Spousal Sexual Assault in Canada and Nigeria: A Substantive Equality Approach

by

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A Thesis Submitted to the Faculty of Graduate Studies of

The University of Manitoba

in partial fulfilment for the requirements of the degree of

MASTER OF LAWS

Robson Hall, Faculty of Law

University of Manitoba

Winnipeg

Abstract

This study examines spousal sexual assault laws in Nigeria and Canada through the lens of substantive equality. The aim is to show that only when a substantive-equality approach is used for legislation and adjudication of spousal sexual assault can victims fairly seek and realize justice. This is because substantive equality considers broader socio-economic and cultural contexts that support this crime, including exposing stereotypes that underpin its legislation and adjudication. The study shows that in Nigeria and Canada spousal sexual assault is endemic and that women are disproportionately represented as victims and men as perpetrators. Failures to apply the principles of substantive equality in adjudicating spousal sexual assault lead to the flaws in evidentiary procedures involving this crime. The study concludes that it is important to revise criminal laws and evidentiary procedures in Nigeria and Canada using substantive equality principles.

Acknowledgements

The completion of this thesis is made possible through the collaborative effort of many people, all of whom I owe an unqualified debt of gratitude.

My sincere gratitude is first to my thesis advisor, Prof. Karen Busby, for her open door policy during the process of my thesis writing. I cannot thank you enough for your guidance, constructive corrections, comments and for how you enlarged the horizons of my thinking and critical engagement with issues. The high standards you set for every chapter of this thesis made all the difference.

I equally thank my co-advisor, Prof Debra Parkes, for all her insightful and invaluable input to my thesis. The inspiring sessions I was privileged to have with you, particularly during the Charter class you taught, sharpened my insight during the whole of this research process. Your dedication and hard work also contributed immensely to the ease of my transition from a Nigerian to a Canadian academic system. My sincere gratitude is also to Dr. Joyce Chadya for her invaluable comments and suggestions on how to strengthen this thesis. I am also grateful to Dr. Mary Sharif for her thought-provoking questions and comments, all of which helped me to sharpen the focus of this research. My gratitude to Aimee Craft for the knowledge gained in the gender and women studies class.

My sincere gratitude goes to the staffs and members of the Robson Hall for all support rendered at different stages of the program. A special appreciation to Maria Tepper, Marie Jivan and Donna Sikorsky for the help, the smiles and the encouragement.

I thank all the friends whose words and show of friendship and love made me strong during this period: Soji Akinlabi, Oyin, Ifeloluwa Fadeyi, Samuel Adeniyi, Tope Joseph, Adeolu

Joseph, Chiedza, Katie, Dunni and Leroy. A special thanks to Big Mummy – Mrs. Joseph – for making Canada feel like home and for all the smiles and Nigerian food.

Most importantly, this research would not have seen the light of day without the support, sacrifice and love of my immediate family. Sharon, you drove me insane with questions about my progress but you also made me see why I could not give up. Mum and Dad, you are my stronghold. Kola, Precious and Bobo, thank you for all the encouraging words. To a friend like no other, my family – Macabees – you were my anchor and compass through this program, just like you always have been. Thanks for not letting me quit!

Lastly, immense gratitude to Adalsteinn Fridrikson Kristjansson, David T. Sgayias and the International Graduate Student for the financial aid without which it would have been impossible to undertake this project with ease of mind.

Dedication

To the voices in my head!

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Introduction

> Recognition of the fact that to achieve meaningful, substantive equality, it may be necessary to require differential treatment rather than treating all parties the same, is important in the sexual violence context.[1]

In a manner different from other crimes, sexual assault embodies some of the major tensions and complications arising from legally-recognised fundamental rights in Canada and Nigeria. Although not limited to the following, these rights include the rights of an accused to a fair trial and complainant's equality right. How often the equality rights of complainants feature in the examination of sexual assault is a contested issue. Canadian and Nigerian societies are largely – and rightly so – invested in ensuring that the justice system is fair to all. In this process, the voices of victims of sexual assault are sometimes muffled under the weight of intersecting factors such as the laborious evidentiary procedures required for criminal prosecutions, stereotypical and prejudicial assumptions about women's experience of sexual assault, and neglect of the complex nature of what constitutes choice and consent.

Sexual assault is a form of gender-based violence with women and children usually the victims and men usually the perpetrators.[2] Apart from some cases of rape involving strangers, many acts of sexual assault reportedly happen between or among people who know each other including those in intimate relationships. A 2010 global study on violence against women shows that globally 35.6% of women have experienced either physical and/or sexual violence.[3] The report also states that globally almost one third (30%) of all ever partnered women experienced

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[1] Fiona Sampson, "The Legal treatment of Marital Rape in Canada, Ghana, Kenya and Malawi-A Barometer of Women's Human Rights" online: (2010) Equality Effects <www.theequalityeffect.org/journal/maritalrapebarometer.pdf>. [Sampson].

[2] See Statistics Canada, *Crime and Victimization in Canada 2009,* by Samuel Perreault & Shannon Brennan Catalogue No 85-002-X (Ottawa: Statistics Canada, Summer 2010); Claudia Garcia-Moreno et al, "Prevalence of Intimate Partner Violence: Findings from the WHO Multi-Country Study on Women's Health and Domestic Violence" (2006) 368:9543 Lancet J 1260-69.

[3] World Health Organization, Preventing Intimate Partner and Sexual Violence Against Women: Taking Action and Generating Evidence". (2010) Geneva: WHO/London School of Hygiene and Tropical Medicine at 20[WHO 2010]. See also ___, "Violence Against Women: Intimate Violence and Sexual Violence Against Women" Fact Sheet N'239 (January 2016) [WHO 2016].

physical and/or sexual violence by their intimate partner in comparison to 7.2% aggregate on women who have experienced sexual violence at the hands of strangers.[4] The report further reveals that there is no age restriction in the experience of intimate partner violence on women and that 38% of all murdered women were killed by their intimate partners. [5] These statistics are in comparison to 6% of men killed by an intimate partner. Emphasising the health implication of violence against women, the report indicates that women who have been physically or sexually abused by their partners report higher rates of a number of important health problems, including low-birth weight babies, abortions, and infections with STIs and HIV, in comparison with women who have not been victims of intimate partner violence.[6]

As a result, it is not surprising that spousal sexual assault has become an issue of concern, especially given the peculiar challenges involved in legal prosecution of such cases. Coming from patriarchal cultures and histories which impeded the recognition of spousal sexual assault as a crime in Nigeria and which until 1983 did not recognise sexual assault in marital context in Canada, legislation against spousal sexual assault as well as its prosecution has remained slow and where such a legislation exists at all it is often weakened by a range of evidentiary procedures adopted for cases of spousal sexual assault. As the present study shows by examining spousal sexual assault laws in Canada and Nigeria, [7] the emphasis on consent and credibility in adjudicating spousal sexual assault, as well as reliance on stereotypical assumptions about women, is essentially problematic in number of ways. Consent and credibility often serve as a

[4] WHO 2010, *supra* note 3 at 16, 18.
[5] *Ibid* at 26 (due to skewed estimates, it used a median percentage of 13%).
[6] *Ibid* at 21-24.
[7] It is necessary to state the limitations of this study. First the study does not include the examination of spousal sexual assault in other forms of relationship aside from heterosexual relationship. This omission is due to the complications likely to arise from this since Nigeria expressly criminalises homosexual unions. Second, the barrier created by the use of English terms when examining spousal sexual assault cases in Canada creates a limitation in respect to Quebec cases as will be discussed later Also, other areas such as police and Crown discretion is not the bane of this study but rather the legislation and judicial interpretation of the laws.

justification for the non-recognition of spousal sexual assault in the criminal codes of countries such as Nigeria. Also, a strict focus on consent and credibility in when engaging spousal sexual assault in Canada treat the crime in similar fashion as any other sexual assault that takes place in other contexts without underscoring the peculiar circumstances that could make spousal sexual assault different and almost impossible to adjudicate fairly. The emphasis on consent and credibility could also inadvertently re-victimize victims and even force them to avoid the law entirely. Yet, consent and credibility cannot easily be dispensed with because they are an essential means through which criminal intent can be established. And therein lies the major challenge. Given the nature of evidentiary procedures in criminal cases, what approaches would best serve spousal sexual assault adjudication?

