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Revealing Insights on Marital Rape and the Violence against Persons (Prohibition) Act in Nigeria

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Abstract: Research reveals that more women than men are victims of marital or spousal rape, a persistent issue in many African marriages due to the archaic belief that wives are the property of their husbands. This belief is rooted in the idea, that upon marriage, the husband and wife become “one” with an implied consent to sex, despite the current trends that recognize a woman as a person in her own right. This study argues for repealing this belief and criminalizing marital rape. For instance, the Violence Against Persons (Prohibition) Act of 2015 (VAPP Act) addresses rape as a non-discriminatory crime, recognizing both men and women as potential victims. However, its failure to classify marital rape as an offense undermines its holistic protection of ‘persons’. The failure to criminalize marital rape can be linked to the continuing prevalence of androcentric theories, which will also be briefly elaborated upon. Through a gendered lens, this study examines the effects of marital rape in Nigeria. The key question posed is whether a woman gives up her personal rights as a human being the day she marries? Analysing the VAPP Act’s innovations, the study posits that, if amended, it could better protect Nigerian women from marital rape. The study recommends enacting specific legislation, amending existing laws, or utilizing judicial activism to criminalize marital rape in Nigeria. To provide a broader perspective, it also examines marital rape laws in other jurisdictions. It concludes that criminalization is necessary to uphold the sanctity of marriage and bodily autonomy, as stipulated for instance in various international instruments.

Keywords: Marriage; Rape; Marital Rape; Nigeria

A. Introduction

There is dearth of authorities on rape, and none specifically addressing marital rape in Nigeria. Sexual abuse and assault, including rape, can occur within and outside family,

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meaning it can occur in both private and public life. Sexual abuse constitutes violence against persons and should be prohibited and is actually prohibited regardless of the context in which it occurs.¹ It is generally accepted that once a person is attacked and sexually assaulted by an assailant, whether outside or inside the house, it is referred to as rape and constitutes a crime. When the offense is committed by a husband against his wife, it is however often not regarded as a serious crime and is rarely classified as rape. Instead, the woman is left victimized, violated, and compelled to continue to live with her assailant, who is capable of repeatedly committing the offence.² Although rape can generally be committed by anyone, including spouses, regardless of gender, it has become a gender-specific crime, predominantly committed by husbands against their wives, ex-wives, estranged wives, or cohabiting partners.

In this regard, the impacts of marital rape on the physical and mental health of victims should be emphasized. Research reveals that an estimated thirty-five per cent of women worldwide have experienced either physical and/or sexual intimate partner violence. Women who have experienced physical or sexual intimate partner violence report higher rates of depression, may have been forced to have an abortion and are at risk of acquiring HIV and/or other sexual diseases, compared to women who have not experienced such violence.³ The violent nature of marital rape may lead to a more deep and lasting damage than any other violent crime. Marital rape not only exposes individuals to prolonged health issues and leads to severe psychological trauma, but it can also destroy the sanctity, trust, and fiduciary nature of the marriage, along with individual autonomy and privacy of the victim.

By now, there is a growing global trend which recognizes that marital rape should be criminalized.⁴ Nevertheless, the Nigerian practices concerning marital rape reveal several shortcomings. The non-consensual sexual intercourse with a spouse may not be considered as a crime in Nigeria yet. In many cases there is still an assumption that a wife gives implied consent to intercourse upon marriage⁵ and that such implied consent can only be

- 1 National Agency for the Prohibition of Trafficking Persons, Violence Against Persons (Prohibition) Act 2015, <https://naptip.gov.ng/download/violence-against-persons-prohibition-act-2015/> (last accessed on 03 February 2025).
- 2 Ogundere J posits that in a prosecution of rape or unlawful carnal knowledge of a female without her consent, it is the duty of the prosecution to prove that a man, the accused, had sexual intercourse with a woman, the victim, that the act of intercourse was unlawful, not being between husband and wife. In other words, the act which would have been unlawful and termed rape and in case of married parties 'marital rape' became lawful on ground of marriage, see *State v Ojo* (1980) 2 NCR 391.
- 3 UN Women, Facts and figures: Ending violence against women, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (last accessed on 03 February 2025).
- 4 *Charles Emeka Ochem / C. T. Emejuru*, An Appraisal of the Jurisprudence of Spousal Rape in Nigeria, *Donnish Journal of Law and Conflict Resolution* 1 (2015), pp. 1-9.
- 5 *Cyprian Okechukwu Okonkwo*, *Criminal Law in Nigeria*, Ibadan 1980, p. 272. This position was also impliedly evidenced by the case of *R v Clarke* - [1949] 2 All ER 448.

revoked by a court order or a binding separation agreement.⁶ An illustrative example in this regard provides the argumentation provided in the 1949 decision *R v Clarke*.⁷ After being married for eleven years, the wife obtained a judicial separation order that included a clause stating that she was no longer obligated to live with her husband.⁸ Within two weeks of obtaining the separation order, the wife was allegedly raped by her husband. Justice Byrne, the presiding judge, acknowledged that a husband cannot be guilty of raping his wife but held that when a wife is granted a legal separation, her implied consent to marital intercourse is revoked. This decision emphasized that it was the legal instrument of separation that served to revoke consent. In other words, in the absence of the separating order, the marital rape would have been exempted, and the victim would have been forced to continue living with the perpetrator.

