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MARITAL RAPE AND GENDER-BASED VIOLENCE IN NIGERIA: INTERROGATING THE ADEQUACY OF CRIMINAL LAW AND THE IMPERATIVE FOR REFORM

By

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Abstract

Of all the types of violence against women, none is as obnoxious as rape. Rape remains a contentious issue in Nigerian criminal jurisprudence, raising fundamental questions about the adequacy of existing legal protection against sexual and gender based violence. The aim of the paper is to critically examine the legal framework governing marital rape and gender-based violence in Nigeria, with a view to assessing the adequacy of criminal law, identifying legal and institutional gaps in the protection of married women against non-consensual sexual intercourse and proposing reforms necessary to ensure consistency with the constitutional guarantees of human dignity, equality and fundamental rights, as well as Nigeria's applicable international human rights obligations. Adopting a doctrinal research methodology, the article examines the provisions of the Criminal code Act, the Penal code Act, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and applicable international and regional human rights instruments. The paper argues that Nigerian criminal law does not provide adequate and consistent protection against marital rape because certain statutory provisions continue to recognize an exception for sexual intercourse within the marriage. The paper further argues that marriage should not constitute a defence to rape and that the criminal law must protect married women against non-consensual sexual intercourse on the same basis as other persons. The paper finds that the Nigerian legal framework is fragmented and inadequate in its treatment of marital rape. It recommends amongst others that the National Assembly and relevant state legislature should amend applicable criminal legislation to remove marital exceptions and expressly recognize that marriage does not constitute to consent to sexual intercourse. It concludes that the continued recognition of marital exceptions to rape undermines the effectiveness of criminal law as an instrument for promoting women against gender based violence.

Keywords: *Marital rape, gender-based violence, human dignity, legislative reform, Nigerian Criminal Law*

1. INTRODUCTION

Marriage is traditionally regarded as a legally recognized union that creates reciprocal rights and obligations between husband and wife. Nonetheless, the question of whether marriage can justify the exclusion of non-consensual sexual intercourse from the Nigerian criminal offence of rape remains an important issue in Nigerian contemporary criminal jurisprudence.

The old fashioned assumption that a wife after marriage gives irrevocable consent to sexual intercourse has increasingly been challenged by constitutional provisions recognizing bodily integrity, and essential components of human dignity coupled with recognized sexual autonomy. Hence, marital rape has come as important area of gender-based violence that requires serious legal and institutional attention.

Under the Nigerian criminal law, section 357 of the Criminal Code Act defines rape within a framework that expressly refers to sexual intercourse outside the union of the couple. Similarly, section 282 of the Penal code applicable in the Federal Capital Territory of Nigeria provides for marital exemption subject to the stated

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provisions. These provisions therefore raise issues concerning the degree to which married women enjoy equal protection against non-consensual intercourse. However, the Violence Against Persons (Prohibition) Act, 2015 provides a broader framework for addressing violence against persons, its limited territorial application and the existing different provisions of the Criminal Code Act and the Penal Code demands critical examination of the legal protection available to victims of marital rape. For instance, sections 34 and 42 of the Constitution of the Federal republic of Nigeria, 1999 (as amended) provide for the protection of human dignity and discrimination respectively. This therefore raises the issue of whether marital rape exemptions as provided under the Nigerian criminal law can be reconciled with the constitutional status married women. Additionally, Nigeria is a signatory to many international instruments, thus giving rise to a critical evaluation of Nigerian criminal law in examining the adequacy of domestic legal protection against marital rape.

It is against this background that this article critically examines the adequacy of Nigerian criminal law in addressing marital rape as a form of gender-based violence. The article also adopts a doctrinal research method based on the analysis of Nigerian legislation, judicial decisions, and important legal instruments. The article argues that marriage should not be a justifiable ground for non-consensual sexual intercourse. It also advocates comprehensive legal reform to ensure dignity of married women.

In view of the above, the paper is divided into seven parts. Part one deals with the introduction. Clarification of concepts is in part two. Part three comprises the legal framework governing marital rape in Nigeria. Part five concerns the imperative for reform. Parts six and seven deal with recommendations and conclusion.

2. Conceptual clarification

a. Rape

Rape is the act of sexual intercourse committed by a man with a woman and without her consent, committed when the woman's resistance is overcome by force or fear or under prohibitive conditions.[1] According to Falana, rape literally, is a type of sexual assault initiated by one or more persons against another person without the latter's consent. The act of rape may be carried out by physical force, or where the person is under threat or manipulation, or with a person who is incapable of giving a valid consent.[2] The United Nations Office on Drugs and Crime defines rape "as sexual intercourse without valid consent", while the World Health Organization (WHO) defines as "physically forced or otherwise coerced penetration-even if slight of the vulva or anus, using a penis, other body parts or an object." The 1998 International Criminal Tribunal for Rwanda defines rape as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive." In the United States, the Annual Uniform Crime Reports, changed the definition from "the carnal knowledge of a female forcibly and against her will" to "the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[3]

Under the Nigerian law, rape may be defined as sexual penetration of a woman against her will. Section 359 of the Criminal Code defines the term as follows:

> Any person who has 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 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 in the case of a married woman, by impersonating her husband is guilty of an offence which is called rape.