It has been noted that government's response to issues of violence against women is often an indicator of the status of women in society.[8] In Nigeria, for instance, women are treated as occupying a subordinate position in society compared to men. This reality manifests in the country's numerous laws, customs and religious practices that, in effect, endorse and perpetuate the view that women are inferior. For example, there are cultural practices such as polygamy, widowhood rites, and bride price that have been implicated for the ways in which they perpetuate ideas about women as humans.[9] Also, there is legislation that promote violence against women. An example is section 55 of Nigeria's *Penal Code* which is applicable to the Northern region of Nigeria. This section legalises the physical chastisement of a wife as a corrective measure if such

[8] See Sampson, *supra* note 1 at 3;

[9] See Hadiza Iza Bazza, "Domestic Violence and Women Rights in Nigeria" (2009) 4:2 Societies Without Borders 175; Foluke O Dada, "The Justicieability and Enforceability of Women's Rights in Nigeria" (2014) 14:5 Global J Hum-Soc Sci E Econ 48; Akinbi, Joseph Olukayode, "Widowhood Practices in Some Nigerian Societies: A Retrospective Examination" (2015) 5:4 Intl J Humanities Soc Sci 67.

force is used within a reasonable degree.[10] All these factors serve to show a society heavily invested in maintaining gender inequality.

From the institutional subjugation of women as described in the preceding paragraph, two fundamental perceptions about spousal sexual assault inform the standpoint of the present study on the subject. First, spousal sexual assault thrives in an atmosphere of gender disparity and power imbalance. Second, certain simplistic gender myths and stereotypes undergird legislation and prosecution of spousal sexual assault. This thesis seeks to examine three questions: How can a society ensure the protection of married women from spousal sexual assault? Second, how can the society ensure that the legal system does not become another avenue to re-victimise victims of sexual assault? Also, how can married women subordinated by centuries of patriarchal institutions of discrimination effectively benefit from any legislation criminalising spousal sexual assault?

The study therefore proposes a substantive equality framework for reviewing laws and law reforms on spousal sexual assault and also uses this framework to examine existing legislations on spousal sexual assault in Canada and Nigeria. The thesis is premised on the four assumptions. First, substantive equality should be used as a foundational principle in the legislation of spousal sexual assault and its accompanying evidentiary procedure. Second, substantive equality framework should serve as an interpretive aid in spousal sexual assault adjudication, especially for deducing consent and assessing credibility of the complainant. Third, the principles of substantive equality should guide government programs and policies in ways that meaningfully impact on the lives of married women. And finally, substantive equality

[10] *Penal Code Act* c P-3, LFN 2004. See also Akinbuwa v *Akinbuwa* 8 (1998) CA/B/6/94, 13 (Court of Appeal of Benin held that physical discipline of wife within a reasonable degree is acceptable for disciplinary purpose).

should serve as an advocacy tool for feminist and women's rights groups seeking to eradicate spousal sexual assault.

A justification for using a substantive equality approach is because research consistently demonstrates that spousal sexual assault still receives less attention than stranger rape in Nigeria and Canada. Research has shown that analysis of spousal sexual assault is often infused with myths and stereotypes about women and marriage. [11] Public perception on the sexuality of women and role of women in marriage seem to affect state actors' reaction to spousal sexual assault due to ongoing intimate relationship between accused and victims, a situation that often complicates the determination of consent and the assessment of credibility. Spousal sexual assault has been established to be the least reported and socially permissible form of sexual assault on women. A substantive equality analysis encourages the nuancing and contextualising of social issues in order to ensure that measures that are taken can have real impact on the life of vulnerable groups.

This thesis critiques present legal frameworks deployed in adjudicating sexual assault cases in Canada and Nigeria. The study identifies the development of sexual assault laws in the two countries with specific focus on the definition of consent and assessment of credibility of the complainant. The thesis further examines the legal framings of consent and the judicial application of consent and credibility to spousal sexual assault cases in Canada and Nigeria. The study also examines the implications and complexities that arise from introduction of cynical myths about women in spousal sexual assault cases in Canada and Nigeria. The study finally

[11]See Ruthy lazar, "Negotiating Sex: The Legal Construct of Marital Rape" (2010) 22:2 CJWL 329 at 333; Elaine Craig, "Ten Years after Ewanchuk the Art of Seduction is Alive and Well: Honest but Mistaken Belief in Consent" (2009) 13 Can Crim L Rev 247; Melanie Randall, "Sexual Assault in Spousal Relationship, "Continuous Consent" and The Law: Honest but Mistaken Judicial Beliefs" (2006) 32 Man LJ 144.

discusses the general limitations and merits of existing sexual assault laws in Canada and Nigeria as they relate to spousal sexual assault.

Canada and Nigeria are important in this study not just because they respectively represent examples of overt recognition and non-recognition of spousal sexual assault as a crime – although this provides a good opportunity to examine the implication of not recognizing spousal sexual assault as a crime, as well as some complications and challenges that arise from expressly recognizing spousal sexual assault as a crime. Canada and Nigeria are important to this study because not only do both countries draw their judicial models from the British legal system–English common law–but they have rarely been brought into a significant comparative study on the issue of spousal sexual assault. Also, both countries share a lot of similarities, particularly with respect to their self-avowed multicultural approaches to culture, governance and legislation. Further, both countries have constitutionally guaranteed rights.

The thesis consists of four chapters with a separate introduction and conclusion. Chapter one provides a general definition of spousal sexual assault. This chapter recognises that the treatment of spousal sexual assault reflects the discriminatory attitude that has been perpetrated towards married women historically. Also, that sexual assault laws in Nigeria and Canada are a break from the patriarchal status quo that previously refused to recognise spousal sexual assault as a crime following the English common law principle of marital rape immunity. Following from this, chapter one provides a historical background to marital rape exemption in Canada and Nigeria, particularly highlighting the factors that informed previously held notions on marital rape exemption in sexual assault legislation in both countries.

Chapter two provides a general conceptual framework for two types of equality: formal and substantive equality. It examines the concept of formal equality and what necessitated a shift

to a broader approach to equality. It also examines the features of substantive equality. The Chapter reviews some current frameworks on equality as evidenced in Canada's and Nigeria's legal systems.

Chapter three examines the legal codes–*Criminal, Penal* and *Sharia Penal Codes*–for tackling sexual assault in Nigeria. The chapter critiques the place and implication of consent and credibility in sexual assault laws in Nigeria. The chapter through the lens of substantive equality uses the *Violence Against Persons Prohibition (VAPP) Act*,[12] as a benchmark to question the effectiveness of any law purporting to criminalise spousal sexual assault without a review of evidentiary procedures. Since no spousal sexual assault case has been adjudicated upon in Nigeria, this chapter carries out an examination of evidentiary procedures by referencing some decisions of the Court and also by analysing the legislative process that birthed the *VAPP Act.* The chapter also briefly examines the implication of the *Sexual Offences Bill*,[13] awaiting presidential assent if eventually passed into law.

Chapter four examines recent interpretations and developments of consent and evidentiary procedures in sexual assault law in Canada. The chapter presents a factual discussion of case analyses of selected spousal sexual assault cases with a date range from 2011 to 2016 (After the *JA* case[14]) in order to determine patterns in the treatment of consent and assessment of

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[12] *Violence Against Persons Prohibition Act, An Act to eliminate violence in private and public Life, prohibit all forms of violence against persons and to provide maximum protection and effective remedies for victims and punishment for offender; and for related matters, 4th Sess,* 7th N/A, 2015 (as assented to 25 May 2015) [*VAPP*].

[13] *Sexual Offence Bill, An Act to make provisions about sexual offences, their definition, prevention and protection of all persons from harm, unlawful sexual act and for purposes connected therewith,* 4th Sess, 7th N/A (as passed by the Senate) [*SOB*].

[14] This thesis uses the *JA* case as a starting point for examining recent developments of consent in Canada because this case provides a good background to judicial treatment of the notion of advance consent. Since the 1992 amendment to the Criminal Code, the Canadian jurisprudence on sexual assault has shifted to the notion of positive consent. In JA's case, The Supreme Court of Canada dealt with the issue of implied, continuous and advance consent which have sometimes implicitly played a role in issues of spousal sexual assault. The Court decided in this case that consent is active and that means it must be contemporaneous with consenting party being in a position to

credibility in spousal sexual assault cases. This chapter briefly examines the implications of the Canadian legal framework of a multicultural approach to sexual assault, especially as established for sexual assault cases related to newcomers. The chapter considers these cases to identify the limitations or merits of the nature of trials of sexual assault laws in dealing with spousal sexual assault cases in a range of Canadian contexts.

