syndrome is not a standalone defence, it may be admitted as contextual evidence within existing defences like self-defence or du-

157 Derrida, *Of grammatology*, 62-63.

158 Derrida, *Of grammatology*, 145.

159 Derrida, *Of grammatology*, 61.

160 Nyabicha, 'Exploring the boundaries of conjugal rights', 44.

ress, specifically recognising that testimony of prior threats or violence is highly relevant to assessing the complainant's state of mind and her ability to withhold consent.[161]

Establishing an affirmative consent standard can help further strengthen legal protections based on ensuring mutual responsibility among interacting parties for active and enthusiastic consent to engage in sex, rather than relying on lack of resistance.

Furthermore, cultural transformation is critical. It requires education and awareness for both men and women to question the patriarchal beliefs that support marital rape and the sense of its meaning, which is consent, bodily autonomy, and gender equality within marriage.[162] In addition, compliance with international human rights conventions would provide a legal framework for Kenya, under both the ratified conventions of the Convention on the Elimination of All Forms of Discrimination against Women to uphold women's rights within marriage.[163]

Other African states have taken a step in the right direction. The first point of reference is South Africa, where they abolished the marital rape exemption through Section 5 of the Prevention of Family Violence Act of 1993.[164] Secondly, Nigeria's Violence against Persons (Prohibition) Act of 2015 broadened the definition of rape and most notably did not provide an exemption clause; a purposive interpretation (that respects the spirit of the law) would lead to the conclusion that it includes spouses.[165]

The reforms demonstrate that Kenya could follow the path already charted while remaining attentive to its situational reality, which Spivak

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161 *Ruth Wanjiku Kamande v Republic*, Petition No E032 of 2023, Supreme Court of Kenya at Nairobi (2025) eKLR, paras 75-81.

162 Fareda Banda, '"If you buy a cup, why would you not use it?" Marital rape: The acceptable face of gender based violence', 109 *American Journal of International Law: Unbound* (2015) 324-25.

163 Eyerusalem Jima Haile, 'Addressing marital rape in Ethiopia: An alternative approach', 10(1) *Harayama Law Review* (2021) 19.

164 Prevention of Family Violence Act (No 133 of 1993) (South Africa) Section 5.

165 Violence against Persons (Prohibition) Act, 2015, Laws of the Federation of Nigeria Section 1.

advises, the voices and conditions of the subaltern cannot be subsumed under universal categories.[166] This risks the essentialism which militates against the core of this paper.

Deconstructive (Derridean) intervention

To move beyond the law's habit of treating marital consent as a single, unchanging event, the statute itself must acknowledge the supplement, that every 'yes' implies what it leaves out.[167] First, we ought to amend the Sexual Offences Act to repeal Section 43(5) and replace it with a simple, clear definition: rape is any non-consensual sexual act, irrespective of marital status. This removes the finality of the wedding vow and acknowledges that consent is always conditional, not a one-time guarantee.[168]

Second, we ought to build consent education into existing health and community services. During routine maternal-child health visits, clinics can provide brief, culturally sensitive sessions on mutual sexual autonomy, normalising conversations about ongoing consent rather than a single vow. This practical step anchors the idea that consent must be continually negotiated, and it reaches women and men in spaces they already trust.

Finally, establish specialised domestic violence units within police stations, staffed by officers trained to recognise marital rape. These units would apply a bias-awareness module in their ongoing professional development, using real case studies to dismantle assumptions of permanent spousal consent and to spot patterns of control and coercion that often go unnoticed. This ensures our laws remain robust enough to protect women now yet adaptable enough to heed tomorrow's voices, embodying Derrida's lesson that true justice always outstrips any fixed code.

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166 Spivak, 'Theory in the margin: Coetzee's *Foe* reading Defoe's *Crusoe/Roxana*', 154.

167 Derrida, *Of grammatology,* 145.

168 Derrida, *Of grammatology*, 145.

Conclusion

This paper has argued that the marital rape exemption in Kenya's Sexual Offences Act is not merely a statutory oversight but a symptom of deeper structural logics that render women's sexual autonomy unintelligible within law and culture. Drawing on Derrida's concept of *deconstruction*, the analysis revealed how marital consent is treated as a fixed, originary act, anchored in the wedding vow, and how this fiction suppresses the trace of future refusal, the supplement of ambiguity, and the *différance* that makes meaning always contingent and open. At the same time, Spivak's notion of the subaltern helped frame the married woman not as voiceless, but as structurally unheard: she speaks, yet the law does not recognise what she says as meaningful refusal.

Across the lenses of feminist theory and African feminism, this paper has shown how the law is not simply neutral but embedded in historical and cultural hierarchies that sustain male dominance. From the enduring legacy of coverture and Hale's doctrine to the local cultural norms that define consent as irrevocable, Kenyan law has inherited and naturalised a deeply patriarchal model of marriage in which rape becomes invisible. This paper has thus re-centred the question of consent as not merely legal, but ontological (hence deconstruction): what does it mean to be a legal subject if one's 'no' is never recognised? It does this while being alive to Paglia's reminder that marital rape is an embodied harm.

The recommendations offered aim to intervene at both levels. The general legal and cultural reforms provide essential protections: repealing Section 43(5), affirming ongoing consent, expanding admissible evidence, and aligning with international norms. But equally vital are the deconstructive interventions: reforms that do not merely replace one rule with another, but that unsettle the law's own assumptions.

Ultimately, this paper calls not only for criminalisation but for transformation, a shift from seeing consent as a closed category to understanding it as a dynamic, relational, and repeatable act. Through Derrida, we see that justice cannot be codified once and for all. It lives

undecided, in the open, and in the responsibility to hear what was once unheard. For Kenyan law to honour women's autonomy, it must learn to listen differently. The trace of the subaltern wife remains, not erased, but waiting to be recognised.