The offence is also defined under the Penal Code[4] as follows: A man is said to commit rape who, save in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances:

(a) Against her will;
(b) Without her consent;
(c) With her consent when her consent has been obtained by putting her in fear of death or of hurt;
(d) With her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believe herself to be lawfully married;
(e) With or without her consent if she is under fourteen years of age or of unsound mind;
(f) Sexual intercourse by a man with his wife is not rape if she has attained puberty.

Section 1 of the Violence Against Persons (Prohibition) Act, 2015 provides a new frontier to the law of rape. It provides that:

1. 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.

In English law the Criminal Justice and Public Order Act 1954 amended the definition of rape and substituted the following section 1 into the Sexual Offences Act, 1956.

[1] *U.B. Bwala, The Law of Rape (Midland Press Limited, 2008)*
[2] *F. Falana, Topical Issues on Women's Rights in Nigeria (Lagos: University of Lagos Press and Bookshop Ltd, 2018), 15*
[3] *United States Federal Bureau for Investigation, 2012*
[4] *Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria, 2004, section 282 (1)*

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1. It is an offence for a man to rape a woman or another man.
2. A man commits rape if-

(a) He has sexual intercourse with a person (whether vaginal or anal who at the time of the intercourse does not consent to it; and

(b) At the time he knows that the person does not consent to the intercourse or is reckless whether that person consents to it.

3. A man commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.

Prior to the amendment, the Sexual Offences Act 1956, merely talked about the crime of rape, as "It is an offence to rape a woman". By then the mental element of rape was governed by common law, in which rape was defined as "Unlawful sexual intercourse with a woman without her consent by force, fear or fraud."[5]

This directly challenges traditional concept of rape, that it could be committed by females against male, a realization of campaigns wedged by male group, in the last decade especially.[6] It is also interesting to note that, in consonance with the pronouncements of the courts in the decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and indeed the statute of the International Criminal Court, Nigerian Legislature adopted the position that rape could be committed outside the traditional mode and by not traditional means.[7]

The definition of rape under the Nigerian criminal law is its restrictive, gender specific and inconsistent nature, particularly regarding marital rape. Under section 357 of the Criminal code Act and section 282 of the Penal Code, rape is narrowly define, with marital exemptions that limit the protection available to married women. This creates the erroneous impression that marriage amounts to permanent consent to sexual intercourse.

Furthermore, the traditional definitions inadequately recognize male victims, different forms of sexual penetration and the importance of voluntary consent. Although section 1 of the Violence Against Persons (Prohibition) Act 2015 provides a broader, gender neutral definition, differences between federal and state laws create inconsistences in legal protection. Thus, the principal difficulty is the failure of traditional rape laws to recognize that marriage does not extinguish a person's right to sexual autonomy, dignity and voluntary consent.

Consequently, the Criminal Code Act[8] defines rape principally in terms of unlawful carnal knowledge of a woman or girl without consent. Its traditional formulation is gender-specific. Also, section of the Criminal Code Act defines unlawful carnal knowledge as carnal connection occurring otherwise than between husband and wife. This provides the statutory foundation for the traditional marital rape exemption. Furthermore, section 1 of the Violence Against Persons (Prohibition) Act, 2015 introduces a broader, gender-neutral definition of rape, covering different forms of non-consensual penetration without expressly exempting spouses. Additionally, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provide constitutional grounds for questioning marital rape exemptions, particularly regarding human dignity and freedom from specific forms of discrimination.[9]

Under the Nigerian criminal law, the ingredients to establish the offence of rape charge of a female without her consent were highlighted in the case of *Adekunle v. State*[10] as follows:

(1) That the accused had sexual intercourse with the prosecutrix;
(2) That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit, or impersonation;
(3) That the prosecutrix was not the wife of the accused;
(4) That the accused had the *mens rea*, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not; and
(5) That there was penetration.