The thesis concludes by way of comparing the spousal sexual assault laws in Canada and Nigeria. This chapter also draws from findings in the analysis of sexual assault laws in the two countries to propose useful reforms and revisions for legislation and adjudication of spousal sexual assault.

withdraw consent at any given point in time. This case provides the opportunity to examine if this approach to consent has had any impact on judicial treatment of consent in spousal sexual assault cases. See generally *R v JA*, 2011 SCC 28.

Chapter One: Spousal Sexual Assault in Canada and Nigeria: History and Context

Introduction

> Without history and social context, each encounter between unequal groups becomes a fresh one, where the participants start from zero, as one human being to another, each innocent of the subordination of others ... I contend the opposite ... Without an understanding of how responses to subordinate groups are socially organized to sustain existing power arrangements, we cannot hope either to communicate across social hierarchies or to work to eliminate them.[1]

Sexual assault is a peculiar form of gender-based violence that disproportionately targets women. As several scholars have shown, while violence is not a peculiarly female experience since males have often encountered diverse forms of violence especially in war contexts, there is however no gainsaying the fact that sex-based violence has been perpetrated almost exclusively by men. And it has also been more damaging and more disproportionately directed at women.[2] The over-representation of women as victims of sexual assault is often a result of historically institutionalised systems of abuse that empower men over women. The English common law system maintained centuries of patriarchal and gender-biased social institutions that legitimated certain forms of violence, including sex-based violence as disciplinary measures to keep women in inferior positions to men. Few examples of these forms of treatment that serve to legitimise sex-based violence include the following: the tradition of dowry and bride price payment[3], provocation and honour killings, sexual harassment, deprivation of inheritance, sex-selective abortions, low economic status of women, low participation of women in politics,

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[1] Sherene Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998) at 11.

[2] See generally John Simister, *Gender Based Violence: Causes and Remedies* (Nova Science Publishers, Inc., 2012).

[3] In Nigeria and across other African countries, there are different schools of thoughts as to the purpose of bride price. Arguments have ranged from the cultural necessity of bride price as an appreciation of the bride's family and value of the woman to the indirect symbolic effect it has as a sale of a woman to a man. While controversies as to the implication of bride price abound, it has been noted that it is often raised as a defence to reinforce the perpetual right of the husband to sexual relationship with his wife. See Alice Armstrong et al, "Uncovering Reality: Excavating Women's Rights in African Family Law" (1993) 7 Intl J L & Fam 314 at 364.

disproportionate overrepresentation of women and girls in cases of domestic violence, among several others.

No context best reveals women's vulnerability to sexual assault more than the marital or intimate-partner context. Over the years, juridical, religious and cultural practices across many societies maintained structures that exempted sexual violence that emanated from marital settings due to a number of institutionalised notions about women as inferior partners to men. Marriages in the traditional heterosexual sense perpetuated myths that cast women as slaves and property to their husbands. Given the contexts and conditions within which this form of sexual violence is conceptualised and legislated, spousal sexual assault poses a number of challenges for adjudication, but more importantly, it provides an opportunity to examine the nature of evidentiary procedures that attend sexual assault prosecution generally.

This chapter defines sexual assault and consequently spousal sexual assault. Recognising the necessity of contextualising the treatment of spousal sexual assault in Canada and Nigeria, this chapter essentially traces the trajectory of the marital rape exemption in the British common law since both Canada's and Nigeria's jurisprudences drew heavily from English common law principles. The chapter examines the history of marital rape exemption and the theories used to support such exemption in order to create a context for the emergence of myths and stereotypes that underpin current assessment of spousal sexual assault in Canada and Nigeria. The chapter by no means makes a totalising claim that spousal sexual assault is only possible with men as perpetrators and women as victims. However, the study is generally premised on the assumption that historically, culturally, legally and socially, spousal sexual assault has essentially manifested as a crime committed by husbands against their wives and not the opposite. While there might have been exceptions to such an assumption in terms of the act itself, a brief survey that this

chapter carries out subsequently about theoretical systems used to rationalise and justify spousal sexual assault in many societies including in Canada and Nigeria reveals that this crime has not only been perpetrated by men but also that social and legal institutions have historically been assembled and used to protect men from this crime.

What is Spousal Sexual Assault?

Any attempt to define spousal sexual assault requires an understanding of the concept of sexual assault. The legal definition of sexual assault varies from state to state. However, because the laws of most countries do not seek to regulate heterosexual sexual activities between two consenting adults, the major element in sexual assault cases is often the proof or otherwise of consent.[4] Sexual assault is thus an assault committed in circumstances of a sexual nature that violates not just the integrity but basically hinders true enjoyment of equality for the victim.[5] The focus of recognising sexual assault or rape as a crime draws from the need to protect individual autonomy and exercise of freewill, as well as the ultimate control of what happens to one's body–a central factor to equality.[6] One important factor of this definition of sexual assault is that it needs not have a sexual goal from the perspective of the perpetrator, that is, it can be humiliation, degradation of a person through the tool of their sexuality.[7] Sexual assault can be coerced sexual or oral intercourse, forced participation in group sex, unwanted sexual touching, forced involvement in sexually explicit depictions, coerced sex arising from victimisation through technology, withholding economic or financial gains, employment of physical violence

[4] Note, the term heterosexual is included because in Nigeria and some other countries, consensual homosexual activities are criminalised. Also in Nigeria, under laws regulating criminal activities, some heterosexual consensual sexual activities are criminalised. For example, the Sharia Penal Code criminalises burggery while the Penal and Criminal Code criminalises offences against the order of nature. These acts which typically implies consensual sexual activity other than vaginal penetration.

[5] *R v Chase*, [1987] 2 SCR 293 at para 11, 45 DLR (4th) 98, McIntyre J (as he then was); *R v Cook*, (1985) 20 CCC (3d) 18, 1985 CanLII 641 (BCCA).

[6] *R v Hutchinson*, 2014 SCC 19 at para 17*; R v Ewanchuck*, [1999] 1 SCR 30, 169 DLR (4th) 193.

[7] *R v V (KB*), 1993 SCC 109 (A father's applying pressure to son's genital as a form of punishment was deemed sexual assault) *R v Nicolaou*, 2008 BCCA 300 (humiliation is enough to translate an act to sexual assault).

or threat of violence before or during sexual activity to facilitate acquiescence to the sexual act.[8] It is, in essence, any act of a sexual nature that denies a person the exercise of freewill.

On the other hand, spousal sexual assault[9] or what in other contexts is known as spousal or marital rape[10] signifies a form of non-consensual assault of a sexual nature between spouses. It is "an intrusion into the most private and intimate parts of a woman's body, as well as an assault on the core of her self".[11] It is an act of domestic violence that generally occurs in a place where the woman would expect a level of safety – her home. It is however important to note that this form of crime was not recognised until recently in most countries that adopted the English common law around the world.[12]

A Historical Review of Marital Rape Exemption–the Common Law of England

Historically, under the English common law, sexual activity was viewed as immoral if it occurred outside the confines of marriage. Thus, marriage was the way to morally engage in

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[8] Fredericton Sexual Assault Crisis Centre, "Intimate Partner Sexual Violence(IPSV): Information Sheet" online: <www.gnb.ca/0012/Womens-Issues/PDF/Fact%20Sheet-E2.pdf>.

[9] The term "spousal sexual assault" will be used in this study interchangeable with the term "marital rape" because this work is a comparative study of two countries that employs these two related yet significantly different terms. Spousal sexual assault signifies a broader range of sexually related intimate partner violence than marital rape which requires actual vaginal penetration. Also, sexual assault is used in describing the law as found in Canada who did away with the offence of rape in 1983. Nigeria, on the other hand still maintains rape – vaginal and penile penetration (which is redefined from vaginal penetration to include penetration of the orifices of a person with any parts of the body or an object under the Violence Against Persons (Prohibition) Act, 2015) as an offence while sexual assault is introduced as a separate offence under the *Sexual Offences Bill*, 2013.

[10] See Jenifer koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience", online: (2010) The Equality Effect at 3, n 7 <www.theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf > [Koshan].

[11] Gail Abarbanel & Gloria Richman, "The Rape Victim", Rape Treatment Center, Santa Monica Hospital, 1989, in Howard J Parad & Libby G Parad eds, *Crisis Intervention Book 2: The Practitioner's Sourcebook for Brief Therapy* (Family Service America, Milwaukee, WI, 1990) [In the work, a survivor of rape describes her experience saying, "it's not just your body that's raped, it is your whole life" at 1].

