

SPouses' Right to "Say No" in Matrimony: Legal Issues and Challenges BY

Chibuiké Nnamdi Okafo, PhD*

Abstract

Spousal rape is one legal concept that is shrouded in controversy.¹ While gender bias associated with rape simpliciter in Nigerian criminal jurisprudence, has adequately been addressed in the Violence Against Persons (Prohibition) [VAPP] Act,² and few legal texts, that cannot be said of spousal rape. Spousal rape has been outlawed in some jurisdictions and that has necessitated the cry for it being outlawed in Nigeria. But most of these agitations to criminalize spousal rape in Nigeria, are either misconceived or shrouded in gender perspective. Laws are generally predicated on the principles of; equity, equality and fairness, however most scholars advocating for criminalization of spousal rape in Nigeria tend to shut their eyes to this reality. Most scholars also appear not to appreciate the meaning of spouse(s), persons that should accorded the status of spouse or equitable parameters that must be used in that regard in their clamour to have spousal rape criminalized in Nigeria. Rape is crime against humanity and as such, should not be clothed with gender perspective. At present, there is no legislation that has criminalized spousal rape in Nigeria and this situation is bad. The VAPP Act has already laid commendable template of what constitutes the offence of rape/offenders thereof and same should be extended to spouses irrespective of model of marriage contracted. These lacunas necessitated this work. In appraising these lacunas, the work adopted the doctrinal method of research, which involves analyzing of primary and secondary data. The primary data sources were local/foreign statutes, conventions, policy documents and case laws. The VAPP Act is the sole legislation that has used gender neutrals in criminalizing rape (even though it failed to criminalize spousal rape). The work seeks to bridge the gender perspective's gap inherent in the VAPP Act and other relevant laws amidst the call to criminalize spousal rape in Nigeria.

Keywords: Rape, Spouse, Crime, Nigeria, Right To Say No¹, Gender, Matrimony

1.0 Introduction

In Nigerian legal jurisprudence, spouses cannot be accused of raping themselves as they cannot be either charged or convicted for the offence of rape involving themselves in any Nigerian court. But, in some jurisdictions, spouses' rape has been criminalized. In the spirited effort to ensure Nigeria join these leagues of nations that have criminalized spouses' rape, some scholars have seriously advocated that, spousal rape (also known as wife rape) should be treated as serious crime and not as mere sexual assaults in marriage. Key proponents of these thoughts are Carol Arinze-Umobi,³ Sharma⁴ and Mishra.⁵ These aforementioned scholars, aside being respected female scholars in their own rights, are advocates for this cause in their respective nations. They are in agreement that, spousal rape should be criminalized in their respective nations, that is; Nigeria and India.

While it is the stance of Carol Arinze-Umobi that:

‘The fundamental problem is not that husbands abuse their power, but that they have so much of it in the first place... Wife rape should be treated as a serious crime and should not be treated as an exemption for sexual assault in marriage... women

* Dr. Chibuiké Nnamdi Okafo LL.B, BL, LL.M, PhD, is a Legal Practitioner, a critic and lecturer at the Faculty of Law, Paul University, Awka. Tel: 07033992440. Email: chibuikeokafo.nachio@gmail.com.

¹ Explorations of legal remedies available to husbands in marriage as well as other categories of spouses like; lesbians, gays yet to be recognized under the Nigerian laws. The topic under review is facsimile of book presentation entitled: ‘The Wife and Right to No in Matrimony: The Divide’ by Prof. Arinze-Umobi, Carol Chinyelugo B.A. (Hons) PGDE, LL.B.(Hons), BL, LL.M., Ph.D. at the 39th Inaugural Lecture at Nnamdi Azikiwe University.

² VAPP Act, 2015, s. 1.

³ Arinze-Umobi, Carol Chinyelugo B.A(Hons) PGDE, LL. B(Hons), BL, LL.M, Ph.D.

⁴ Sharma is a research scholar, Faculty of Law, Agra College, Agra.

⁵ Mishra, ‘Marital Rape Criminalization: A Critical Study’, (Sanjeev Sharma Research Scholar, 2021); vol 20, p 3.

who are sexually violated by men are their husbands or intimate partners are left unprotected and this scenario must cease if spousal rape will ultimately be addressed.⁶

Sharma and Mishra,⁷ believe that the Indian government has not done much to criminalize marital rape despite numerous laws being implemented to protect women from domestic violence, dowry, and other forms of abuse.

But from the totality of these aforementioned scholars' narratives/recommendations in their quest to address or criminalize spousal rape in their respective countries, they consciously represented spouses' rape to mean, non-consensual sex committed against wives in matrimony either by their husbands or intimate partners. However, they failed to;

- i. appreciate the legal definition of spouse,
- ii. specify category of spouses that must be criminalized for the act of spousal rape,
- iii. neglected to group husbands as integral component of spouse and by this omission, discriminated against the male gender (husbands),
- iv. extend their scope of wives/ spouses to include spouses in polygamous marriages or other unorthodox marriages yet to be recognized by Nigerian law (though already recognized in some foreign jurisdiction) or those that now enjoy Papal' blessings as enjoined by Pope Francis.