In conclusion, the traditional definition of rape under Nigerian criminal law suffers from significant limitations concerning gender consent and marital status. Although section 1 of the VAPP Act, 2015 represents legislative progress, the continued differences between applicable criminal laws justify further harmonization and reform.

b. Marital Rape

Marital rape (or spousal rape) is any unwanted sexual act including vaginal, anal, or oral penetration committed by a person against their current or former spouse or cohabiting partner without their free and voluntary consent. The definition of marital rape can be stated as forced sex without the consent of the woman in cases where perpetrator and victim are legally married. This definition appears clear and succinct, yet there are ambiguities embedded within it. First, the phenomenon "marital" rape is not limited to legally married couples. Cohabiting couples have relationships quite comparable to husbands and wives, and there is evidence that cohabiting women experience even higher rates of violence than wives[11]

[5] *L.B. Curzon, Criminal Law (5th edn.) (McDonald and Evans: Estovry, Plymouth, England 1987) 185*
[6] *A.O.Alubo, Modern Nigerian Criminal Law, 2nd edition, (Jos: University of Jos Press, 2017), 294*
[7] *Ibid, 295*
[8] *Section 357*
[9] *See more the cases of Ogunbayo v. State (2007) 8 NWLR (pt. 1035) 157 (SC); Posu v. State (2011) 2 NWLR (pt. 1234) 393 (SC); Upahar v. State (2003) 6 NWLR (pt. 816) 230 and Iko v. State (2001) 14 NWLR (pt. 732) 221 (SC)*
[10] *(2015) 7 NWLR (pt.1458) 237*
[11] *D. Finkelhor and K. YIlo License to Rape: Sexual Abuse of Wives (New York: Free Press, 1985*

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Marital rape constitutes a violation of sexual autonomy, bodily integrity and human dignity arising from non-consensual sexual intercourse within marriage. At Common law, a man cannot be held criminally liable for rape of his own wife if she refuses to have sexual relations with him during the marriage and he has forcible intercourse with her. This is because intercourse in the marriage is deemed lawful. The exclusion of marital rape from the valid categories of illegal act in many rape laws implies that marital rape does occur with sufficient frequency for the legal system to be concerned.[12] It has been suggested that marital rape is likely to occur in a relationship which is violent in other ways as well.[13] Victims of marital rape undergo a variety of emotional and behavioural reactions, some of which are severe, even though Lord Matthew Hales declaration that "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 had given up herself in their kind into her husband, which she cannot retract."[14] In other words, the marital vow "I do" was taken to legally imply consent any time, any place, and under any circumstances. The Hale doctrine became part of the United States criminal code, and marital rape was legal until the 1980s when most states eliminated or at least limited, the spousal exemption.[15]

From whatever angle one sees it, the debates are ongoing both from the perspective of the male which sees marital rape as "a bedroom squabble over whether to have sex tonight"[16] and the perspective of the female which regards it as rape involving "brutality and terror and violence and humiliation to rival the most graphic stranger rape".[17]

The marital rape exemption raises important questions concerning human dignity,[18] freedom from discrimination,[19] sexual autonomy (where the right of every individual to determine whether to participate in sexual activity) and consent (marriage does not necessarily imply permanent consent to sexual intercourse).

c. Gender-based Violence

The Nigerian criminal law recognizes and prohibits various forms of gender-based violence (GBV), but there is no single, uniform definition of GBV across all Nigerian criminal laws. This creates difficulties concerning the scope

The Criminal code act does not expressly define GBV. However, it criminalizes conduct associated with it, including rape, indecent assault and other forms of violence.

VAPP defines violence broadly to include acts or attempted acts capable of causing physical, sexual, psychological, verbal, emotional or economic harm.[20] The Act also recognizes domestic violence, sexual abuse, sexual harassment and harmful traditional practices.

Nonetheless, some Nigerian states law expressly define gender-based violence. For example, Ekiti State Gender-Based Violence (Prohibition) Law, 2019 defines GBV to include violence that disproportionately affects persons because of their sex, including physical, mental and sexual harm.[21]

Under the annotated statutes, a husband cannot rape his wife, though he can commit sexual assault on her.[22] At Common law, a man cannot be held criminally liable for rape of his own wife if she refuses to have sexual relations with him during the marriage and he has forcible intercourse with her. This is because in the marriage is deemed lawful.[23]

Ikpeze and Muoneke examine gender-based violence in Nigeria, its underlying causes and the theoretical explanations for its occurrence. They discuss several explanations, including psychoanalytic approaches, family-violence theories and control theory and resource theory. Their discussion identifies factors such as family upbringing, cultural and religious beliefs, financial difficulties and alcoholism as possible contributors to domestic violence.[24] Heise et al, examine violence against women as a significant public health problem. They discuss domestic violence, rape, the health consequences of violence, factors that perpetuate abuse and possible responses. Their work provides foundation for explain that marital rape is not merely a private disagreement between spouses. It can have serious and psychological consequences and requires effective legal and institutional responses.[25] In addition, CEDAW General Recommendation explains that gender-based violence is a form of discrimination that seriously impairs women's enjoyment of their rights and freedoms. It recognizes that violence against women includes physical, mental and sexual harm, threats, coercion and other deprivations of liberty.[26]