[12] With the exception of South African which criminalised marital rape in 1993, most countries in Africa with an express criminalisation of marital rape did so between 2000-2015–Ghana, Lesotho, Tanzania, Zimbabwe, Burundi, Namibia, etc. Countries like Gambia, Zambia and Nigeria have through the introduction of different laws removed the marital rape exemption but remains vague as to the overall implication of the removal while in Uganda marital rape is recognised under very narrow circumstances. In Botswana, there is no marital rape exemption but the court in Botswana is said to have reiterated the exemption in its application of the rape law in 2007. See Claire Provost, "UN Women Justice Report: Get the Data" *The Guardian* (6 July 2011), online: <www.guardian.com>.

sexual activity without societal condemnation.[13] Central to the definition of marriage under the English common law was the procreation of children which was evident in the approach to the concept of consummation. Lack of consummation–sexual relationship between spouses—was enough ground to legally declare a marriage voidable.[14] The implications of this definition of marriage and approach to sexual activity are numerous. It means that sexual activity is expected in marriage and in an era where women had little or no independence, the husband and not wife had control over when sexual activity occurred in marriage.[15] When transferred into the legal system, this principle and understanding of marriage as a legal space for authorised consensual sex informed the structure and approach to the offence of rape under the English common law.

This approach to marriage and rape seems intertwined. The legal protection for women prior to the introduction of the statute of Westminster in the thirteenth century by Edward I protected only women who belonged to men.[16] Some scholars have argued that women were, by implication forced to either stay under the protection of their father or a husband. [17] Thus, marriage was a necessity for women who sought legal protection. For men, marriage served different purposes: First, it was a way to expand their property. This was achieved by kidnapping or having sexual intercourse with a propertied heiress (one who has an inheritance).[18] Also,

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[13] Nicholas Bala, "The History & Future of Marriage in Canada" (2005) 4:1 JL Equality at 23 (Before late twentieth century, the law penalised illegitimate children and unmarried single mothers were treated as sex workers).

[14] *Ibid* at 21–22.

[15] *Ibid* at 25 (Formal legal patriarchal structure as existed prior to 1983 in Canada inferred husbands did not need the wife's consent for sexual activity); Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward 1*, Vol 1, (Cambridge University Press 1898) (He noted that provocation is a defence if a male adulterer is killed by the woman's husband and/or male siblings).

[16] See generally Bruce A MacFarlane, Historical Development of the Offence of Rape in 100 years of the Criminal Code in Canada ed., Wood and Pack (1993) [MacFarlane].

[17] See Susan Brownmiller, *Against our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975) at 15 [Brownmiller]; Lorenne Clark & Debra Lewis, *Rape: The Price of Coercive* Sexuality (Toronto: The Women Press, 1977) at 121 [Clark & Lewis] (The law protected women belonging to a man and those who did not were caught in the web of little or no protection).

[18] Brownmiller, *supra* note 17.

marriage was an honourable way to fulfil sexual desires, and reproduce.[19] Families also used marriage to cement relationships with other families and forge alliances, oftentimes women used as wagers for such alliances and relationships.[20] This view of women as objects for men's sexual, economic, familial and social gratification informed the marital rape exemption.

The marital rape exemption has been a longstanding principle that underpinned the spirit of the English common law. Sir Matthew Hale has been credited with the first formal pronunciation of the tyrannical injustice to married women that significantly denied them the protection of the law from the offence of rape by their husbands. In his 1736 legal treatise published as *History of the Pleas of the Crown*, Hale is credited to have said that

> the husband cannot be guilty of the rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract, the wife hath given up in this kind unto her husband which she cannot retract.[21]

Although Hale's proposition was not supported by judicial authorities and sources of his time, one logical conclusion to draw from the book is that the understanding of marriage as an institution that enforced conjugal rights at the time exempted any charges of rape against a husband. It is equally important to note that in the sixteenth and seventeenth centuries when *History of the Pleas of the Crown* was published the only means through which marriage could be revoked was by Act of Parliament. This meant that without such a formal revocation of marriage by divorce, women could not refuse their husbands access to their own bodies nor could they bring a case of rape against their husbands since consent to sex was already matrimonially authorised. This principle of implied consent in marital contexts carried into the

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[19] See Kersti Yllö, "Prologue: Understanding Marital Rape in Global Context" in *Marital Rape: Consent, Marriage and Social Change in Global Contex*t eds, Kersti Yllö, M.G. Torres. (London: Oxford University Press, 2016) 1-6.

[20] See Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (New York: Penguin Books, 2006).

[21] Mathew Hale, *The History of the Pleas of the Crown* (1736), Vol 1 (Robert H Small 1847) at 627[Hale].

nineteenth century and was trenchant in both Edward Hyde East's 1803 *Treatise of the Pleas of the Crown* and in the 1822 legal treatise by John Frederick Archbold, titled *Pleading and Evidence in Criminal Cases*.[22] These legal treatises were undergirded by marital rape exemption.

However, even though the husband under the English common law could not be charged with the offence of rape against his wife, he could be charged as an accomplice to the offence of rape against his wife. He may also be liable for assault against his wife, even to the extent that such assault was used to obtain sexual intercourse from his wife. Also, the definition of rape under the English common law was restricted to vaginal intercourse involving a man and a woman. Thus, penetration through other orifices of a woman's body might suffice for a charge of indecent assault, but not rape. In subsequent years, the English court decided that a man could be guilty of assault if he has unprotected sexual intercourse with his wife knowing he has a communicable and/or life-threatening sexually transmittable disease.[23]

Theories about the Exemption of Marital Rape

In examining the rationale for maintaining the marital rape exemption under the English common law, feminist scholars have identified different theories used to support the exemption although it was legally framed within the ambit of contract law.[24] Jennifer Koshan's study provides a good foundation to draw from when examining theories used to rationalise marital rape exemption.[25] These theories include the following: property theory, implied irrevocable

[22] John Federick Archibold, *Pleading and Evidence in Criminal Cases* (London 1822) at 260 (emission is a requirement at common law) [Archibold].

[23] *R v Clarence* 1888, 22 QBD 23 [*Clarence*] (This Clarence case is not applicable in Canada but it is a judicial precedent in Nigeria).

[24]Constance Backhouse & Lorna Schoenroth, "A Comparative Survey of Canadian and American Rape Law" 6:48 Can-US LJ 48[Backhouse & Schoenroth].

[25] Koshan, *supra* note 10 at 10-12.

consent theory, unity theory, and privacy and reconciliation theory.[26] Also, there are arguments about the difficulty of proving that the offence of rape was committed.[27]

Property Theory

Under the English common law, women hardly existed in the public space. And neither were they recognised in law as persons until the late nineteenth and early twentieth centuries.[28] This reality meant that generally the female human was not just a minor but her very existence depended on a male authority. This designation of women as inferior stemmed from the superior status that men enjoyed not because of any specific reason but because they were men and by

[26] *Ibid*; Constance Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6:2 L Hist Rev 212[Backhouse "Married Women"]; Theresa Fus, "Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches" (2006) 39 Vand J Transnat'l L 481 at 483-85[Fus]; Backhouse & Schoenroth, *supra* note 24 at 49-56; Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and The Disclosure Of Personal Records"(2006) 43: 3 Alta L Rev[Gotell]; Brownmiller, *supra* note 17; Statcy-Ann Elvy, "A Post Colonial Theory of Spousal Rape: The Caribbean and Beyond" (2015) 22 Mich J Gender L.

[27] See Christine Boyle, "Married Women-Beyond the Pale of Law" (1981) 1 Windsor YB Access Just at 199-00 [Boyle].