Regrettably, many women, while carrying out their wifely “duties”, perceive marital rape as a consequence of their failure to be sufficiently submissive as the marital role anticipates. Some equally see the endurance of marital rape as being tolerant of the partner’s fault, even when it is unbearable.⁹ The Quran speaks of the intimate and close relationship of the two spouses in these words: “They are like garments unto you as you are like garments unto them.”¹⁰ Thus, since garment is considered to be one of the most fundamental needs of human beings in all stages of life and it is expected to cover the private parts; most women hide their husband’s weakness and frailty and do not want them to be disclosed to others even when they are being raped. Following this, they end up blaming themselves and the devastating act reduces their level of self-worth and confidence. On the other hand, informed women or women married under the Act¹¹ are sceptical about bringing the offence of marital rape to court because, in the end, the assailant might be convicted for a lesser offence such as assault or wounding.¹²

Against this background, this study advocates for the explicit criminalization of marital rape. The emphasis is on studying legislation regarding rape offenses in Nigeria, with particular focus on the Violence Against Persons (Prohibition) Act of 2015 (VAPP Act). It concludes that the failure of the VAPP Act to explicitly classify marital rape as an offense undermines its comprehensive protection of ‘persons’. The non-criminalization of marital rape can be linked to the continuing prevalence of androcentric theories, which will also be briefly elaborated upon. Using a gendered lens, this study explores the impact of marital

6 *R v Miller* [1954] 2 Q.B 282.

7 *R v Clarke* - [1949] 2 All ER 448.

8 *Ibid.*

9 Section 55 of the Penal Code Act, Chapter 53, Law of Federation of Nigeria, 2004 stipulates that “nothing is an offence which does not amount to infliction of grievous hurt upon any person which is done [...] by a husband for the purpose of correcting his wife, such husband and wife being subject to any native law and custom under which such correction is lawful.”

10 Quran 2:187.

11 Marriage Act, Chapter M6, Law of Federation, 2004.

12 *R v Miller* [1954] 2 Q.B 282.

rape in Nigeria within a global context. The central question it raises is whether a woman forfeits her personal rights as a human being upon marriage? By analysing the innovations in the VAPP Act, the study suggests that an amendment could provide greater protection for Nigerian women against marital rape. It recommends the enactment of specific legislation, amendments to existing laws, and/or the use of judicial activism to criminalize marital rape in Nigeria. To provide a broader perspective, the study also examines marital rape laws in other jurisdictions and considers developments within international law on this issue, by focusing specifically on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, hereinafter the Convention).¹³ It concludes that criminalization is crucial to uphold the sanctity of marriage and bodily autonomy.

B. Consensual Marital Sex Vs. Non-Consensual Marital Rape

As this study advocates for explicitly criminalizing marital rape, the question arises of how to define marital rape. Marital rape remains a difficult concept to grasp. This is because, it is assumed that in marriage spouses' vow to each other for life and give themselves to one another till death. This belief is grounded in androcentric theories, which are discussed further below, and contributes to the reasons why some states have yet to criminalize marital rape. Though, for instance Bryan Andrew defined marital rape as "a husband's sexual intercourse with the wife by force or without her consent";¹⁴ the author of this study simply defines marital rape as a situation where either of the parties of the marriage has sexual intercourse with the other, to whom he/she is lawfully married without his/her consent.

It is important to distinguish between marital rape and consensual marital sex to clarify the boundaries of consent within marriage. Marriage is a contract between two adults, based on mutual consideration and respect. Throughout the world, especially in Africa, it is a respected institution that grants spouses rights and duties. Marriage be loosely defined as the legal union of a couple as spouses.¹⁵ In that sense, marriage constitutes a contract. Marriage is further defined as the mutual relation of husband and wife ("wedlock"). It is the institution in which men and women are joined in a special kind of social and legal relationship, primarily for the purpose of creating a family.¹⁶ Marriage legalizes the sexual relations between man and woman in society for the perpetuation of the race, permitting lawful expression of passions, preventing licentiousness, and enabling the procreation of children.¹⁷ The practice of marital sex is considered a non-discriminatory conjugal right.

13 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979).

14 *Bryan Andrew Garner*, Black's Law Dictionary Ninth Edition, Eagan 2009, p. 1059.

15 *Ibid.*

16 *Abdur Rahman Biswas*, Biswas Encyclopedic Law Dictionary, New Delhi 2008, p. 979.

17 *Ibid.*

Religious Christians viewed marriage as a union where there is no denial of a conjugal right: “The husband should fulfil his marital duty to his wife, and likewise the wife to her husband. The wife does not have authority over her own body but yields it to her husband. In the same way, the husband does not have authority over his own body but yields it to his wife. Do not deprive each other except perhaps by mutual consent and for a time, so that you may devote yourselves to prayer. Then come together again so that Satan will not tempt you because of your lack of self-control.”¹⁸ Islam also protects the marital sex, and satisfying the sexual appetite of one's spouse is a legitimate objective of sexual relations and even of marriage itself. The right of gratification belongs to both, the husband and wife, and it is a mistake to assume that only the husband enjoys this privilege.¹⁹ One of the objectives of marriage in Islam, which is equally upheld by Christians, is the preservation of morals and chastity.²⁰ Another objective of marriage in Islam is upholding love and compassion. For example, the Quran provides as follows: “And of His Signs is that He has created mates for you from your own kind that you may find peace in them and He has set between you love and mercy. Surely there are Signs in this for those who reflect.”²¹ According to the Quran, the relationship between husband and wife should be one of love, mercy, and mutual understanding. Allah also commands men to treat their wives in a good manner when it admonishes: “And consort with your wives in a goodly manner, for if you dislike something about them, it may be well that you dislike something which Allah might yet make a source of abundant good.”²²

Marital rape cannot be considered a form of good treatment toward the wife though, as it disregards her lack of consent for this act of intimacy. More legally speaking, marital rape constitutes an act of sexual assault and domestic violence²³ occurring when an individual commits a sexual act²⁴ against their spouse or ex-spouse whether living or not living in the same residence,²⁵ against their will or in the absence of concern or “unequivocal voluntary agreement”.²⁶ Marital rape takes place in coercive circumstances and constitutes a violation

18 1 Corinthians 7: 3-5, NIV.