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[12] *A.O.Alubo, Modern Nigerian Criminal Law, 2nd edition, (Jos: University of Jos Press, 2017), 303*
[13] *The History of the Pleas of the Crown 629 (S. Emlyn ed. 1778)*
[14] *Inbau, as quoted by A.O. Alubo in his work: Modern Nigerian Criminal Law, op. cit*
[15] *K. YIIo, The Battered Women's Justice Project, 1996*
[16] *H.R. Gavin, 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade', (1991) 70 Minn. L.Rev. 763*
[17] *D. Finkelhor, 'Marital Rape: The Misunderstood Crime', being an address to the New York Country Languages Association, May 3, 1984*
[18] *Constitution of the Federal republic of Nigeria, 1999 (as amended), section 34*
[19] *Ibid, section 42*
[20] *VAPP, 2015, section 46*
[21] *Section 1 (1)*
[22] *Illinois Annotated Statutes (St. Paul Minn: West Publishing Co. 1983), Chap. 38, 11-1, 1102, 11-3*
[23] *M. Davis, Setting Penalties: What Does Rape Deserve? I Law and Philosophy 3 (USA: Reidel Publishing Company, 1984), 61-110*
[24] *O.V.C. Ikpeze and M.C. Muoneke, 'Theories and Causes of Gender-Based Violence in Nigeria', (2023) 4 (1) Law and Social Justice Review*
[25] *L.L. Heise, A. Raikes, C.H. Watts and A.B. Zwi, 'Violence Against Women: A Neglected Public Health Issue in Less Developed Countries', (1994) 39 (9) Social Science & Medicine, 1165-1179*
[26] *Committee on the Elimination of Discrimination against Women,*

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The United Nations Declaration on the Elimination of Violence against Women defines gender-based violence as:

> Any act of gender-based violence, that is, violence directed against a woman or that affects women disproportionally that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Gender-based different manifestations include physical violence, sexual violence, psychological and emotional abuse, economic abuse and deprivation, coercive control, harmful traditional practices and technology facilitated gender-based violence.

3 The existing legal framework governing marital rape in Nigeria

The legal framework governing marital rape in Nigeria comprises the Constitution of the Federal Republic of Nigeria 1999 (as amended), Criminal code Act, the Penal Code, the Violence Against Persons (Prohibition) Act, 2015 and applicable state legislation.

a. Constitution of the Federal Republic of Nigeria 1999 (as amended)

Section 34 (1) states that "Every individual is entitled to respect for the dignity of his person, and accordingly, (a) no person shall be subjected to torture or to inhuman or degrading treatment. In this section, the Constitution guarantees to everyone the respect or the dignity of his or her person. It prohibits the torture or degrading treatment of any person, slavery or servitude and compulsory labour.[27]

An insight into the importance of this right is provided by the UN Declaration of Human Rights. It provides that all human beings are born free and equal in dignity and rights.[28] As aptly noted by Ari Kohen:

> The proper grounding for the idea of human rights is dignity, which can be understood non-religiously and applied universally because it is a feature of human personhood. Thus, every human person has dignity and, as a result, human rights.[29]

Undoubtedly, the imputation of indignity on a person, according to the wise counsel of the Court of Appeal in *Uzoukwu v. Ezeonu*,[30] would include mental harassment, physical brutalization, while inhuman treatment typifies the lack of human sentiments, belittling of one's social status or character, and the derogation of one's value or position of a person.

Section 42 of the Constitution, 1999 prohibits discrimination against Nigerian citizens on grounds including sex, religion, ethnic group, place of origin and political opinion. Section 42 (2) further prohibits subjecting a Nigerian citizen to disability or deprivation merely because of the circumstances of their birth. Section 42 is relevant to marital rape because it raises questions about equality between men and women within marriage. Where the law recognizes husband's sexuality but fails to provide equivalent protection for his wife's sexual autonomy, the resulting difference in legal protection may be criticized as discriminatory on grounds of sex. Furthermore, if a wife is denied the same legal protection against non-consensual sexual intercourse because she is married to the perpetrator, it raises important questions about equality, bodily autonomy and the protection of women under the Constitution.

However, section 42 does not expressly define, criminalize or prohibit marital rape. Its relevance is primarily constitutional as it provides a basis for challenging discriminatory laws and practices, particularly when read alongside section 34, which guarantees respect for the dignity of the human person. These provisions provide constitutional grounds for questioning whether the traditional marital rape exemption adequately protects married women's rights.

b. Penal Code

Section 282 of the Penal Code provides:

1. A man is said to commit rape, who, save in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances
a. Against her will
b. Without her consent
c. With her consent, when her consent has been obtained by putting her in fear of death or hurt,
d. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married,
e. With or without her consent, when she is under fourteen years of age or of unsound mind,
f. Sexual intercourse by a man with his own wife is not rape, if she has attained puberty.