This work seeks to bridge the bias gap inherent in definition of spouses/spouses' rape, expand the scope of victims/offenders of spousal rape to include; husbands and other category of spouses recognized in other jurisdictions. One may be tempted to ask, is the quest to criminalize spouses' rape in Nigeria borne out of good will or a mere quest to align with global trends? This poser and other issues associated with spouses' rape, will be addressed in this work.

2.0 Conceptual Framework/Clarifications

This appraisal will kick start by appraising key terms/ concepts used in this work.

2.1 Spouse

A spouse has been defined as one's husband or wife by lawful marriage.⁸ The word martial,⁹ is an adjective that relates to marriage relationship just as spousal. In *Okoro v State*,¹⁰ the words 'wife' and 'husband' were defined to mean the wife and husband of a monogamous marriage and same interpretation was proffered in section 2(1) of the Evidence Act.

2.2 Rape

Before the enactment of the VAPP Act, rape was deemed committed, as provided in section 357 of the Criminal Code, section 282 of the Penal Code¹¹ and echoed in *Benjamin v State*¹² when;

A person has unlawful carnal knowledge of a woman or girl,
without her consent, or with her consent, if the consent is

⁶ For detailed note on origin/biological anatomy of rape of spousal rape, please refer to 'The Wife and Right to No in Matrimony: The Divide' by Carol Chinyelugo Arinze-Umobi.

⁷ Indian scholars.

⁸ B.A Garner, *Black's Law Dictionary*, (8th edn. Thomson West) p 1438).

⁹ B.A Garner, *ibid* p 987.

¹⁰ (1998) LPELR-2493(SC).

¹¹ In Penal Code, it is considered rape to have sexual intercourse with a girl below the age of 14 years or a mental deranged person with or without her consent

¹² (2019) LPELR-53098(SC).

obtained by force or by means of threats or intimidation of any kind or by fear or harm, or by means of false or fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of rape.

Presently, the offence of rape, victims and offenders of rape in Nigeria have been expanded to include women and anyone, all to address gender bias inherent in previous Nigerian legislations. This can be best appreciated in section 1 of the VAPP Act.¹² But despite this expanded definition of rape in the VAPP's Act, some scholars are yet to discard their gender bias while examining offence of rape or what amounts to spousal rape.¹³

2.3 Spousal Rape/Marital Rape

The compound word, spousal rape also known as marital rape/wife rape,¹⁴ has been given varying definitions by scholars. First, from a bias standpoint and second, from centrifugal perspective. According to Emeke and Emejuru,¹⁵ spousal rape connotes a situation where, 'a man has sexual intercourse with his wife, to whom he is lawfully married without her consent.'¹⁶ These two are not alone in their gender bias definition of spouses' rape, Carol Arinze Umobi shares same sentiment. The distinguished Professor of law,¹⁷ in her appraisal of spousal rape, preferred to use the term 'wife rape' over marital rape or spousal rape. Nevertheless, she is of firm stance that, spousal rape is not gender neutral. According to her, the term 'spousal rape' tends to convey the message that, 'rape is something that wives do to their husbands, if not as readily as husbands do to their wives.'¹⁸ But from gender neutral standpoint, spousal rape has been defined as nonconsensual sexual intercourse between parties in matrimony.¹⁹ Be that as it may, there are some who share the view that, marital rape is more widely experienced by women, though not exclusively.²⁰

The quest to criminalize spouses' rape in Nigeria is one that is shrouded in confusion, though commendable. Advocates of spousal rape appears to be more focus to align with global trend rather than pursue the eradication all form of marital rape. These advocators seem to be more concerned with vulnerable state of wives in monogamous marriages as opposed to those in polygamous marriages. At this juncture, one may be tempted to ask what becomes the fate of wives in polygamous marriages or husbands (either in monogamous or polygamous) in this bias quest to criminalize spouses' rape in Nigeria.

Rape²¹ is a heinous crime that needs to be punished, irrespective of its culprits or perpetrators. For this reason, the conception or misconception associated with the clamour to criminalize spouses' rape in Nigeria, makes mockery of this serious crime and principle of justice/fairness associated with law. If the word 'spouse' connotes wife and husband in matrimony, what then becomes the of husband(s), spouses in polygamous marriages²² amidst this call to criminalize spouses' rape in Nigeria! These queries will hereunder be discussed. But before doing, there is need to ask to further ask, what really constitutes spouses' rape and when do spouses' right to 'no' in matrimony starts?

¹² 2015.

¹³ An Appraisal of the Jurisprudence of Spousal Rape in Nigeria

¹⁴ These two terms will be used interchangeably in the cause of this work.

¹⁵ An Appraisal of the Jurisprudence of Spousal Rape in Nigeria.

¹⁶ *ibid.*

¹⁷ Prof Carol Arinze Umobi.

¹⁸ Prof C C Arinze Umobi, 'The Wife and Right to No in Matrimony: The Divide', *ibid.*

¹⁹ Definition mine.

²⁰ <<https://en.m.wikipedia.org/wiki/marital-rape>> last accessed on 28/12/2023.