[28] In Britain and Canada, although the *British North American Act* 1867 used the word person to describe men and women, in 1876, a ruling by the British common law court stated that women were "persons in matters of pains and penalties, but not in matters of rights and privileges". In England, the first test case for the inclusion of women in the definition of person happened after the passage of the 1867 Reform Act. John Staurt Mill, in the process of this reform had tried to replace the word 'person' with men but the Prime Minister Benjamin Disraeli, felt the issue should be left to interpretation by judges. Women 's group decided to test this gap by registering to vote in Manchester but had their name struck off the roll. In 1899, another woman, Sandhurst, who had been appointed to the London court had her appointment challenged on the ground that women were not person for the purpose of appointment under the law. There was another challenge brought in 1908 by Margaret against the University of Edinburg for denying graduate women the rights to register as voters but the Court ruled that women were not persons under the Representation of the People (Scotland) Act 1868. In Canada, there was also wave of activism against the definition of person and its exclusion of women. The challenge was brought province by province and success achieved within different time frame. In 1905, a challenge was brought by Mabel Penery French simultaneously in New Brunswick and British Columbia in 1905 and 1911 respectively. She applied to be allowed to practice law. Although the court ruled against her, the provincial laws were amended and she was able to practice. In 1902, Hertha Ayrton, a physicist was refused a fellowship by the Royal Society because her married status denied her personhood. See Joan Mason "Hertha Ayrton (1854-1923) and the Admission of Women to the Royal Society of London" (1991) 45:2 Notes and Record of the Royal Society of London 201. In Canada, some women had the opportunity to occupy public position despite the restriction on the recognition of women as persons under s24 of the *British North American Act* 1867 but it was not until 1929 through an appeal to the Privy Council by the "famous five" was this resolved that women were persons under the British North American Act. See Vivien Hughes, "How the Famous Five in Canada Won Personhood for Women" (2001-2002) 17 London J Canadian Stud.

virtue of that very socially-constructed privilege superior.[29] The status of a woman upon marriage shifted from belonging to her father, brother or uncle to belonging to a husband.

Also, before the thirteenth century when Edward 1 introduced the statute of Westminister, a rapist could be saved from gruesome punishment by paying the father the bride price for his virgin and then compelled to marry the girl. However, when a woman gets married, she transferred the property interest in her virginity unto her husband and even though this view of rape shifted with time, a woman's sexuality was still implicitly viewed as belonging to a male figure, especially if she was betrothed or married.[30]

Equally, the rape of a married woman by a "stranger" was considered a more heinous crime than the rape of a single woman because it was perceived that more psychological harm and dent had been done to her husband's honour and estate.[31] More so until the thirteenth century in England, only a man could sue for monetary compensation for the rape of his daughters, thus reinforcing the understanding that women were part of a man's property over which he had control. Consequently, one can infer that the legal concept of rape emerged predominantly as a way to protect a man's interest in a woman he had authority over.[32]

In other words, societies that maintained these unequal marital relations between men and women essentially possessed cultural systems that preserved a two-tiered structure of master-servant, parent-child, and husband-wife relations of inequality. These hierarchical structures of relationship reinforce the vocabulary of superiority and inferiority.[33] In the semantic world of

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[29] Rebecca M Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption" (1995) 20:4 L Soc Inquiry 941 [Ryan].

[30] Clark & Lewis, *supra* note 17.

[31] See generally Backhouse Constance, *Petticoats and Prejudice: Women and Law in the Nineteenth Century Canada* (Toronto: Women's press of Canada 1991) [Backhouse, *Petticoats*]; Brownmiller *supra note* 17 at 21.

[32] Brownmiller, *supra* note 17; Clark & Lewis, *supra* note 17.

[33] Ryan, *supra* note 29 at 944.

this highly hierarchized vocabulary that signifies power relations, a woman is essentially defined in material terms that reduce her to a man's property.[34] Thus, a man engaging in sexual activity with his wife was, naturally, exercising the right to use his property. To allege criminal charges against a man in such circumstance would be tantamount to suing a man for stealing his own property.[35]

Unity Theory

Another theory that drew heavily from property theory is the unity theory. The unity theory derives from the theory of coverture, a theory that emphasises the merging of the identities of husband and wife legally.[36] Blackstone explains this theory in his work stating that

> By marriage, the husband and the wife are one person under the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated or consolidated into that of the husband: under whose protection, and cover, she performs everything… and her condition during her marriage is called coverture.[37]

However, the first wave of feminist and women's movement across the United Kingdom and North America in the 1800s began to demand increased participation of women in the public space. Most of the activism centred on ensuring equality between sexes. Women were challenging discriminatory laws and demanding rights to vote, to hold property, and to work.[38]

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[34] Boyle, *supra* note 27 at 197.

[35] Lalenya Weintraub Seigel, "The Marital Rape Exemption: Evolution to Extinction" (1995) 43 Clev ST L Rev 351 at 356.

[36] Anne C Dailey, "To have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment" (1986) 99 Harv L Rev at 1255-56.

[37] William Blackstone, *Commentaries on the Law of England* 325 (London:1765-1769) at 441[Blackstone].

[38] There was no restriction placed on women's rights to vote in the United Kingdom until the 1876 with the passage of the Reform Act which excluded women from voting. In the colony that became Canada, the right to vote was also tied to property ownership and not gender. However, with the transfer of property through the patrilineal line and married women's inability to hold property, women were disproportionately restricted from voting. Women who owned property under the Quebec Franchise Act had the right to vote between 1809 and 1849. In 1849, the word person was replaced with men and excluded women from exercising the right to vote. In 1850 Ontario, women of property could vote for school trustee irrespective of their marital status. Between 1867 and 1884 there was a federal restriction on the right to vote. Gender was made a perquisite for casting a vote and all women were exempted. Subsequently race was made the foundation for the rights to vote with Caucasian women being granted

The property conception of married couples used to uphold marital rape exemption seemed absurd since woman's ability to vote implied that they had a degree of autonomy. In other words, if women had a say over their body, then rape could not be a property offence but one against the woman.

But while the status of women was changing generally, married women seemed to occupy a different private space. Upon marriage, married women became part of a husband's estate.[39] All belongings and properties that they might have acquired from their father were vested in their husbands. A married woman was not legally denied ownership of her real estate, but the man who presumably had the responsibility of taking care of her managed her estate on her behalf. A married woman could not enter into contract or sue in her own name. A few married women who wanted to do business needed to obtain consent from their husbands.[40]

The unity theory which runs parallel to the property theory purports that upon marriage women have no distinct identity from their husbands. Thus, to charge a man with rape of his wife would be to charge him with committing the offence against himself.[41] Like the property theory, feminists began to chip away at the theory of coverture from the early seventeen century but it was the introduction of Married Women's Property Act across the United Kingdom and North

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the rights to vote before the Indigenous, Asian, Hindu women. While women were enfranchised between 1885 and 1960 depending on the provinces they occupied, it was not until 1960 that all women were recognised as having the capacity to vote during a federal election. See "Canadian History of Women's Rights" The Nellie McClung Foundation. Online: <www.ournellie.com/womens-suffrage/canadian-history-of-womens-rights/ >

[39] Married women were treated significantly as existing in their husband. A married woman had no right to devolve any part of her inheritance without her husband consent. Although there were exceptions to the things a married woman had control over such as her clothing, ornaments or claims of debt. See Backhouse, "Married Women", *supra* note 26 at n 6-9.

[40] *Ibid* at 213.; See Jill Elaine Hasday, "Contest and Context: A legal History of Marital Rape", (2000) 88 Calif L Rev 1387; Richard Chused, *Married Women's Property Law*; 1800-1850, (71 GEO l.J 1359,1361 1983).

[41] Fus, *supra* note 26.

America in the early 1900's that aided the displacement of the principle of coverture.[42] Recognising a married woman's right to own property and enter into contract in her name obviously refuted any claim that she was not an independent person. With no justification for denying a woman the right to sue her husband for rape, since the crime could not be perceived as one against oneself, the notion that marriage was a contract with rights and responsibilities was advanced.

Implied and Irrevocable Consent Theory

Hale viewed marriage as a civil contract with rights and duties in which husbands and wives had basic rights and responsibilities. [43] In the contract sphere of marriage, the woman was totally giving up her rights and agreeing to unwritten terms of the contract which included her responsibility to have sexual relationship with her husband on his whim. This theory developed in conjunction with the legal definition of rape as a non-consensual sexual intercourse.[44] With the focus on consent, a husband had to be immune for "the husband cannot be guilty of the rape

[42] The theory of coverture was already being chipped at in England around the early seventeen centuries. The English Court had created exemptions to the concept of covertures. Spouses could enter into agreement that allowed a woman to have control over certain properties. Also, a woman, her husband or her family could set up a form of trust for the woman which would not be under control of the husband. By mid-eighteenth century, wives had a little more autonomy in respect of property. They did not need consent of husband to create a trust. Canada and Nigeria inherited the concept of coverture as part of the received English Common Law. Canada gained independence from the United Kingdom before some of these developments. In Canada, the concept of coverture thrived in part depending on the province until 1900s when it was eventually displaced. See Backhouse "Married Women" *supra* note 26 at 214,230-41; Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Act in Nineteenth-Century England* (Toronto: Toronto University Press 1983) at 292.