Section 282 (2) of the Penal Code expressly excludes sexual intercourse between a man and his wife from rape, subject to the statutory qualification concerning puberty. This provision reflects the traditional legal position that marriage limits the applicability of the offence of rape between spouses. Thus, in *Ogunbayo v. State*,[31] the judicial interpretation of rape under Nigerian criminal law reveals important limitations in the traditional framework. In the case, Niki Tobi, JSC, raised the question whether a husband

General Recommendation No. 19: Violence against Women, 1992
[27] *S.O.Bello & Ors v. Ihuoma Doris (2016) LPELR-41298 (CA); and Eric Chukwuemeka Igweokolo v. Marvel Akpoyibo & Ors (2017) LPELR-41882 (CA)*
[28] *UDHR, 1948*
[29] *A. Kohen, 'An overlapping Consensus on Human Rights and Human Dignity' in M. Goodale ed, Human Rights at the Crossroads (Oxford University Press 2013) 61*
[30]
[31] *(2007) 8 NWLR (pt. 1035) 157 (SC)*

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could rape his wife and observed that the issue was debatable. Although the case did not invalidate the traditional marital exemption, it illustrates the need for further judicial and legislative clarification.

Furthermore, section 282 is relevant to marital rape. It establishes a marital exemption from rape. It protects a husband from prosecution for rape under this provision where his wife has attained puberty, even where the sexual intercourse is against her will or without her consent. Additionally, it limits the protection of women's sexual autonomy. It also raises questions about gender equality and creates a potential exception involving a wife who has not attained puberty. Thus, in Ibrahim v. State, the court considered section 282 of the Penal Code in the context of the offence of rape. The decision provides useful judicial material for examining the statutory definition of rape and the operation of the marital exception. Similarly, the decision in *Idam v. FRN*,[32] is useful because it discusses the statutory requirements for establishing rape and expressly addresses the significance of whether the woman was the accused's wife and whether she had attained puberty. It therefore provides relevant judicial material for analyzing the scope of the marital exemption.[33]

The central weakness of section 282 is that it makes marital status and puberty decisive to the rape exception rather than treating consent as the fundamental issue. Consequently, reform is necessary to ensure that the criminal law recognizes the continuing importance of consent within marriage and provides effective protection against non-consensual sexual intercourse.

c. Criminal Code Act

The Criminal Code Act constitutes a significant component of the legal framework governing rape in Nigeria. Section 357 criminalizes unlawful carnal knowledge of a woman or girl without her consent or in other specified circumstances, while section 6 defines unlawful carnal knowledge as carnal connection occurring otherwise than between husband and wife. Read together, these provisions effectively exclude non-consensual sexual intercourse between spouses from the offence of rape under the general Criminal Code framework. Although section 358 prescribes severe punishment for rape, its protective effect is limited where the conduct in question falls outside the statutory definition.

The framework raises fundamental concerns regarding consent, bodily autonomy, gender equality and the adequacy of criminal law protection against sexual violence within marriage. Accordingly, legislative reform should consider removing the marital exclusion and making the absence of legally valid consent central to the definition of rape, irrespective of marital status.[34]

The law's recognition of non-consensual intercourse as rape is undermined by its exclusion of sexual intercourse between husband and wife and from the definition of unlawful carnal knowledge.

d. Violence against Persons (Prohibition) Act 2015

VAPP, 2015 provides an important legal framework for addressing marital rape and gender-based violence in Nigeria. The Act covers most of the prevalent forms of violence in Nigeria, ranging from economic, physical, psychological and sexual violence such as rape. It covers violence relating to traditional practices, such as circumcision or genital mutilation and harmful traditional practices.[35]

Section 1 defines rape in terms of non-consensual penetration without expressly exempting married couples, this provides a basis for arguing that marriage should not constitute automatic consent to sexual intercourse. Furthermore, sections 2, 3 and 19 address physical injury, coercion and spousal battery, respectively thereby strengthening protection against domestic violence.

However, the Act has some limitations such as the absence of an express provision specifically addressing marital rape, its territorial application primarily to the Federal Capital Territory under the Federal legislation, and potential conflict with older criminal laws. For instance, section 282 (2) of the Penal Code expressly provides a marital exception subject to the qualification stated therein. Consequently, legislative reform is necessary to clarify the legal status of marital rape, harmonize conflicting provisions and ensure uniform protection for victims throughout Nigeria.