²¹ Or whatever nomenclature it is described with.

²² And other category of spouses yet to be recognized in Nigeria but are already recognized in some jurisdiction.

3.0 Spouses' Right to "no" in Matrimony (Spousal Rape)

No legislation has criminalized spouses' rape in Nigeria. This neglect has rightly, ignited the call to criminalize spouses' rape from scholars/ minority rights' advocates. Spousal rape has been described as serious violations of a woman's bodily integrity which is usually committed when a husband has nonconsensual intercourse with his wife or continues with the act upon the withdrawal of such consent. While some scholars, share the view that offenders of spousal rape ought to be severally punished to serve as deterrence to others, few have argued that marital rape as concept is absurd and should be treated as an impediment to fulfillment of conjugal responsibilities of parties which was mutually contracted. This latter sect shares the sentiment that, criminalizing nonconsensual sex in marriage is unbiblical and will be tantamount to punishing a spouse (a wife or husband) for executing responsibilities she or he agreed by marital contract to perpetually execute on the alter before men and God.²³ Flowing from the two arguments (for and against spousal rape), one might be tempted to further argue that, the clamour for criminalization of spousal rape in Nigeria (in the manner canvassed by its proponents), is one that is prejudicial and clothed with bias. While appraising how hard it is to criminalize spousal rape, Hale,²⁴ argued 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 hath given himself in kind unto the husband, whom she cannot retract.

It is worthy to note that this stance of Hale is no longer tenable in England where it was propounded. Marital rape has now been criminalized in England and in some countries.

Nevertheless, it is worthy to note that, before the conceptualization of spousal rape, men have been held as sole offenders/culprits of offences of rape/defilement. And what constitute the offence of rape/offenders for offence of rape were aptly captured in section 357 of the Criminal Code Act²⁵ and echoed in *Ali v State*,²⁶ where the Apex Court defined rape to mean:

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 the case of a married woman by personating her husband.²⁷

Under the Penal Code Act,²⁸ a person is said to commit rape when he has sexual intercourse with a woman in any of the following circumstances; where it is nonconsensual, against her will, with her consent which was obtained either by force, duress or deceit or where she is under fourteen years of age or of unsound mind. But despite the enactment of the VAPP Act, and provisions of section 1 thereof which discarded the gender bias associated with offence of rape/offenders in previous Nigerian Criminal legislations, most scholars still share the sentiment that there should not be gender neutrals in criminalizing spouses' rape in Nigeria. Put differently, that husbands (or men) should be

²³ Sir M Hale, 'History of the Pleas of the Crown'(1736)vol 1ch 58, p 629.

²⁴ The then Chief Justice in England in his book, History of the Pleas of the Crown 1736.

²⁵ Cap c 38 LFN 1994.

²⁶ (2020) LPELR -53409 (SC).

²⁷ This is also the decision of the Apex Court in; *Benjamin v State* (2019) LPELR 53098(SC), *Habibu v State* (2023) LPELR 54768(SC).

²⁸ Penal Code Act, s 282.

designated as culprits of rape due to their structural capacities to rape. It is the stance of Carol Arinze Umobi that;

Man's structural capacities to rape, and the woman's corresponding structural vulnerability, are as basic to the physiology of both our sexes, as the primary act of sex itself. Had it not been for this accident of Biology, an accommodation requiring the hook together of two separate parts, penis and vagina, there would be neither copulation nor rape as we know it. Anatomically, one might want to improve on the design of nature but speculations appear unrealistic.

Regrettably, the world evolves and so do nature, men and their structural capacities to rape. Women also rape and, in this age, where same sex marriages, trans gendering is now randomly legalized in some countries,²⁹ one begins to ponder whether, sexes or accident of Biology as espoused by Carol Arinze Umobi, should be the sole yardstick in gauging victims/offenders of spousal rape.

The gender bias, prejudice ascribed to victims/perpetrators of rape is one that, has been transmitted from generation to generation and this narrative is not different in the quest to criminalize spousal rape in Nigeria. Men are vulnerable person and as such, should enjoy equal protection from law. To exempt men(husbands) as victims of spousal rape and categorize them as sole offenders of it, makes mockery of equity, equality and fairness. Granted that rape cases against the male gender are hardly reported or given any serious concern, due to fear of stigma, societal prejudice meted against the male gender, laws should serve all interest. Men hardly speak out when raped by opposite gender. Regrettably, these societal stigma/prejudices are hardly considered in the quest to criminalize spousal rape in Nigeria or globally. This assertion can best be appreciated from varying definitions of spousal rape by key scholars in their clamour to criminalize it in Nigeria.