[43] Blackstone, *supra* note 37 ("our law considers marriage in no other light than a civil contract" at 442)

[44] Even when rape was defined in the early 19th century as having carnal knowledge of a woman with force and resistance, Hale has always advocated for a consent approach to rape. He differentiated the requirement of force and resistance. To him, force was to be viewed from the perspective of the accused and resistance is the response of the victim. While he agreed that lack of consent can be deduced from resistance, he felt using consent approach allowed the law to protect other categories of women such as -the mentally challenged, the unconscious woman, the involuntarily intoxicated woman. Thus it is not surprising that he used a consent approach to the marital rape exemption. See MacFarlane, *supra* note 16.

committed by himself upon his lawful wife for by their mutual matrimonial consent and contract, the wife hath given up in this kind unto her husband which she cannot retract."[45]

This dictum is self-contradictory on the ground that Hale employed the use of the word "rape" to signify that what occurs between a husband and a wife can be rape but then indicating that it is not just legitimate rape as not only is the act lawful but the man is not criminally liable for such an act. Thus, the mutual matrimonial consent referred to by Hale was not an equal power relationship but one that placed the husband in a superior position and the wife in an inferior position. Each party in the marriage had specific duties and the wife's included sexual satisfaction of the husband. Thus, sex in marriage was viewed as a legal right of the husband.

The consent theory arising from the contractual relationship between spouses received intense criticism from feminist and women's group. In 1860, Elisabeth Cady Stanton, a social activist, wrote extensively on the nature of the improper contract Hale proposed. A situation where only the man had contractual capacity to determine the nature of the contract.[46] Feminists criticised essentially a contractual relationship where the woman's status reinforced inferiority to her male counterpart.[47] There were those who challenged the foundation of marriage as a heterosexual union and the implication of this heterosexual conception of marriage on the contractual nature of marriage. They argued that if marriage was like any contract, there would be no requirement for specific gender relations to make it a subsisting contract.[48]

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[45] Hale, *supra* note 21 at 628.
[46] Carol Pateman, *Sexual Contract* (Stanford: Stanford University Press 1988) at 154[Pateman].
[47] *Ibid* at 160.
[48] *Ibid* at 167.

The Privacy and Reconciliation Theory

The concept of privacy as propounded under the English common law was used as a tool to encourage the subjugation and promotion of violence against of women.[49] There was a fictitious creation of dichotomy between the public and private sphere.[50] The private which represented a man's personal space was untouched by criminal law. The privacy argument had two sides to it: First, the need to protect the institution of marriage by promoting reconciliation over retribution, and second, the state's responsibility not to interfere in private affair of couples. The privacy theory therefore borders on the protection of the interest of both parties in marriage and avoidance of public intrusion in marriage. The belief was that upon marriage, the public gaze should be averted from private marriage affairs[51]. Thus, rape that occurred in marital contexts was viewed as a private affair and married parties left to deal with it.[52]

Although intertwined with the privacy theory, the reconciliation theory focuses on the protection of the marriage institution. Marriage was viewed as an institution larger than the individual parties and almost independent of individuals.[53] Hence, even though an individual had the choice of entering into marriage without the state's investigation about the mental and emotional fitness of both parties, upon entering into such an institution, they are bound by the unwritten rules of marriage which included the preservation of the marital institution at all cost. They could not by mutual agreement invalidate marriage without the state's permission. The

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[49] Elizabeth Schineider, "The Violence of Privacy" (1990-1991) 23 Conn L Rev 973 at 974; Catherine Mackinnon, "Reflections on Sex Equality Under the Law" (1991) 100 :5 Yale LJ 1281.

[50] The dichotomy that existed under the English common law is described as fictitious based on the contradictions evident in the privacy approach in relation to other criminal cases. For example, under the English common law, homosexual relationship and heterosexual relationship regarded as against the order of nature was criminalised. Also, anal sexual relationship and sexual relationship with animal was criminalised. Also issues of abortion and prostitution found their way into the criminal law. See Backhouse, *supra* note 26.

[51] See Micheal Gary Hilf, "Marital Privacy and Spousal Rape" (1980) 16 New Eng L Rev 31 at 34–40.

[52] Gotell, *supra* note 26 at 747.

[53] See James Schouler, *A Treatise on the Law of Domestic Relations; Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Masters and Servant* 35(4th ed) (Boston: Little Brown &Co 1889) [Schouler]

theory was that if the court became an avenue to resolve dispute between couples, then the court would open the floodgate to marital breakdown and shut the door on actual reconciliation. Thus, if the court needed to protect marriage and promote reconciliation, it was important for it to stay away from the most private aspect of marriage – sexual activity.

Like other theories used to support the marital rape exemption, the privacy and reconciliation theory has been criticised for some of apparent flaws it embodies. First, feminists have undertaken a review of the concept of privacy propounded by pro-marital rape exemption as one that seeks not to protect men and women but rather the hierarchy relationship of marriage. It has been argued that, for women, privacy theory was a way to protect their modesty and femininity, that is, a domestication of women.[54] For men, privacy reinforced their authority and allowed them to act outside the ambit of the law. By the early 1970s, feminist and women's groups involved in the anti-rape movement began to move rape into the arena of politics.[55] Feminists focused on rape as a violation of women's right to bodily autonomy and as a crime that thrived on unequal power relations between men and women in society. They also focused on emphasising the violent nature of rape not as a sexual impulse but as one that put women in a position inferior to men. The purpose was to change the conversation on rape especially rape in marital settings from conceptions of the crime as an individual, personal or private problem to a systemic problem.[56]

[54] Gotell, *supra* note 26 at 748-49.
[55] *Ibid* at 750.
[56] Lee Lakeman, "Canada's Promises to Keep: The Charter and Violence Against Women" (Vancouver Canadian Association of Sexual Assault Centres, 2004); Lise Gotell, "A Critical Look at State Discourse on 'Violence Against Women': Some Implications for Feminist Politics and Women's Citizenship" in Manon Tremblay6 & Cariline Andrews eds, *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press 1998) 39.

Other Rationales for Marital Rape Exemption

Aside from the theories listed above, there were practical concerns about the difficulty of establishing the offence of marital rape especially with evidentiary procedures and the definition of consent.[57] Under the English common law, rape was defined as "the unlawful carnal knowledge of a woman forcibly and against her will".[58] From the thirteenth to the fourteenth century, for the Crown to successfully lay a claim for rape, it had to establish the following: that there was penetration,[59] that the woman made a timely report of the rape, that the woman must have called for help and struggled with her assailant to the point of obtaining injuries, that the presence of force should be evident in torn garment, and if the woman was not a virgin at the time of the offence her credibility would be questioned and the Crown most likely lost the case.[60] Also, there was need for witnesses to corroborate her account and she must have gone to the coroner, sheriff or the king's court to lodge a complaint and have her testimony entered.[61] During trial, she might be called upon to relate her testimony and any slight discrepancies–even in choice of word – between her earlier testimony and the oral one could taint her credibility.[62] The law was centred on protecting men from perceived vengeful and frail women who cried hue after sexual intercourse.[63]

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[57] See Fus, *supra* note 26 at 484; Boyle, *supra* note 26 at 199; David Lanham, "Hale, Misogyny and Rape" (1983) 7 Crim LJ 148 at 153-56. Compare *R v Lord Audley*, (1631), 3 St Tr 401 (the accused was convicted for assisting another in the rape of his own wife);

[58] William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* 1 (London: Butterworth and Son, 1826) at 556; Hale, *supra* note 21 at 628.

[59] Hale, *supra* note 21 at 628 (emission not a requirement of law just penetration even partial); But see William Hawkins, in *Pleas of the Crown* Book 1 c. 41 (London: 1716) at 108 (emission a necessary requirement to establish penetration); Archibold, *supra* note 22 at 260 (emission is a requirement at common law).

[60] MacFarlane, *supra* note 16 at 6-8.

[61] *Ibid*; Backhouse, *Petticoats*, *supra* note 31 at 81-103; See Blackstone, *supra* note 37 at 211.

[62] See Henry De Bracaton, *De Legibus et consuetudinibus Angliae Libri quinq* [On the Laws and Customs of England 1915 to 1942] George E Woodbine ed, translated by Samuel E. Thorne Vol II (Cambridge: Harvard University Press, 1968) at 416-17.