19 Mohammed Shoiab Ibn Ebrahim Adam, Guidelines to Intimacy in Islam, <https://irp-cdn.multiscreensite.com/3844bd1d/files/uploaded/Guidelines%20to%20intimacy%20in%20Islam%20pdf.pdf> (last accessed on 03 February 2025).

20 Maulana Abdul A'la Maudoodi, the Laws of Marriage & Divorce in Islam, Kuwait 1983, p. 7.

21 Quran 30:21.

22 Quran 4:19.

23 United Nations, UN Handbook on sexual violence legislation, New York 2009, pp. 24 ff.

24 “[Invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”, see e.g. International Criminal Court, Elements of Crime, Article 7 (1) (g) 1 Crime against humanity of rape, <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> (last accessed on 03 February 2025).

25 See Article 36 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

26 UN Handbook on sexual violence legislation, note 23, pp. 26 ff.

of bodily integrity and sexual autonomy.²⁷ The lack of consent and the presence of force next to penetration are often considered crucial elements for an act to be considered as rape. It was however not until the latter half of the twentieth century that marital rape was even recognized as a legal problem.

C. Revisiting Different Theories on Rape

Contemporary understandings of what constitutes rape are still heavily influenced by ancient theories of rape on this matter. Therefore, this section revisits the most influential theories to examine their impact on issues such as marital rape. Historically, there are three theories that “justify” the exemption of accusing husband of rape: thereby undermining the concept of marital rape. The first documented legal statement regarding marital rape, popularly known as implied theory, occurred in 1736. Back then, Sir Mathew Hale, who served as chief justice in England, published the following passage in the “History of the Pleas of the Crown”:²⁸ “But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”²⁹ This statement became known as the “Lord Hale doctrine” and represented a common-law exemption for marital rape, under which husbands could not be accused of raping their wives.³⁰

By the middle of 18th century, the marital rape exemption gained further support when Blackstone introduced the “unity theory”, which viewed the husband and wife as becoming “one” in marriage.³¹ According to this theory, women lost their own civil identities in marriage, and they were subsequently viewed as their husbands’ property.³² In Blackstone’s Commentary on the Laws of England (1765), he wrote, “Husband and wife are legally one person. The legal existence of the wife is suspended during marriage, incorporated into that of the husband. ...If a wife is injured, she cannot take action without her husband’s concurrence.”³³ This illustrates why at that time, women could not obtain immigration passes without their husband’s consent. It is important to note that in Nigeria, prior to

27 Committee on the Elimination of Discrimination against Women, General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19 (1992).

28 *Mathew Hale et al.*, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, Philadelphia 1847, p. 69.

29 *Ibid.*

30 *Jennifer A. Bennice / Patricia A. Resick*, Marital rape: history, research, and practice, *Trauma Violence Abuse* (2003), pp. 228-246.

31 *Ibid.*

32 *Small A. Mark / Pat A. Tetreault*, Social Psychology, Marital Rape Exemptions, *Behavioral Sciences & Law* 8 (1990), pp. 141 ff.

33 *Bennice / Resick*, note 30.

2009³⁴, this “unity theory” was operational in Nigeria as the Nigerian Immigration Services (NIS) required married women to obtain written consents from their husbands before applying for an international passport. Although the Immigration Act³⁵ does not permit discrimination, married women applying for Nigerian passports were still required to submit the written consent of their husbands. The NIS claimed that this requirement was in-line with its administrative policy, despite how significantly the so-called policy violated the fundamental human rights of married women.³⁶

During that middle of 18th century, rape was considered a crime against another man’s property rather than a violation against a woman’s body and personal integrity.³⁷ As a result, common law dictated that it was impossible for husbands to steal (i.e., rape) their own property (i.e., wives); thus, marital rape was considered a legal impossibility.³⁸

The “unity theory” supported the view of women as property, while the separate spheres theory further eroded the women’s civil identity. Under this theory, men were considered to inhabit the political/public sphere, whereas women were relegated to the family/private sphere.³⁹ Because women were already considered the property of their husbands, there were no laws to restrain male power within the private realm. As a result, husbands were free to abuse their wives with little fear of penalization.⁴⁰ In *R. v. J.*,⁴¹ Justice Rougier would have eliminated marital exemption; however, he adhered to what he felt was his judicial duty and interpreted “unlawful” as he believed it meant at the time the Act was passed.⁴² Meanwhile, the common belief that spousal abuse was a private matter further dissuaded criminal justice officials from taking any legal action.⁴³

34 When this NIS policy was challenged by Dr. Priye Iyalla-Amadi (wife of popular author- Elechi Amadi) at the Federal High Court, Port Harcourt, Rivers State, Nigeria and the Federal High Court (per Justice G. K. Olotu) delivered a reassuring judgment on 15 June 2009, reiterating supremacy of the Nigerian constitution and that the so-called policy of NIS was archaic and a violation of human rights. Since 2009 till date, there is no known report that the celebrated judgment of the Federal High Court has been appealed against by the NIS. So, NIS is by all standards and measures bound by the said judgment.