It is the stance of Obidimma and Obidimma that, 'spousal rape is nonconsensual sexual intercourse in which the perpetrator is the victim's spouse. In most cases, it would be the husband having sexual intercourse with his wife without her consent'.³⁰ Emeka and Emejuru, on their part, defined spousal rape as a situation where:

A man has sexual intercourse with his wife, to whom he is lawfully married without her consent. That is, nonconsensual sexual intercourse with a spouse, however obtained may not be a crime.³¹

Sharma and Mishra (staunch crusaders of spousal rape) argued that:

When a guy commits marital rape, the victim knows that she will have to spend the rest of her life with him, which has a detrimental effect on her mental and physical health as well. Because there are no laws against marital rape, most of these women are afraid to come forward and report the crime for fear of being shunned by society if they do.³²

From the above definitions of spousal rape, none ascribed a husband the status of a spouse capable of being raped by his wife. Put differently, most scholars are in agreement that wives can only be victims of rape save Obidimma and Obidimma.

²⁹ And with the recent pronouncement by Pope that spouses/person of the kind, should be accorded blessings by Catholic priests.

³⁰ 'Spousal Rape in Nigeria: An Aberration', *International Journal of African and Asian Studies* (2015) vol 13, p1.

³¹ 'An Appraisal of the Jurisprudence of Spousal Rape in Nigeria',

³² Dr D C Mishra, 'Marital Rape Criminalization: A Critical Study', Sanjeev Sharma Research Scholar, *ibid*.

To further buttress this point, Sharma and Mishra, while lambasting the provisions of Prohibition of Child Marriage Act³³ and Protection of Women from Domestic Violence Act,³⁴ did argue that the Act merely made child marriage voidable and not void in India. It is their stance that these Act merely gave definition of violent or aggressive behaviour to mean, 'harms or harms or jeopardizes the wellbeing, security, life, appendage or prosperity, regardless of whether mental or physical, of the oppressed individual³⁵ without adding any strong sanction to it.

In Nigeria, neither the VAPP Act³⁶ nor Criminal Code Act/ Penal Code criminalized spouses' rape just as it obtained in the Protection of Women from Domestic Violence Act of India. Act. But in some jurisdictions, spousal rape attracts life imprisonment³⁷ and that is the scenario in South Africa and United Kingdom. Before spouses' rape was criminalized in the United Kingdom, Anthony³⁸ once prophesied that:

The day will come when man will recognize woman as his peer, not only at the fireside, but in councils of the nation. Then, and not until then will there be the perfect comradeship, the ideal union between the sexes that shall result in the highest development of the race.

While this prophesy has been fulfilled in the United Kingdom, Nigeria is yet to criminalize same. The delay in criminalizing spouses' rape in Nigeria might be attributed to tenacious inclination of Nigerians and some Westerners to the biblical injunction that;

- i. the essence of marriage as ordained by God is to be fruitful,
- ii. multiply and fill the earth or
- iii. the need to hold onto their wives in perpetuity as their inheritance.

Many also place reliance on the biblical mandate, that husbands are the head of the family, just as Christ is the head of the Church and such, should enjoy all benefits, conviviality attached to their 'Lordship' status to argue that, men(husbands) are serial rapists.

While spousal rape has been criminalized in many countries, Nigeria, India and Malawi (some other nations) are yet to do so. The delay might also be attributed to diverse model of marriages inherent in Nigeria and fears that the male gender might be perpetually denied of their right to say no in matrimony where criminalized in the many advocated by many. One may query, should wives solely enjoy right to say no to sex to their companion in matrimony or should these rights be extended to both parties in matrimony for equity's sake? The answers to the above posers have earlier been proffered. But for clarity, it will now be discussed in details.

The term spousal rape is alien in Nigerian legal jurisprudence for obvious reason. The extant Nigerian legislations did not criminalize nonconsensual intercourse between couples or spouses (wife or husband of legal union). It is also not envisaged that a man can be raped and this perception still persist even with the enactment of the Violence Against Persons (Prohibition) [VAPP] Act. The VAPP Act stated that both genders can be raped or held culpable for offence of rape and nothing more. But it is worthy to note that Nigerian courts hardly place reliance on the provisions of VAPP

³³ Prohibition of Child Marriage Act (India)2006.

³⁴ Protection of Women from Domestic Violence Act (India), 2015.

³⁵ Violence Against Persons (Prohibition) Act, 2015, s 1.

³⁶ *Ibid*, s 1.

³⁷ *R v R* [1992] 1 AC 599 (UK)

³⁸ American social reformer and women rights activist (1820-1906). Culled from Kolade Faseyi, 'Spousal Rape in a Globalized World,' *NAUJILJ* 9 (1) 2018, p 107.

Act when appraising what amounts to rape or offenders of offence rape. In a recent judgement,³⁹ the Appellate Court while examining the requirements to make the offence of rape complete or necessary to ground the conviction of a person accused of the offence of rape relied heavily on the provisions of section 357 of the Criminal Code which stipulates that ‘a girl’ or ‘a woman’ or even ‘a married woman’ can be raped, so long as the unlawful carnal knowledge is without consent, without averting its mind to the provisions of section 1 of VAPP Act.

The Apex Court, in its recent judgement also failed to appreciate the provisions of section 1 of the VAPP Act⁴⁰ when it defined the offence of rape to mean:

The 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 of⁴¹ 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 the case of a married woman by personating her husband.