[63] *Ibid* at 417 (most appeals on rape were either quashed or abandoned or compromised)

Underpinning most of the evidentiary requirements were various myths and stereotypes about women.[64] First, there was a general suggestion that women often lied about rape. Second, there was the myth of the vengeful woman who conjured rape as a retaliatory way to get back at a man.[65] Third, it was also believed that women were frail and could be susceptible to seduction by men and once that was over they turned around and cried rape. Also, the impression was that woman who had had sexual relationship before allegations of rape often consented to further sexual relationship with men. In other words, only "good girls" got raped, and not those already experienced in sexual intercourse.[66] More so, women who did not immediately report cases of rape were most likely not raped. There was also the myth about consent which maintained that women were often coy creatures and that when they said no they oftentimes meant yes or try again.

In specific relationship to marital rape, some scholars reiterated how women could conjure up lies in order to gain upper hand in divorce proceedings or child custody trials.[67] Others pressed their own concerns with the myth of the lying woman who could easily raise the hues of rape to get back at her husband. There were those who, without empirical evidence, proposed that rape within marriage was not as traumatizing as rape with a stranger.[68] A few others thought that the offence of assault was sufficient to capture any harm arising from

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[64] For list and definition of Rape myths see Kimberly A Lonsway & Louise F Fitzgerald, "Rape Myths in Review" (1994) 18 Psychol Women Q 133 (rape myths are "attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women" at 134); Martha R Burt, "Cultural Myths and Supports for Rape" (1980) 38:2 J Personality Soc Psychol 217.

[65] The myth of the vengeful woman dates as far back as the biblical times. The story of Joseph and Potiphar was a strong reference point to warn judges, juries and men alike about the danger of falling prey to the lies of a bitter woman. This parable find expression in the Koran, the Egyptian folk law of 300 BC and even the Celtic had a variation of this narration. See Brownmiller, *supra* note 17 at 22; Genesis 39:7-20.

[66] Barbara Findlay, "The Cultural Context of Rape" (1974) 60 Women's J 199 at 203,204; Karen Busby, "Every Breath You Take: Erotic Asphyxiation: Vengeful Wives and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24:2 CJWL 328 at 377.

[67] Backhouse & Schoenroth, *supra* note 24 at 54-55; Boyle *supra* note 27 at 199-200.

[68] Backhouse & Schoenroth, *supra* note 24 at 54-55.

domestic violence.[69] These justifications for the marital rape exemption lent credence to the assumption by some scholars that although Mathew Hale made a formal pronouncement on marital rape he was only instrumental for voicing out the social values that existed at that time.[70]

Chipping Away at Marital Rape Exemption

By the late nineteenth century and early twentieth century, the foundation upon which the marital rape exemption towered under the English common law was shaken. Although across the United Kingdom and Northern American there was still great reluctance to absolutely tamper with the hierarchical structure of marriage with the man having the upper hand, yet a few scholars were beginning to see reasons to restrict the scope of the marital rape exemption. In *R v Clarence*,[71] four judges–Hawkins, J. (Day, J concurring) and Field, J. (Charles, J concurring)–in obiter were of the opinion that a husband could be guilty of the offence of assault through forced sexual intercourse[72] and Wills, J suggested that there might be circumstances where a husband would be guilty of rape against his wife with consideration to the state of the marriage.[73]

As noted by Bruce MacFarlane, the implication of any provision that made allowance for the wife to sue for assault would make a mockery of the marital rape exemption.[74] If a woman was presumed to have consented to be raped by her husband but could not consent to the violent mode employed by the man to exercise his legal right to engage in sexual activity with her, then such presumed sexual right was a figment of the imagination.[75] Subsequent court decisions in

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[69] *Ibid*.
[70] MacFarlane, *supra* note 16 at 33.
[71] *Supra* note 23.
[72] *Ibid* at 51-7 (Hawkins J) and Field J.
[73] *Ibid* at 33-5.
[74] *Supra* note 16 at 37.
[75] Note, not all judges seemed to share this opinion, Pollock B suggested in *Clarence* that a husband may sometimes need to undertake a level of force that may otherwise be considered as cruel under the law to exercise is right to sexual activity with his wife. *Clarence*, *supra* note 23 at 67. This opinion was also supported by Lord Dunedin in a 1924 case that dealt with a husband's impotency and decree of nullity. The judge was of the opinion

England would limit the marital rape immunity granted to husband by slowly chipping at the marital rape exemption and recognising that even though a husband was immune from the charge of rape against his wife he might under certain circumstances be liable. These circumstances included when the couple had been judicially separated[76] or where the wife had filed for divorce or obtained a decree *nissi*,[77] or for charges of assault arising from force used to obtain sexual relationship.[78] These decisions had no effect in Canada because she gained her independence from Britain in 1867, but they theoretically applied to colonial Nigeria which did not gain independence until 1960.

Marital Rape Exemption in Canada and Nigeria

Hale's proposition on the marital rape exemption was brought to an end in England in the 1991 case of *R v R*.[79] While speaking for the Court, Lord Keith states that the common law was "capable of evolving in the light of changing social, economic and cultural developments".[80] He reiterates that the view of wives as chattels was not a modern approach to marriage and that to hold a woman to the standard of irrevocable consent without consideration of her state of mind and health should be unreasonable.[81] Explaining the new approach to marital rape, Keith states that with married women it is now "whether or not consent has been withheld".[82] Lord Keith's pronouncement appears like a victory for married women, until shown later that his pronouncement on consent which presumably influenced subsequent approaches to consent, contains an implicit belief that consent is continuous until revoked.

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that a degree of gentle force may be necessary for husband to engage in sexual activity with his wife. *G v G,* 1924 AC 349 (HL).

[76] *R v Clarke*, [1949] 2 All E R 448.
[77] *R v O'Brien*, [1974] 3 All E R 663.
[78] *R v Miller*, [1954] 2ALL ER 529.
[79] [1991] 4 All ER 481[*R*].
[80] *Ibid* at 483.
[81] *Ibid* at 483-84.
[82] *lbid* at 484.

Despite the fact that seen from the English common law history marital rape exemption started in Britain and then spread to the Commonwealth, some Commonwealth countries have prior to the 1991 decision in *R's* case eradicated the marital rape exemption while other countries under the Commonwealth maintained the exemption even till date. For example, even though the criminal law in England as it existed in 1792 was adopted by the legislature of upper Canada in 1800, the marital rape exemption was eliminated from the *Canadian Criminal Code* in 1983.[83]

However, the growing trend of feminist movement that shaped the views of the law on rape was not being met with the same reception in Nigeria. The marital rape exemption adopted in Nigeria from the British common law still remains firmly ingrained in the *Criminal*, *Penal* and *Sharia Penal Codes* applicable in states of the Nigerian federation with the exception of the Federal Capital Territory–Abuja. In May 2015, the president assented to the *Violence Against Persons Prohibition (VAPP) Act*[84] passed by the Nigerian National Assembly. The *VAPP Act* amends the provision on rape and removes the marital rape exemption under the *Criminal* and *Penal Code*. This changes only applies applicable however only in the country's capital territory – Abuja.

Conclusion

This chapter discussed the nature of theories used to sustain marital rape exemption by focusing essentially on the British common law. The chapter highlights how the principle of marital rape exemption instituted a systemic endorsement of abuse of married women who by virtue of their marriage lost their right to institute charges of rape against their bodies. With sustained feminist and human rights advocacy, legal systems around the world have increasingly revised previously held assumptions about spousal sexual assault. Yet, while several countries,

[83] SC 1980-81-82-83, c. 125, s 19.
[84] *Violence Against Persons (Prohibition)* Act, 2015.

including Canada, have recognised spousal sexual assault as a crime, the procedural nature of prosecuting such cases has not made it any easier for spousal sexual assault to be fairly prosecuted. Similar assumptions that informed previous attitudes that supported marital rape exemption in sexual assault cases still subsist.

This chapter has tried to show that spousal sexual assault is not just a crime against married women but also a crime against married women as a historically disadvantaged group. This is so because marriage as it has been constituted traditionally in the heterosexual sense guarantees an unequal relationship between men and women. In order to promote equality for everyone, women must not just have the choice, but also the freewill to determine their sexual choices. While experiences of sexual assault generally are tragic and demonstrate a violation of bodily autonomy, spousal sexual assault has a more damaging effect on victims of such offences because it indicates not just a violation of the woman's body but a systemic oppression of a specific category of women.

Following from the above, the next chapter will provide a conceptual framework for the concept of equality with focus on substantive equality. The purpose of the next chapter is to highlight the features of substantive equality and how it can be used to ameliorate the conditions of disadvantaged groups one of which includes married women. The next chapter will also contextualise discussions of equality on Canadian and Nigerian jurisprudences.