35 Immigration Act, Laws of the Federation of Nigeria, 2015.

36 *Onyekachi Umah*, Married Women and the Need for Husband’s Consent for International Passport, <https://sabilaw.org/married-women-and-the-need-for-husbands-consent-for-international-passport/> (last accessed on 03 February 2025).

37 *Tetreault*, note 32.

38 This is commonly known as property theory.

39 *Small / Tetreault*, note 32.

40 *Ibid.*

41 [1991] 1 All E.R. 759, 765 (Crown Court 1990).

42 Sexual Offences (Amendment) Act of 1976.

43 *Susan Caringella-Macdonald*, The Relative Visibility of Rape Cases in National Popular Magazines 4 (1998).

All theories, but especially the implied consent theory thrived. Previously in Nigeria, women were referred to as a chattel capable of being inherited.⁴⁴ The impact of legislation such as *Married Women Property Act 1870*⁴⁵ and *Married Women Property Act 1882*⁴⁶ is so glaring that the unity theory or the practice of referring to a wife as a property are now considered obsolete and mundane. Today, a woman in a statutory marriage inherits her husband's property just as he inherits hers.⁴⁷ They have mutual and equal rights over their properties, and the same should extend to their bodies. A great deal of revolution and judicial activism was necessary for women to achieve their current status regarding property rights. Thus, the revolution that led to women's inheritance in Nigeria is what this study canvasses in relation to criminalizing marital rape.

D. Analysing Nigeria's Legislation on Rape Offenses

After elaborating the prevailing theories on rape which continue to hinder the criminalization of rape, this part will focus on Nigeria's legislation on rape offenses. This part elaborates Nigeria's stance on rape more generally before addressing the specific offense of marital rape, which is not explicitly criminalized. Special attention will be paid on the Violence Against Persons (Prohibition) Act of 2015 (VAPP Act) and its potential to address marital rape. Conclusively, the concept of rape has been expanded under Nigerian Law to accommodate socio-realities but the desired revolution for criminalization of marital rape is yet to be attained.

I. What Constitutes as Rape?

Historically, in Nigeria, rape was defined as unlawful sexual intercourse with a woman against her will. The essential elements of the crime included sexual penetration, force, and lack of consent.⁴⁸ The absence of consent is the main component that determines if the act of rape occurred. In *Idi v State*, the Court per Ibrahim Shata Bdliya JCA made reference to the case of *Posu v State*⁴⁹ defined rape as follows:

“[.] an unlawful sexual intercourse with a female without her consent. It is an unlawful carnal knowledge of a woman by a man to have sexual intercourse forcibly and against her will. It is the act of sexual intercourse committed by a man with a

44 *Suberu v Sunmonu* (1957) 2 F.S.C. 31.

45 This Act enabled women to keep their income (but not other property) for their own use.

46 This Act enables a married woman to keep separate possessions. Under this Act, she could sue and be sued in her own right over disputes relating to her separate property.

47 *Ifeoma Lynda Agbo*, Palm Tree Justice and Settlement of Matrimonial Property under A Statutory Marriage in Nigeria, *International Review of Law and Jurisprudence* 3 (2021), p. 72.

48 *Ogunbayo v State* (2007) 8 NWLR (Pt. 1035) 157; *Idi v State* (2016) LPELR-41555(CA).

49 2 Nigerian Weekly Law Report (NWLR) (Part 1234) P. 392, 414 -416 (2011).

woman who is not his wife without her consent ... or with her consent if the consent is obtained by force or by means of threat or intimidation of any kind or by fear or harm, or by means of false and fraudulent representation as to the nature of the act or in the case of a married woman by personating her husband.”⁵⁰

Force as an ingredient of rape encompasses ‘constructive force’. This accounts for cases in which no force is required beyond what is inherent in the act of the intercourse. The requirement of force is simply a means of demonstrating that the unlawful violation of the woman was without her consent and against her will.⁵¹ The Court maintained that among the cogent evidence that the prosecution must adduce to establish the offence of rape is that the prosecutrix was not the wife of the accused.⁵² In other words, a man can assumingly not rape his wife.

In the era when women were perceived as only victims of rape, women who were raped were expected to have physically resisted to the utmost of their power, otherwise their assailant might not be convicted of rape. This resistance is seen as evidence that the act was done without the woman’s consent. However, even when a woman cooperates with the assailants due to threat, the lack of resistance should not absolve the assailant of responsibility.⁵³ Thus, there is different between submission and consent. Submission may be induced by threat or promise. This is further explained by the dictum of Coleridge in *R. v Davy*:⁵⁴

*“There is different between consent and submission, every consent involves a submission but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description, was not consenting, on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be consent as will justify the prisoner in point of law”.*⁵⁵

Surprisingly, a husband in Nigeria could have sex with his wife against her will without being charged with rape, even in cases where there is bodily harm that demonstrates physical resistance and absence of consent. There is no denial that the biological makeup of the female sexual organ is such that when a woman is ready to have sex, the relevant hormones are released by her body to prepare her physically and psychologically for the

50 See also Section 357 Criminal Code Act C38, Laws of the Federation of Nigeria (LFN), 2004; Section 282 of the Penal Code Chapter P3, Laws of the Federation of Nigeria (LFN), 2004.

51 *Rollin M Perkins / Ronald N. Boyce*, Criminal Law, New York 1982, pp. 211-212.

52 *Ogunbayo v State* (2007) 8 Nigerian Weekly Law Report (NWLR) (Pt. 1035) 157.

53 *Udjour v State* (2018) Law Pavilion Electronic Law Report (LPELR)-43928(CA).

54 (1941) 9 C & P. 722, 7224.