Before the enactment of the Violence Against Persons (Prohibition) [VAPP] Act,⁴² men above the age of 12 years old were deemed sole culprits of rape.⁴³ But that is no longer the law. Nevertheless, the gender bias that held sway before the enactment of the VAPP Act still persist till date even among those advocating for the criminalization of spousal rape in Nigeria. But, the essence of law is to instill fairness, equity and equal treatment to all irrespective of gender or marital status. All humans are entitled to their human dignity/ fundamental rights and these rights must be protected by law and not made mockery of. The quest to criminalize spouses' rape is one clothed with bias globally and this can be gleaned from the stance of Sharma and Mishra in their clamour to have spouses' rape criminalized in India. It is their stance that;

Article 14 of the Indian Constitution guarantees the Fundamental right of equality before the law and equal protection of the laws within the territory of India. However, criminal law is still silent on the discrimination that is faced by the victims of marital rape. If you're married and you're being harassed by your husband for reasons that aren't comprehensible, artificial, or evasive, you won't be protected by the law under the Exception to Section 375 of the IPC, which is a discriminatory statute against married women.

According to Sharma and Mishra, when a man and a woman are married, the State has already set laws governing marriage, such as dowry and cheating, as well as cruelty and divorce. Adding rape to the list would be nothing short of a monumental achievement for India's mental health. It is also their stance that, ‘destabilizing the institution of marriage and harassing spouses are two reasons why the State opposes criminalizing marital rape.’⁴⁴ In their disdain with the status quo, they opined that getting justice for an act that has already tainted the sacredness of marriage should not affect the relationship between the two people involved. It is their resolve that, attempts or actual sexual assault by one of the spouses have already shattered the foundation of the marriage and such attempts or

³⁹ *State v Ijiwande* (2020) LPELR-51627(CA).

⁴⁰ As it relates to the extended scope of who can be raped or offenders of rape.

⁴¹ *Ali v State* (2020) LPELR _53409(SC).

⁴² VAPP Act 2015.

⁴³ Criminal Code Act, s 30

⁴⁴ Dr D C Mishra, ‘Marital Rape Criminalization: A Critical Study’, Sanjeev Sharma Research Scholar, *ibid*.

sexual assaults should be punished. Flowing from the above extract, it is clear, Sharma and Mishra⁴⁵, did not in any way suggest that, husbands in marriage can be victims of marital rape. Rather, it is their stance that husbands should be made sole offenders of marital rape. This submission of Sanjeev and Mishra resonates with the stance of Carol Arinze-Umobi. According to Arinze-Umobi;

Nigeria lacks laws that guarantee the rights of married women and as such they are stripped of their fundamental legal protections and basic human rights afforded to other women, denied equal benefit and equal participation in social, economic and domestic life.

Put differently, Arinze-Umobi and Mishra are in agreement on many fronts in their clamor to criminalize spousal rape to wit:

- i. spousal rapes are committed against women in marriage,
- ii. married women are sole victims of spousal rape,
- iii. offenders of these acts are husband or intimate partners of married women,
- iv. all husbands of married women treat them as captives, predicating same on their patriarchal nature,
- v. almost all countries have criminalized spousal rape, either by amending existing legislation or by enacting new legislation,
- vi. spousal rape should be criminalized in Nigeria/India and husbands imprisoned for life as it is applicable in the United Kingdom or other nations that have criminalized it.

From the analogies made by Arinze-Umobi and Mishra, it may appear that the compound word, 'spousal rape' was deliberately interpreted to mean rape by women in marriage or married women by their husband(s). But can it be rightly said that in this age, women (married or unmarried) are sole victims of rape and husbands (men) sole offenders of rape?⁴⁶ The above queries can only be answered in negative and this work disagrees with the stance of Sanjeev, Mishra and Prof Carol Arinze-Umobi in this regard.

At present, wives cannot be raped by their husband and vice versa in Nigeria.⁴⁷ While appraising the offence of rape and why wives cannot be raped, Obidimma and Obidimma,⁴⁸ agreed that rape is unlawful carnal knowledge or carnal connection which takes place otherwise than between husband and wife. In their appraisal of the topic under review, both⁴⁹ agreed that under the Nigerian Customary Law:

The incident of rape of a wife by her husband is unknown as the wife is regarded as the property of the husband. As such, he is free to have her at will notwithstanding her disposition. This altitude is predicated on the notion that on the payment of bride price, the husband becomes the "owner" of the wife just as he owns other items of property including goats, sheep and chicken and reserves the right to discipline her, including having sexual intercourse with her any time he desires. This

⁴⁵ In their stance to have spousal rape criminalized in India.

⁴⁶ Or spousal rape.

⁴⁷ Section 282 of the Penal Code and section 357 of the Criminal Code.

⁴⁸ Prof E.O.C Obidimma, Prof A.E. Obidimma Spousal Rape in Nigeria: An Aberration', *International Journal of African and Asian Studies*, 2015, vol 13; p

⁴⁹ *Ibid.*

perpetuate the idea held under customary law, that a woman is a piece of property owned by the husband.