There some few scholarly authorities to this legal framework. For instance, Otumala, in his work argues that the VAPP Act's definition of rape encompasses non-consensual penetration within marriage because it does not expressly exempt spouses.[36] He argues that marital rape is not necessarily excluded from the VAPP Act merely because the Act does not expressly name it as a separate offence.

In view of the above, VAPP 2015 provides an important basis for addressing marital rape, but the interpretation of its provisions and application across Nigeria require careful legal examination.

4. Marital rape and the adequacy of existing criminal law

Marital rape refers to non-consensual sexual intercourse or penetration by one spouse against the other. Its treatment under Nigerian criminal law remains controversial because traditional

[32] *(2020) LCN/4931 (SC)*

[33] *See also S.C. Ifemeje, 'Legalization of Marital Rape in Nigeria: A Gross Violation of Women's Health and Reproductive Rights' (2011) 33 (1) Journal of Social Welfare and Family Law, 39-46; G.N. Okeke and M.O. Ilobinso (2021) 17 (1) UNIZIK Law Journal, 114-126 and S.R. Garba, 'The Need to Criminalize Marital/Spousal Rape in Nigeria' (2023) 8 (1) Journal of International Law and Jurisprudence*

[34] *Criminal Code Act, Cap C38, Laws of the Federation of Nigeria, 2004, section 359;*

[35] *F. Falana, Topical Issues on Women's Rights in Nigeria (Lagos: University of Lagos Press and Bookshop Ltd, 2018), 105*

[36] *E.O. Otumala, 'A Silent Crime or a Silenced Crime? Re-examining the Stance of the VAPP Act on Marital Rape in Nigeria made available through the Social Science Research (SSRN) in February 2025 and published on SabiLaw on 10 March 2025*

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criminal legislation providers protection for husbands against prosecution for rape within marriage.[37] Thus, both the Criminal Code and the Penal Code do not recognize spousal rape thus discriminating against women married to sexual predators. This act of injustice was also conceived in Seventeenth century when justified this position thus:

> The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their natural matrimonial consent, and contract, the wife hath given up herself in this kind into her husband which she cannot retract.[38]

The main difference between the Criminal code and the Penal Code is that the former is detailed in its definitions on sexually related offences. The Penal Code is precise in its definition and specifies the elements needed to be proved to uphold a charge of rape. The differences between the Criminal Code and the Penal Code concerning marital rape demonstrate a significant weakness in Nigeria's criminal justice system. Although both legal regimes restrict the criminalization of marital rape, the Criminal code creates an implied marital exemption, whereas the Penal Code expressly provides a marital exemption subject to qualification concerning the wife's attainment of puberty. These differences contribute to legal uncertainty, unequal protection and the need for legislative reform. In view of this Ifemeje Chika examines the marital rape exemptions under Nigerian criminal, particularly law, particularly section 6 of the Criminal Code and section 282 of the Penal code, and argues that these provisions undermine women's health and reproductive rights by failing to adequately protect wives against non-consensual intercourse.[39] Her analysis supports the argument that the Criminal Code's express exemption and the Penal Code's express exemption create a legal framework that inadequately protects women's sexual autonomy.

Iluba-Oganyi views it differently. The author argues that section 45 (2) of the federal VAPP Act supersedes inconsistent provisions concerning similar offences in the criminal code and the Penal code. The author therefore maintains that the VAPP provides legal basis for prosecuting spousal rape in jurisdictions where it applies.[40] In *Oludotun Ogungayo v. The State*[41]the appellant challenged his conviction for rape. The Supreme Court considered the elements of rape under section 357 of the Criminal Code, including the question of consent. In discussing the question of whether a husband can rape his wife, the judgment states "does it mean that a husband, can rape his wife? I think this is debatable". The observation is important because it demonstrates that the question of marital rape was expressly recognized in the Supreme Court's discussion on rape law. However, the Court did not conclusively decide that a husband could be convicted of raping his wife. The observation must therefore not be presented as a binding criminalizing marital rape. Similarly, in *Tunde Ojolade v. The State*,[42] the appellant challenged his rape conviction, which arose from allegations that he had sexual intercourse with a woman following inducements. The Supreme Court considered issues arising from the rape conviction and the evidence supporting it. The case concerns the general offence of rape under the Penal Code

The judicial treatment in the above cases remains important area requiring clarification. The decision do not conclusively resolve whether non-consensual sexual intercourse within marriage constitutes rape under the VAPP Act 2015. The resulting uncertainty, particularly concerning the interaction between sections 1 and 45 (2) of the VAPP Act and the marital exemptions in older criminal legislation, strengthens the case for authoritative judicial clarification and express legislative reform.