55 *Suleiman Ikepechukwu Oji / Idiat Funmilol Akande*, Mental Element of Rape, ResearchGate, https://www.researchgate.net/publication/334561084_MENTAL_ELEMENT_OF_RAPE (last accessed on 03 February 2025).

process, which includes providing lubrication for smooth penetration to occur. How does one however explain a situation where a wife tells her husband that she is not in the “mood” for sex and yet the man defies her decision to painfully penetrate her? Rape is legally defined under the *Criminal Code Act* of Nigeria as:

[.] having unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in case of a married woman, by personating her husband.⁵⁶

Section 6 of the *Criminal Code Act*,⁵⁷ nailed the plight of wife rape victim when it provides that: “unlawful carnal knowledge” means carnal connection which takes place otherwise than between husband and wife.”

The *Penal Code* which is applicable in the Northern part of Nigeria expressly provides that rape cannot occur between husband and wife: “sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.”⁵⁸ Thus, if the non-attainment of puberty of the married women can be proven, the husband can be convicted of rape.

Other means recognized under the *Criminal Code Act* by which an act against a married woman amounts as rape is if someone impersonates her husband. In *Adonike v State*⁵⁹ one of the elements that a prosecutor must prove in a rape case is that the prosecutrix was not the wife of the accused. The offence of rape is punishable under the *Criminal Code Act* by imprisonment for life, with or without caning.⁶⁰ Additionally, rape is punishable under the *Penal Code* with imprisonment for life or for a lesser term, and the offenders shall also be liable to a fine.⁶¹

Rape is despicable and its effect remain unimaginable. The despicable nature of this sexual act warranted a notable pronouncement in the case of *Edwin Ezigbo v The State*⁶² where Justice Muhammed J.S.C shared these findings:

[.] the facts revealed in this appeal are sordid and can lead to a conclusion that a man can turn into a barbaric animal. When the “criminal” was alleged to have committed the offence of rape, he was 32 years. His two young victims: Ogechi Kelechi, 8 years old, and Chioma, 6 years, were, by all standard underage. What did the appellant want to get out of these underage girls [?]. Perhaps, the appellant

56 Section 357 of the Criminal Code Act, Chapter C38, Laws of the Federation of Nigeria (LFN), 2004; Section 282 Penal Code Chapter P3, 2004.

57 Chapter C38, Laws of the Federation of Nigeria (LFN), 2004.

58 Section 282 (2) of the Penal Code.

59 (2015) Law Pavilion Electronic Law Report (LPELR)-24281(SC).

60 Section 358 of the Penal Code.

61 Section 283 of the Penal Code.

62 (2012) 16 Nigerian Weekly Law Report (NWLR), Pt. 1326.

forgot that by nature, children, generally, are like animals. They follow anyone who offers them food. That was why the appellant, tactfully, induced the young girls with ice cream and zobo drinks in order to translate his hidden criminal intention to reality, damning the consequences. Honestly, for an adult man like the appellant to have carnal knowledge of underage girls such as the appellant's victims, is very callous and animalistic. It is against the laws of all human beings and it is against God and the State. Such small girls and indeed all females of whatever age need to be protected against callous acts of criminally likeminded people of the appellant's class. I wish the punishment was heavy so as to serve as deterrent."

Although the offence committed by the assailant above falls within the offence of defilement due to the victims' age, Justice Muhammed's analyses is apt and should not be ignored; it is even an abomination for a thief to steal what is bestowed on him/her for safekeeping and this is further buttressed by an Igbo adage that "a dog does not eat bone hung on its neck".

II. Promises and Pitfalls of the VAPP Act in Combating Marital Rape

A novel development in Nigeria is the adoption of the Violence Against Persons (Prohibition) Act of 2015 (VAPP Act), which addresses rape as a non-discriminatory crime, recognizing both men and women as potential victims. It is important to mention that the VAPP Act has repealed the Criminal Code, Penal Code and Criminal Procedure Code. Against this background, this section will reflect on its potential promises and pitfalls in combating marital rape. Analysing the VAPP Act reveals that the definition of rape in Nigeria is now more encompassing and broader. Section 1(1) of VAPP Act provides: "A person commits the offence of rape if (a) he or she intentionally penetrates the vagina, anus, or mouth of another person with any other part of his or her body or anything else; (b) the other person does not consent to the penetration; or (c) the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse." Except where the exceptions apply, the penalty for rape in Nigeria is life imprisonment.⁶³

Despite the comprehensive provisions of the *VAPP Act*, it is applicable only to the Federal Capital Territory (FCT), Abuja, and only the High court of FCT has jurisdiction over crimes created in the *VAPP Act*. As a result of the innovations of the *VAPP Act*, many states have passed their own versions of the Act applicable within their respective jurisdictions.⁶⁴

63 Section 1 (2) of the VAPP Act.

64 Anambra, Bauchi, Ekiti, Enugu, Kaduna, Oyo, Benue, Ebonyi, Ondo, Osun, Ogun, Cross River, Lagos, Plateau, Akwa Ibom, Abia, Kwara, Yobe, Jigawa and recently, Rivers State.

In general, the VAPP Act is considered to be the first piece of legislation in Nigeria which recognizes that men are capable of being raped as well. The old school of thought believed that the act of rape can only be committed by a man, in that sense, the penis is perceived as the sole instrument of penetration and the vagina as the sole object of rape. This belief presumes that a male person under the age of 12 years is incapable of having carnal knowledge⁶⁵ and thus, cannot be guilty of the offence of rape. Although, a male child under 12 years may be charged of rape, he can be convicted of indecent assault.⁶⁶

For the first time, the VAPP Act classifies unlawful anal or oral sex as rape⁶⁷, rather than classifying these acts as mere sexual assault.⁶⁸ In addition, the VAPP Act was radical in its definition, stating that the instrument of penetration does not have to be a sex organ of another person;⁶⁹ it can include other parts of the body, such as the hand or even an object such as a dildo, pen, pencil, cucumber, etc.