In making a case against the criminalization of spousal rape in Nigeria, Obidimma and Obidimma agreed that;

Law is dynamic and ought to be used to address the needs of the society. Our opinion is that should the Nigerian society really need a change in the sexual offences laws to prescribe marital rape, then that should be it. It will not be an exercise in wisdom to amend the law just because other countries are doing so. Nigeria should take into account the sensibilities of peculiar social and cultural norms and the real intent of the marital relation. Sex is the reason most men marry. To outlaw sex in marriage on grounds of lack of consent would require a superior persuasion. But until that is done, marital rape remains an aberration under the Nigerian jurisprudence.

In most countries, the offence of rape is now described using gender neutral terms since victims must not necessarily be a man. In South Africa, a husband who attempted to rape his wife was convicted and duly sentenced but not without some sentimental undertones.⁵⁰ Section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act, South Africa⁵¹ has also expanded the offence of rape to include all forms of sexual assault and penetration without consent using gender neutral terms. In section 5 of the Prevention of Family Violence Act (South Africa)⁵², the law specifically states that, 'a husband may be convicted of the rape of his wife.' But in India, rape despite being a serious offence, does not apply to those in marriage judging from section 375 of the Indian Penal Code.⁵³ In *State v Vikas*,⁵⁴ the Indian Court acquitted a man who allegedly drugged and raped his wife. The court per Virender Bhat, J held that thus;

The prosecutrix (the wife and accused Vikash) being legally wedded husband and wife and the prosecutrix being major, the sexual intercourse between the two, even if forcible is not rape and no culpability can be fastened on the accused.

In Malawi, non-consensual sex is yet to be criminalized.⁵⁵ However, rape has been defined by the Malawian Penal Code⁵⁶ to wit:

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 fraud or means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman by impersonating her husband, shall be guilty of a felony termed rape.

⁵⁰ *S v Modise* (2007) ZA NWHC, 73.

⁵¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act (South Africa) 2007.

⁵² Prevention of Family Violence Act (South Africa), 1993.

⁵³ (45 of 1860).

⁵⁴ SC No 1/14 FIR No 256 dated 17.10.2013.

⁵⁵ Nigerian legislations share similarity with that of Malawi as it relates to offence of rape.

⁵⁶ Malawian Penal Code, No 263 of 1969, s 132.

Courts in Malawi are usually reluctant to rule on marital rape or even sexual abuse in marriage as can be gleaned from the decision in *R v Mwasomola*.⁵⁷ In the instant case, Malawian Court held that, 'a man who killed his wife because she refused to consent to sex, can only be guilty of manslaughter since such refusal of sex with her husband amounted to provocation.'⁵⁸ In Nigeria, a spouse cannot be guilty of raping his or her partner but can be charged for grievous bodily harm or assault.⁵⁹ Nonconsensual intercourse was exempted as marital rape in England and Wales up until 1991 when court ruled otherwise in *R v R*⁶⁰ coupled with corresponding amendment made to section 147 of the Criminal Justice and Public Order Act⁶¹ afterwards.

At present, all recent legislations that criminalized spousal rape in England, protected female genders in marriage to the exclusion of others save section 3 of Criminal Law [Sexual Offences and Related Matters] Amendment Act,⁶² that is not gender bias.

4.0 Right to Say No: Legal Issues/Challenges

From time immemorial, spouses are known and described as husband and wife. But while advocating for criminalization of spousal rape in Nigeria, wives of monogamous marriages⁶³ seems to be the sole party designated as persons capable of raped in matrimony (or be victims of spousal rape) and no other party in other form of marriages.⁶⁴ But aside the orthodox marriages (spouses), there exist many variants of marriages recognized globally and they include; gay, lesbians, trans gender spouses that are yet to be recognized in Nigeria. At present, thirty-five countries⁶⁵ have legalized same sex marriages and seven African countries⁶⁶ make up this number.⁶⁷

In some African and Western nations, spouses of lesbian/gay marriages enjoy equal respect, rights, protections like their monogamous and polygamous spouses. But there seems to be an uncensored consensus among agitators of spousal rape in Nigeria (and globally) that, wives (women specifically) are sole victims of spousal rape and no other gender. Gay, lesbian and transgender marriages(spouses) are outlawed in Nigeria even though, they have been legalized in some jurisdiction. Assuming without conceding that these listed outlawed marriages are legalized in Nigeria, who then should be ascribed the status of wife (ives) or penalized where spousal rape is criminalized in the manner being advocated by advocates of spousal rape?

In most jurisdictions, husbands are sole culprits/offenders of spousal rape and this situation is discriminatory. In South Africa, victims or offenders of nonconsensual intercourse applies to all irrespective of gender or prejudice. To restrict offenders of spousal rape to traditional men or husbands in monogamous marriages without extending the scope to wives in monogamous/polygamous marriages or being futuristic about dynamics of marriage. It also undermines the quest to protect the dignity, liberty of all parties in matrimony, thereby making mockery of the principles of equity, equality and fairness attributed to law.

Every society gets what it desires and laws are never applied in vacuum. In most countries, if not all, the need to preserve culture, good values and heritages, determine the nature of laws made. Culture and maintenance of cultural values of any society, to some extent, determine the tenor of her

⁵⁷ *R v Mwasomola* 4 ALR(Mal) 572.