There is therefore the absence of a definitive marital-rape decision. Thus, it is important to note the following;

1. section 357 of the Criminal Code defines rape in terms of unlawful carnal knowledge in specific circumstances;
2. section 6 of the Criminal code Act defines unlawful carnal knowledge by reference to sexual intercourse otherwise than between husband and wife;
3. section 282 (2) of the Penal code expressly provides that sexual intercourse by a man with his wife is not rape if she attained puberty;
4. section 1 of VAPP Act 2015 defines rape without expressly stating a marital exemption; and
5. section 45 (2) of the VAPP Act addresses the Act's relationship with provisions concerning similar offences in the Criminal Code, Penal code and Criminal procedure Code.

The interaction between these provisions is central to the debate. In particular, section 45 (2) supports the argument that the VAPP Act overrides inconsistent provisions on similar offences where the Act applies. Nevertheless, whether that provision conclusively removes the marital rape exemption remains a question requiring careful statutory interpretation.

The differences between the Criminal Code and the Penal Code concerning marital rape expose significant deficiencies in Nigeria's existing criminal law framework. Sections 6 and 357 of the Criminal Code, when read together, have traditionally been interpreted as excluding marital rape, while section 282 (2) of the Penal Code expressly excludes sexual intercourse between spouses from rape where the wife has attained puberty. These approaches undermine consistency in criminal liability, weaken the recognition of sexual autonomy within marriage and complicate the

[37] *Penal Code (Northern Nigeria), section 282 (2)*
[38] *J. Smith and B. Hogan, Criminal Law (5th edn) (London: Butterworth, 1983), 63*
[39] *I.S. Chika, 'Legalization of Marital Rape in Nigeria: A Gross Violation of Women's Health and Reproductive Rights (2011) 33 (1) Journal of Social Welfare and Family, 39-46*
[40] *O.O. Iluba-Oganyi, ;Analysis of Spousal Rape: A Crime Under the Nigerian Criminal Jurisprudence' (2024) 3 (2) Awka Capital Bar Journal*
[41] *(2007) NGSC 165*
[42] *(2022) SC 1133C/2019*

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harmonization of Nigerian rape legislation. Although the VAPP Act 2015 provides a broader statutory framework for addressing sexual violence, questions remain concerning its interpretation and territorial application. Thus, according to an author, the various laws have elements of discrimination towards criminalization of offenders.[43]

Therefore, legislative reform is necessary to expressly criminalize non-consensual sexual intercourse within marriage, harmonize conflicting statutory provisions and ensure consistent protection for victims throughout Nigeria.

In view of the above, the National Assembly and relevant state legislatures should harmonize the Criminal Code, Penal Code and applicable VAPP legislation by expressly providing that marriage does not constitute irrevocable consent to sexual intercourse. This reform would promote legal certainty, equality before the law and effective protection of bodily autonomy.

5 The imperative for reform

The imperative for reform of Nigerian criminal laws governing marital rape and gender-based violence arises from the inadequacies, inconsistencies and discriminatory provisions of the existing legal framework. Especially, the marital exemptions under the Criminal Code and Penal Code. They undermine women's rights to dignity, bodily autonomy, equality and freedom from sexual violence, as guaranteed by the Constitution of the Federal republic of Nigeria, 1999 (as amended).

Although the VAPP Act represents a significant legislative advancement, its limited territorial application and uneven adoption and implementation across states have contributed to gaps in legal protection. Consequently, there is an urgent need for comprehensive legislative reform to eliminate marital rape exemptions, harmonize relevant criminal laws, strengthen enforcement mechanisms and ensure effective protection of victims.

Such reforms are imperative not only to address existing legal deficiencies but also align Nigeria's criminal justice system with international human rights standards[44] and the principles of constitutional supremacy,[45] gender equality and substantive justice.

To address the inadequacies of existing Nigerian criminal laws governing marital rape and gender-based violence, the following reforms are recommended:

1. Abolition of marital rape exemptions

Amend the Criminal Code and Penal Code to eliminate provisions that exempt husbands from criminal liability for non-consensual sexual intercourse. Consequently sections 357 of the Criminal Code and section 282 (1) of the Penal code be amended.

2. Reform of age-old definition of Rape

There should be a reform of the age-old definition of rape, to a more encompassing definition that looks into all spheres of the society to see the likely instances whereby a person can be raped. The issue of corroboration should be looked into properly as well to change the law whereby a person needs corroboration where a case like rape occurs, which is unrealistic in Nigeria.

3. Harmonization of Federal and State Laws

The major criminal laws, Criminal Code, Penal Code and VAPP, 2015 be harmonized to establish uniform legal protection against marital rape. This can be done by amending the existing criminal legislation. This reform should be undertaken by both the National Assembly and State Houses of Assembly. Additionally, adoption of a uniform definition of rape, nationwide adoption of VAPP standards by State Houses of Assembly, establishment of a a model criminal law, harmonizing penalties and enforcement procedures and constitutional and international human rights compliance respectively. This will eliminate inconsistencies concerning marital rape.