The Act removes the judge's discretion to sentence the accused to less than the maximum imprisonment and provides that if the accused is found guilty of rape, they must be sentenced to a minimum of twelve years' imprisonment.⁷⁰ However, the judge still has the discretion to impose a sentence longer than twelve years, including life imprisonment.⁷¹

One of the key innovations of the VAPP Act is the recognition that justice in criminal cases is tripartite:⁷² "Justice is a three-way traffic, justice for the victims of the offence who is crying for justice from the grave, justice for the state and justice for the accused person who is standing trial for murder."⁷³ In this instance, surviving victims of rape can be financially compensated. This is a welcoming development because the compensation assists the survivor of rape in rebuilding and resuscitating his/her life after the act of rape. For instance, the victim of rape might need to go for therapy, which is most often the case. The bill of such therapy should not be paid by the victim of rape. Instead, the accused person will be ordered to finance the bill.

The VAPP Act provides that the name of the rapist may be entered into a register for convicted sexual offenders, which will be made accessible to the public.⁷⁴ A sex offender registry is a system designed to allow government authorities to track the residence and activities of sex offenders, including those who have completed their criminal sentences.

65 Section 30 of the Criminal Code Act.

66 Sections 223 and 231, Administration of Criminal Justice Act, 2015.

67 Section 1 (1) (a) of the VAPP Act.

68 Section 214 of the Criminal Code Act.

69 Section 1 (1) (a) of the VAPP Act.

70 Section 1 (2) (b) of the VAPP Act.

71 Sections 2 & 2 (2) (a) of the VAPP Act.

72 Section of the 1 (3) VAPP Act.

73 Per Opata, JSC in the case of Josiah v State (SC. 78/1969) [1970] 10 (19 June 1970).

74 Section 1 (4) of the VAPP Act.

The National Agency for the Prohibition of Trafficking in Persons (NAPTIP) refers to it as a one-stop solution to reporting and curbing sexual offences.⁷⁵

As exemplified in this analysis, the VAPP Act prohibits all forms of violence in both private and public life and provides maximum protection and effective remedies for victims.

Moreover, the VAPP Act makes consequential amendments to the *Criminal Code Act*, *Penal Code*, and *Criminal Procedure Code* to the effect that any provision of the VAPP Act shall supersede any other provision on similar offences in the *Criminal Code Act*, *Penal Code* and *Criminal Procedure Code*.⁷⁶

It is interesting to interrogate the effectiveness of the above innovations found in the revolutionary nature of the *VAPP Act* in bolstering the fight against sexual offences, in particular the largely unaddressed topic of marital rape. That is; has the mischief been cured? The pertinent answer remains that it has, by no means, addressed the issue of marital rape and the plight of married women regarding marital sexual harassment in general. Marital rape remains a widespread problem for women that has existed for centuries throughout the world.⁷⁷ Despite this fact, marital rape has been largely overlooked in the rape and domestic violence literature. The experience of marital rape has been validated for its victims legally, culturally, and otherwise. As a result, the proliferation of validation continues to have serious implications for the victims of this crime.

III. Alternative Roads?

The absence of a specific legislation criminalizing marital rape might lead to a repletion of the occurrence in *R. v. J.*,⁷⁸ where Justice Rougier, faced with interpreting the word “unlawful” within the definition of rape, was torn between his desire to eliminate the marital exemption and his obligation to comply with the Sexual Offences (Amendment) Act of 1976. He further pronounced that:

“Once Parliament has transferred the offence from the realm of common law to that of statute ... then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallized as at the making of the [Sexual Offences] Act and only Parliament can alter it.”

In the interim or if the legislature fails to criminalize marital rape, nothing prevents the court from employing activism and extending the definition of rape to marital rape. The

75 National Agency for the Prohibition of Trafficking Persons, Nigeria Sexual Offender & Service Provider Database, <https://nsod.naptip.gov.ng/> (last accessed on 03 February 2025)

76 Section 45 of the VAPP Act.

77 *Bennice / Resick*, note 30, p. 228.

78 [1991] 1 All E.R. 759, 765.

courts can explore the provision of section 34 of the 1999 Constitution of the Federal Republic of Nigeria which provides for the right to dignity of human persons and interpret marital rape as one concepts that enjoys constitutional vindication. In addition, the preamble to the Fundamental Rights (Enforcement Procedure) Rules encouraged the court to expansively and purposely interpret and apply provisions of the Constitution, especially Chapter IV, as well as the African Charter, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.⁷⁹ Also, for the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court are mandated to respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions.⁸⁰ After all, Oliver Wendel Holmes defined law as: "the prophesies of what the court will do in fact, and nothing more pretentious."⁸¹

E. A Global Trend: Towards the Criminalization of Marital Rape

It is evident from the discussions so far in this work that the plight of the female folks, particularly married women, can be linked to that of an endangered species due to the archaic legal frameworks on the subject. More worrisome is consensus in the dominant theories exploring spousal rape. The English common law system, which by extension applies to Nigeria through common law inheritance, at one time or another had little regard for the sanctity of a wife's right not to be violated by her spouse. The exemption for marital rape in Nigeria does not align with the fundamental principles of justice and equality, which is the basic feature of the Nigerian Constitution. The advancement in the international legal system is undoubtedly shaping the current trend to operate within the ambiance of human rights. These developments suggest that maintaining exceptions for marital rape are unjust.⁸²

In recent years, the definition of rape was expanded *globally*, to include marital rape as well. This was achieved by revising the relevant legislation to keep up with changing circumstances. The major factor that led to criminalization of marital rape in these countries is not only the effects of marital rape on its victims but also the autonomy of a woman's body. If this autonomy is not protected, it ultimately affects the security, liberty, integrity and dignity of all human beings in the long run.