⁵⁸ *Supra*.

⁵⁹ *Alausa v Odusote* (1941) 7 WACA 140, *Njoku v State* (2017) LPELR-42743(CA).

⁶⁰ (1991) 3 WLR 767.

⁶¹ Criminal Justice and Public Order Act, 1994

⁶² 787, Act no. 13 of 2021(South Africa).

⁶³ With the exclusion of spouses in polygamous marriages, and husbands in marriages.

⁶⁴ Polygamous and Islamic marriages.

⁶⁵ 35 countries out of 195 countries that exist in the world. This total consists of 193 countries that are member States of the United Nations and 2 countries that are not member states; the Holy See and the State of Palestine.

⁶⁶ <<https://www.globalcitizen.org/en/content/countrieslegalized-same-sex-relationships-africa>>last accessed 27/12/2023.

⁶⁷ They are; South Africa, Angola, Botswana, Mozambique, Lesotho, Seychelles and Mauritius.

legislations or judgement and same applies to Nigeria. Nigeria is a nation with cultural differences and values. Every nation guides theirs tenaciously and most often, see attempts to modify its culture, value as an affront to their existence. What more, the right to dignity of human persons as guaranteed under section 34 of the CFRN 1999 (as amended), is not a nebulous one.⁶⁸ It is the duty of courts and law enforcers to ensure that, no gender is discriminated upon in its decisions or enforcement of law as it relates to preservation of dignity of citizens as guaranteed by the Nigerian Constitution and other enabling laws. Regrettably, these listed principles of law are rarely considered by most scholars that clamour for criminalization of spousal rape in Nigeria. Many conveniently shy away from the reality that men (husbands) are also vulnerable persons that need protection from law. Equality is equity and as such, all animals must be equal, some should not be more equal than the others.

It is known to all that gay, lesbian, transgender marriages though outlawed in Nigeria⁶⁹, has been legalized in some countries. Flowing from these dynamics in marriages, is it wise that the definition of spouse (in relations to spousal rape) will continue to be gender bias amidst the call to criminalize spousal rape in Nigeria. Is the call to criminalize spouses' rape in Nigeria truly a borne to promote equal right or clamour to align with global trend!

Before the enactment of Violence Against Persons Prohibition (Act),⁷⁰ offences of rape are only deemed committed in Nigeria Criminal jurisprudence⁷¹ when;

- unlawful carnal knowledge of a woman or girl is had; without her consent or with her consent,
- lawful carnal knowledge of a woman or girl is had 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, and carnal knowledge of a married woman, by personating her husband.⁷²

The VAPP Act, like all legislations before it, did not criminalize nonconsensual sex among married couple, though it laid to rest gender perspective associated with rape generally in Nigeria. To argue that, the rampant rise of spousal rape is caused solely by husbands or to attribute same to over-zealous quest of men to exert power, use their penises (rather than their brains) to intimidate and suppress women all to re-enforced the patriarchal nature of the African society, will be totally unfair, prejudicial to humanity and nature. No man has power to determine how he is created or the gender he/she must be born with. While arguing that the rampant rise of spousal rape is caused solely by husbands or to attribute same to over-zealous quest of men to exert power, use their penises, Carol Arinze Umobi bemoaned the fact that:

Nigeria lacks laws that guarantee the rights of married women and as such they are stripped of their fundamental legal protections and basic human rights afforded to other women, denied equal benefit and equal participation in social, economic and domestic life.

This sentiment of Arinze-Umobi is also shared by Sharma and Mishra. It is worthy to note that in India, husbands can also have sexual intercourse with their wives between the ages of 15 and 18, due to the fact that, there is no provision for males to ask for their wives' consent while they are

⁶⁸ *Bassey & Anor v Akpan & Ors*(2018) LPELR-44341(CA).

⁶⁹ Same Sex Marriage Prohibition Act 2013, s 1.

⁷⁰ VAPP Act 2015.

⁷¹ *Sunday Jesede v The State* (2001) 14 NWLR (Pt.733) 264 at 275 (2001) 10 SCM 49; *Edet Okon Iko v The State* (2001) 14 NWLR (Pt.732) 221

⁷² *Musa v State* (2013) LPELR-19932(SC), *Sani v Kano State* (2017) LPELR-43329(CA), *Lucky v State* (2016) LPELR-40541(SC).

between the ages of 15 and 18 years. For clarity's sake, section 3(a) of the Protection of Women from Domestic Violence (PWDV) Act (India) defined abusive behaviour in marriage to mean:

Harms or jeopardizes the wellbeing, security, life, appendage or prosperity, regardless of whether mental or physical, of the oppressed individual or will in general do as such and incorporates causing actual maltreatment, sexual maltreatment, verbal and psychological mistreatment and monetary maltreatment".