4. New Legislation

National Assembly and State legislators must raise the issue of marital rape again and again and propose new legislation, even if they were forced to compromise in order to even partially criminalize. Efforts to fully sanction sexual violence must continue until all women are legally protected from rape.

5. Reform of the Law of Consent

Legislation should expressly provide that marriage does not amount to permanent consent to sexual intercourse. Also, consent must be freely and voluntarily given and consent may be withdrawn at any stage. Furthermore, sexual intercourse obtained through force, intimidation or coercion constitutes rape, notwithstanding the existence of marriage.

6. strengthening institutional enforcement

Government should strengthen investigative and prosecutorial institutions through which specialized police training, improved forensic facilities, survivor protection mechanisms and effective prosecution procedures.

7. public enlightenment

There should be sustained public education aimed at correcting cultural and religious misconceptions that portray sexual intercourse as an unconditional marital entitlement.

In view of the above suggested reform, marriage should never operate as a legal justification for sexual violence, since the existence of a marital relationship does not extinguish an individual's fundamental right to sexual autonomy and human dignity. Accordingly, Nigeria should abolish marital exemptions, expressly criminalize non-consensual sexual intercourse within marriage, harmonize its criminal laws and strengthen enforcement institutions. The continuous recognition of marital exemptions under traditional criminal legislation is inconsistent with contemporary principles of consent, bodily autonomy and human dignity. The reform of marital rape laws in Nigeria is essential to

[43] *Y. Olomojobi, Human Rights On Gender, Sex and The Law in Nigeria (2nd ed,) (Lagos: Princeton & Associates Publishing Co. Ltd, 2013), 88*
[44] *CEDAW General Recommendation No. 35, paragraph 29 (e)*
[45] *Constitution of the Federal Republic of Nigeria, 1999 (as amended), sections 34 and 42*

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the protection of fundamental human rights, gender equality and the administration of criminal justice.

6. Recommendations

In view of the above, the paper recommends as follows:

i. **Comprehensive reform of Nigeria's legal framework**

Reforming of Nigeria's legislation ensures the address of inadequacies regarding marital rape and gender based violence. Thus, the Criminal Code should be amended to abolish marital exemptions from rape liability and expressly criminalise non-consensual sexual intercourse in marriage. VAPP Act, 2015 should be strengthened through an express provision criminalizing marital rape. The various states in Nigeria should be encouraged to enact corresponding legislation to ensure protection of married women.

ii. **Modification of the Laws**

Laws on rape should be modified to the effect that the criminal does not only serve imprisonment, but also be castrated, and compelled to undertake paid community labour the proceeds of which go to the medico-social upkeep of his victims.

iii. **Consent issue**

The law should expressly recognize that marriage does not constitute perpetual sexual consent and that consent must be freely and voluntarily given by the wife.

iv. **The need for an electronic bangle or collar**

Electronic bangle or collar should be made a compulsory wear of the criminal and as such a wear should enable the necessary authority to trace him wherever he is and the wear should also announce him as a rapist.

v. **Setting up of special Establishment**

There should be the establishment, just the EFCC and ICPC to track and prosecute rapists and other sex offenders in Nigeria.

vi. **Economic Empowerment**

Women are in majority but paradoxically disempowered. Therefore, there should be an affirmative action be embarked upon by the Federal Government of Nigeria to empower women.

vii. **Establishment of for complaints and rehabilitation**

There is a need to establish centres for complaints and rehabilitation in each of the 774 local government areas in the country. This serves as anchor, solace, and places of psycho-somatic and medico- legal support for victims of gender violence. Such centres should be a joint venture between the WHO, Presidency, Ministry of Women Affairs, and the National Council of Women Societies, in collaboration with such philanthropic bodies such as Carnegie Foundation and Ford Foundation.

7. Conclusion

The paper concludes that Nigeria's criminal law framework remains inadequate in addressing marital rape and gender-based violence. Although VAPP Act, 2015 represents significant legislative progress, the continued existence of marital exemptions under the traditional criminal laws, legislative inconsistencies and weak enforcement mechanisms undermine effective protection of women.

Thus, the inadequacy of Nigeria's criminal law in addressing marital rape lies not merely in legislative omissions but also in the continued recognition of marital immunity, fragmented legal protection and ineffective enforcement mechanisms.

The paper therefore argues that marriage cannot extinguish an individual's fundamental rights to dignity, bodily autonomy and sexual consent. Thus, comprehensive legislative reform, effectual institutional enforcement and societal orientation are imperative to achieving substantive gender equality, protecting victims and ensuring that marital relationships do not provide immunity for sexual violence.

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