79 Preamble 3 (a), Fundamental Rights (Enforcement Procedure) Rules, 2009.

80 Preamble 3 (b), *Ibid*.

81 *Stephen R. Perry*, Holmes versus Hart: The Bad Man in Legal Theory, in: Steven J. Burton (ed.), *The Path of the Law and its influence: The Legacy of Oliver Wendell Holmes*, Cambridge 2000, pp. 158 ff.

82 *Theresa Fus*, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, *Vanderbilt Journal of Transnational Law* 20 (2006).

I. Criminalizing Marital Rape Within Other Jurisdictions

In the United States of America, by 1993, all states had removed marital rape exemptions from their laws concerning rape. The first case to charge a man for marital rape was *Oregon v Whiteout*⁸³ where the accused forcefully engaged in sexual intercourse with his wife after they had a fight. This case, although the accused was acquitted, drew national attention to the topic, and highlighted the need to criminalize marital rape. The public controversies led to the removal of “marital rape exemption” by the amendment of the *Oregon Criminal Code*. In *People v Liberta*,⁸⁴ the United States of America Court of Appeal held that the marital rape exemption was unconstitutional. Judge Sol Wachtler ruled that the exemption for marital rape was unconstitutional: “Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. A marriage license should not be viewed as a license for a husband to rape his wife with impunity. A married woman has the same right to control her body as does an unmarried woman”.⁸⁵

Another illustrative example is the development related to the California Penal Code, particularly California's repeal of section 262, where marital rape is treated as all other forms of rape. Prior to its repeal on October 8, 2021, spousal rape was regulated in the separate section 262. However, with the passage of Assembly Bill 1171, rape between spouses is now prosecuted under section 261 of the Penal Code, treating it largely the same as rape between non-spouses.⁸⁶ Moreover, the California Penal Code encompasses exhaustive grounds for scenarios that can constitute marital rape, while also avoiding associating acts of rape exclusively with the male gender. In other words, marital rape is any sexual act committed by a spouse on the other partner without the partner's express consent, or where such consent is obtained by force or threat.⁸⁷

⁸³ (1978) 108, 866, Circuit Court, County of Marion, Oregon.

⁸⁴ (1984) 64 N.Y.2d 152.

⁸⁵ *People v Liberta* (1984) 64 N.Y.2d 152

⁸⁶ California Legislative Information, Assembly Bill No. 1171, https://leginfo.legislature.ca.gov/faces/sbillTextClient.xhtml?bill_id=202120220AB1171 (last accessed on 04 February 2025).

⁸⁷ *Adeniyi Israel Adekunle*, Marital Rape: An Examination of the Current Position of Law in Nigeria, This Day, 07.09.2021, <https://www.thisdaylive.com/index.php/2021/09/07/marital-rape-an-examination-of-the-current-position-of-law-in-nigeria/> (last accessed on 03 February 2025).

Other countries, including Canada (1983)⁸⁸ and France (1990)⁸⁹ have also taken steps to criminalize marital rape. Some African countries including South Africa (1993),⁹⁰ Zimbabwe in 2001,⁹¹ and Sierra Leone in 2012⁹² have enacted similar legislation.

As the Nigerian legal system is based on common law due to colonization, Nigeria is expected to follow the trend in United Kingdom, where the marital rape exemption has been outlawed as well. In the United Kingdom, the case of *R v R*⁹³ abolished the marital rape exemption, with the House of Lords describing it as an anachronistic and offensive legal fiction.

In sum, other legal systems have recognized the necessity of neutralizing the gender of rape, acknowledging that, aside from a woman being raped by a man, a man can also be raped by a woman; and a boy or man can be raped by another man. Consequently, the objects of rape have been further defined to include vagina, anus, mouth or any other part of the body. Meanwhile, the requirement of force has been watered. It has been suggested that emphasising on coercion suggests that rape is mostly a crime of inequality, whether of physical, relational or status-based. Having non-consent as the element of rape focuses on the deprivation of sexual freedom.⁹⁴ Most Civil-Law-states define rape by mentioning coercive measures of the offender or coercive circumstances that lead to a breach of the victim's will and thereby facilitate the sexual act. The Common Law-states establish the offence of rape by proving an inner state of mind, namely the lack of consent of the victim to the sexual act.⁹⁵ Many jurisdictions have moved towards a model of affirmative consent, meaning consent is not assumed. Rather a positive obligation is placed on the individuals to ensure that the other party is consenting.⁹⁶

II. International level

On the international level, which heavily influences contemporary conceptions of rape, it is particularly important to refer to the role of the Convention on the Elimination of All Forms

88 The introduction of the *Canadian Charter of Rights and Freedoms* in 1982 provided the impetus for the criminalization of marital rape in Canada.

89 *Rita J. Simon*, A comparative perspective on major social problems, Lanham 2001.

90 Spousal rape was criminalized by article 5 of the Prevention of Family Violence Act, 1993.

91 Section 68 of the Criminal Law Act, 2004.

92 Sections 5 and 6 of the Sexual Offences Act, 2012.

93 (1992) 1 AC 599.