In lampooning the provisions of section 3(a) of PWDV Act, Sharma and Mishra lamented the Act failed to criminalize abusive behaviour or give an imprisonment term for such wrongs. These aforementioned Indian scholars and Arinze Umobi, share same conceptualization of spousal rape. They mutually agreed that, criminalization of spousal rape or right of spouses to say no in matrimony should be accorded strictly to married women. Put differently, it is their stance that husbands should be held as sole culprit for offences of spousal rapes. This can be gleaned from Sharma and Mishra's⁷³ posture on criminalization of spousal rape to wit;

This type of domestic violence is the violent or aggressive behaviour in the home, which includes the violent abuse of one's spouse or partner in the home. However, most men understand that marriage gives them the right to have sexual intercourse with their wives at any time, whether or not they are willing. This is the face of a patriarchal society, and it's bad for marriage.

In today's Nigeria, rape can be committed either by men and women, though spouses are exempted from it. Spouses are wielded with legal rights to make complaint of domestic violence against each other.⁷⁴ But the snag about the VAAP Act is its neglect to include;

- i. spouses in monogamous marriage as persons capable of committing nonconsensual rape against themselves and also as offenders for the offence of nonconsensual rape committed on each other,
- ii. spouses of other marriages as persons that can be raped by their spouses or be offenders of nonconsensual rape committed against their spouses,
- iii. use gender neutral in nonconsensual rape committed by parties in matrimony committed on themselves irrespective of the type of marriages contracted.

Victims of rape, hardly get the attention/protections they deserve and male victims are hardly afforded any protection from relevant authorities in Nigeria. Nevertheless, the Nigerian legislatures must be commended for using gender neutrals unassociated with previous criminal legislations in describing the offence/perpetrators of rape in the VAPP Act. However, there is need to extend the scope of nonconsensual rape to spouses in matrimony using to gender neutrals. This can only be achieved when offence of rape (be it spouses' rape or rape simpliciter) and their offenders are ascribed gender neutrals status. This can also be achieved by amending section 1 of the VAPP Act, section 357 of Criminal Code Act and section 282 of Penal Code Act to accommodate this desired change, that is using gender neutrals in defining the offence of rape and offenders of rape in Nigeria as it is applicable in South Africa.

⁷³ D C Mishra, 'Marital Rape Criminalization: A Critical Study', *ibid* (n 5)

⁷⁴ VAPP Act, 2015, s 1.

5.0 Conclusion

There is a belief in Nigeria that marriage is sacred institution that must be preserved at all cost. And in striving to preserve this institution called marriage, the contractual rights inherent in it collide with fundamental rights of contracting parties. One of such right is right to dignity of person. The right to dignity of person is an inalienable right of all humans (irrespective of sex and status) and most times, it is usually hard to conceptualize when and where these rights are infringed upon or waived. Spouses' rape has been described by some as one of the worst, inhumane violation of right of dignity of women by husbands through nonconsensual intercourse in marriage. However, this work totally disagrees with this misconception ascribed to spouses' rape and its bias inclination. Granted that spouses' rape is one of the worst, inhumane violation of right of dignity of women/husband through nonconsensual intercourse in marriage and it is not committed by husbands alone. Spouses (wife/husband) are mutually guilty of these inhumane acts. The word spouse does not connote woman but, 'a wife or husband in lawful union' and this concept should always be used in its broad sense rather than its narrow concept in this clamour to criminalize spousal rape in Nigeria. Section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act (South Africa),⁷⁵ which described rape to include, 'all forms of sexual assault and penetration without consent' using gender neutral terms, should also be used as right template in criminalizing spousal rape in Nigeria and not otherwise.

6.0 Recommendations

The drive to criminalize spousal rape in Nigeria should not be turned into gender-based warfare as it is evident in section 5 of the Prevention of Family Violence Act⁷⁶ which states that, 'a husband may be convicted of the rape of his wife' without using gender neutral terms in its description of victims/offenders of spouse rape.

While this work agrees in part with the recommendations of Obidimma and Obidimma as it relates to criminalizing spousal rape to wit;

Should the Nigerian society really need a change in the sexual offences laws to prescribe marital rape, then that should be it. It will not be an exercise in wisdom to amend the law just because other countries are doing so. Nigeria should take into account the sensibilities of peculiar social and cultural norms and the real intent of the marital relation.

It is the stance of this researcher that, whenever Nigeria desires to criminalize spousal rape, such criminalization should be gender neutral. Since section 1 of the VAAP Act has already laid a perfect template on how offence of rape may be perpetrated and also categorized victims/ offenders of rape⁷⁷ using gender neutrals, the scope should be extended to all spouses in matrimony (irrespective of types) using gender neutrals. Section 1 of the VAPP Act, should be amended to include wives/ husbands in marriage as persons capable of rape or being raped. The ingredients of nonconsensual rape should be expanded or enlarged to include; nonconsensual penetrating of the vagina, anus, penis, mouth or any part of one's body by another with any part of the ANYBODY or with instrument/ anything either by anyone or any entity without the consent of the victim or where such consent such was obtained by fraud, duress, misrepresentation of any kind.

⁷⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act (South Africa), 2007.

⁷⁶ Prevention of Family Violence Act (South Africa) 1993.

⁷⁷ Even though it exempted spouses from criminal liability of rape committed on themselves.