94 *Catharine A. MacKinnon*, Defining Rape Internationally: A Comment on Akayesu, *Columbia Journal of Transnational Law* 44 (2005), pp. 940-958.

95 *Alexandra Adams*, The First Rape Prosecution before the ICC: Are the Elements of Crimes Based on a Source of International Law? *International Criminal Law Review* 15 (2015), pp. 1098-1121.

96 *Kiran Grewal*, The Protection of Sexual Autonomy under International Criminal Law, The International Criminal Court and the Challenge of Defining Rape, *Journal of International Criminal Justice* 10 (2012), pp. 373-396.

of Discrimination against Women (CEDAW, hereinafter ‘the Convention’). The Convention itself does not expressly prohibit marital rape and generally does not contain explicit references to violence against women and girls.⁹⁷ The CEDAW General Recommendations 12, 19 and 35, however “clarify that the Convention, as per Article 2 on non-discrimination, extends to violence against women, and also makes detailed recommendations to States to address violence against women.”⁹⁸ The CEDAW General Recommendation No. 19 (1992) was historic as it clearly framed violence against women as a form and manifestation of gender-based discrimination, used to subordinate and oppress women. It unequivocally brought violence outside of the private sphere and into the realm of human rights. The Recommendation defines Gender Based Violence against Women as, “[...] violence that is directed against a woman because she is a woman or violence that affects women disproportionately [...]” to the inclusion of “[...] acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship.”⁹⁹ CEDAW General Recommendation No. 35, updating Recommendation No. 19, explicitly calls for the criminalization of marital rape and other acts of sexual violence as crimes against women’s right to personal security and their physical, sexual and psychological integrity.¹⁰⁰ Despite this, the *Declaration on the Elimination of Violence against Women* (1993) specifically focused on addressing violence against women, and Article 2 (a) of the Declaration explicitly refers to marital rape as a form of violence.¹⁰¹

H. Concluding Remarks

Although marital rape is not expressly considered as a criminal offence in Nigeria, human beings evolve and our societies changes. Therefore, our laws must keep up with the changes and define our interactions in the context of new societies. Many areas of Nigerian laws are not responding to societal changes. Areas such as marital rape need the guiding hands of legislature or pronouncements from the courts to liberate its victims, who are mostly women. It is suggested that in light of the growing and disturbing statistics of domestic violence and sparsely reported cases of marital rape in Nigeria, the Nigerian lawmakers should rethink on the criminalization of marital rape in Nigeria. This recom-

97 Articles 1-3 and 5 (a) of the CEDAW.

98 UN Women, Global norms and standards: Ending violence against women, <https://www.unwomenn.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards> (last accessed on 03 February 2025).

99 CEDAW General Recommendation No. 19: Violence against women, para. 6, see also CEDAW General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19 (1992), para. 12.

100 CEDAW General Recommendation No. 35 (2017), para. 33.

101 Declaration on the Elimination of Violence against Women Proclaimed by General Assembly resolution 48/104 of 20 December 1993.

mendation is apposite, in line with the current international trend of the criminalization of marital rape. For instance, other jurisdictions such as the United States, South Africa, Zimbabwe and Sierra Leone as evidenced in this study, have necessarily criminalized marital rape.

Given this, Nigeria should emulate the growing global trend and take steps to criminalize marital rape by reshaping the archaic legal regimes on the subject to match international standards. Since Nigeria, as seen in VAPP Act, has adopted the modern social-legal realities in respect of rape, a non-gender discriminatory approach to marital rape should be revisited, and it is essential to establish specific legislation on this special issue. This is increasingly urgent, the absence of law criminalizing marital rape leaves victims with no recourse, trapping them in a horrible situation. Additionally, it emboldens those inclined to commit such crimes, as they have no fear of legal retribution.

It is equally highly recommended that if not feasible to establish a new and independent law specifically addressing marital rape, the VAPP Act should be amended to incorporate marital rape into the definitions of rape and violence. This amendment should provide adequate penalties, such as life imprisonment. Any spouse who suffers marital rape should be separated from the perpetrator, who should face punishment. A comprehensive framework should be established that includes protection orders, institutions for recovery and therapeutic services to support victims of marital rape, given the intimate nature of the crime.

Finally, the reluctance to criminalize marital rape in Nigeria and most common law countries can be attributed to the opinions of Hale and other prevailing theories on rape. It is important to note that these views have been widely contested though and have been overtaken by event, circumstances and legislations.¹⁰² In other words, the reason for not criminalizing marital rape is obstinate, mundane, obnoxious, and sacrilegious.

The core element of rape is penetration, as emphasized in *Udjor v State*¹⁰³ where the court held, that in a rape case, evidence of penetration must be established. Unless penetration is proven, the prosecution will fail. However, even slight penetration is sufficient, and it is not necessary to demonstrate any injury or the rupture of the hymen to constitute the crime of rape.¹⁰⁴

With the enactment of the *VAPP Act*, most of the elements of rape have been expanded. For instance, Section 1 1 (a) of the *VAPP Act* broadened the instrument of rape to include

102 Justice Owen in *R v R* [1991] 1 All E.R. 748 rejected Hale's statement as being made "at a time when marriage was indissoluble".

103 Law Pavilion Electronic Law Report (LPELR)-43928(CA) (2018).

104 *Okoyomon v The State* (1972) 1 Nigerian Monthly Law Report (NMLR), p. 292, (1972) 1 SC, p. 21 at 33.

dildo, pen, pencil, cucumber, etc. Therefore, as the elements of rape have been broadened, the definition of victim of rape should likewise be expanded to include husbands and wives.



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