Chapter Two: Equality in Canadian and Nigerian Jurisprudence: Conceptual Framework

Introduction

Equality is a founding principle of most democratic societies. The classical liberal approach usually referred to as a formal equality embodies the recognition of a state's obligation to treat "likes alike" and "unlike differently" irrespective of the arising negative implication of such treatment.[1] This vertical approach to equality means that states only focus on uniform application of the law or at best the removal of express institutional and legal barriers that may restrict the application of law to an individual or group based on their personal characteristics. However, recent decades have seen increased focus on an egalitarian approach to equality which requires looking beyond the application of the law to the purpose and effect of the law on disadvantaged groups in order to achieve "genuine" equality.[2] John Rawls has been credited with setting the tone for the emergence of this conception of equality when he proposed a redistribution of wealth and described equality in terms of "justice as fairness".[3] Drawing from Rawls's proposition, the theory of substantive equality emerged to ensure the fair treatment of all individuals beyond a uniform application of laws and policies to everyone.

An application of the principles of substantive equality requires a fusion of a vertical and the horizontal approach to equality.[4] A horizontal approach to equality calls for reviewing the

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[1] See Marc Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 SCLR 131 at 156[Gold]; Hon Madam Justice Beverley McLachlin, "The Evolution of Equality" (1996) 54:4 Advocate 559 [McLachlin].

[2] Gold, *supra* note 1 at 156. See also B Hough, "Equality Provisions in the Charter Their Meaning and Interrelationships with Federal and Provincial Human Rights Acts" in AW MacKay, CE Beckton & BH Wildsmith, eds, The Canadian Charter of Rights: Law Practice Revolutionized (Halifax: Faculty of Law, Dalhousie University, 1982) 306 at 312 [Hough].

[3] See John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).

[4] This section draws inspiration from the work of Anthony Sangiuliano. See Anthony Robert Sangiuliano, "Substantive Equality as Equal Recognition: A New Theory of Section 15 of the Charter" (2015) 2:2 Osgoode Hall

starting point of relationship among members of society. This call is not an imposition of obligation on members of a society to act in a particular manner towards one another but rather a recognition that status and hierarchy exist in society due to unequal power relations. Unequal power relations have led to the imposition of disadvantage on some groups. Even though there may be a change in attitude towards these groups that have been historically discriminated against, states need to be conscious of how negative attitudes towards such disadvantaged groups can influence consciously or otherwise the vertical approach to equality.[5] The central question underpinning substantive equality is how to ensure that the law has meaningful impact on historically disadvantaged groups without imposing extra burden on them, denying them benefits or exacerbating their disadvantaged situation because the law uses as a marker the historic perception of a group or fails to take into consideration their circumstances.

This chapter examines the concept of substantive equality as a sufficient framework for intervening in spousal sexual assault cases. In tracing the historical development of equality conceptualisation to a substantive equality understanding, this chapter also examines two significant models of equality relevant to the study–formal and substantive. The chapter further reviews the place of equality in the Canadian and Nigerian legal systems. Given that the equality jurisprudence in Nigeria is narrow and formalistic, the chapter undertakes an examination of recent doctrinal approach to equality in Canada to draw inference on the features and purposes of substantive equality. The chapter concludes by highlighting other salient features of substantive equality useful for adjudicating spousal sexual assault cases.

LJ 601 [Sangiuliano]. See also Sophia R Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 UTLJ 291 at 317 [Moreau, "Wrongs"].

[5] Sangiuliano, *supra* note 4 at 609.

What is Equality?

Equality is a contested and controversial concept.[6] It is one of the most commonly used terms; yet, it evades a precise and distinct definition.[7] Many scholars have attempted to define the scope of equality and provide pointers to determining the presence of absence of equality.[8] There are scholars who view equality as a comparative concept, constantly requiring us to look to groups with similar characteristics in order to determine the presence of inequality while some propose deemphasising the comparative nature of equality with another group on basis of personal characteristics.**[9]** Oftentimes, the terms equity, diversity, inclusiveness, participation, respect for human dignity, fairness and justice are used alongside equality.[10] These terms all focus on the acknowledgment of the multi-cultural and pluralistic nature of most societies, but also on the need to treat members of this multiplex entity equally. This chapter builds on the overriding purpose of the concept of equality as identified by Canada's Supreme Court Chief Justice, Beverly McLachlin to describe the purpose of equality as essentially bridging the gap between groups or individuals in society.[11] This view on equality means that when "state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it," [12] it violates the principle of equality. Justice McLachlin's definition of equality derives from a substantive-equality approach that stems in part as a response to the weaknesses of a formalist understanding of equality as subsequent sections of this chapter show.

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[6] Judy Fudge, "Substantive Equality, The Supreme Court of Canada, and the limits to Redistribution" (2007) 23 SAJHR at 237 [Fudge]**.**

[7] Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" 22:5 Dal LJ (1999) 5 at 22 [Hughes, "Principle"]; Kim Brook 'Foreword" in Fay Faraday et al, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter*, (Ontario: Toronto Irwin Law Inc., 2009) at ix.

[8] See Patricia Hughes, "Equality Jurisprudence and Everyday Life" (2012) 58 SCLR (2d) 245 at 246-47 [Hughes, "Equality].

[9] Hughes, "Principles" *supra* note 7 at 45; The Honourable Claire L'Heureux-Dube, "Conversation on Equality" (1998-99) 26:3 Man LJ 273 at 273-76 [L'Heureux-Dube];

[10] Hughes, "Equality", *supra* note 8 at 251.

[11] McLachlin, *supra* note 1 at 563.

[12] *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 332 Abella J dissenting in result [*Quebec v A*]. See also Hough, *supra* note 2 at 312.

Formal Equality: Like-Treatment and Equality of Opportunity

Formal equality views equality in its procedural form, that is, a uniform application of law to everyone without considering the negative outcome that may arise from the application of such law or policy.[13] Formal equality emphasises sameness and seeks to ignore the implications of difference in how members of a group become affected by laws and policies when uniformly applied to them. Scholars of equality understand formal equality to operate more broadly in two models for understanding this approach: like-treatment and equal opportunity.[14]

The like-treatment Model has been traced to the Aristotelian principle that likes should be treated alike and unlike differently.[15] From its name, like-treatment model favours the recognition of different personal characteristics and proposes that such characteristics should form the basis for inclusion, exclusion or negative treatment.[16] Those perceived as different under this model of equality are often referred to as "unlike" or "minority" and treated in a way that perpetuates and emphasises their unequal status.[17] The like-treatment model is problematic because it relies heavily on a two-tiered structure of superiority and inferiority and usually results in state's endorsement of such perspective of the inferiority of a group on the basis of which they are often denied benefit or have extra burden imposed on them. For example, under this model treating a group the same way based on perceived peculiar attributes would be considered justified so long as no member of the group was adjudged to be treated differently. In such contexts as the historic marital rape exemption that riddled the English common law, formal

[13] Hughes, "Principles" *supra* note 7 at 22,33.

[14] Most scholars often divide the approach to equality into formal and substantive equality. This approach usually fuses the two type of formal equality. I decide to follow the division used by McLachlin as it better exemplifies the necessity of substantive equality and what it seeks to correct. See McLachlin, "Evolution", *supra* note 1. *Cf* Hughes, "Principles", *supra* note 7; Ebenezer Durojaye, "Substantive Equality and Maternal Mortality Rate in Nigeria" (2012) 44:65 J Leg Pluralism & Unofficial L 103 at 106 [Durojaye].

[15] Aristotle, *Ethica Nicomachea* v.3 1131a-1131b translated by W Ross, (1925).

[16] Hughes, "Principles" *supra* note 7 at 19 (Formal Equality thrives on excluding a group perceived as different with difference viewed from the perspective of the dominant group).

[17] McLachlin, *supra* note 1 at 560.

equality would ask if all married persons were regarded in the eyes of the law in the same way. If so, then the law treated everyone equally. If married women were exempt from seeking legal remedies against rape, so were men. Hence, the law treated married couples equally. Another way a formal equality might approach complaint about unequal treatment for married women would be to ask whether all married women were accorded equal recognition and privilege as whomever was bringing a case before the law. If found that all married women were treated in the same way in the eyes of the law, then under this model of equality, treating all married women alike would satisfy the requirement of sameness or different treatment based on peculiar characteristics

Formal equality of opportunity, on the other hand, recognises the inequality in creating a distinction based on personal or peculiar characteristics. However, it focuses only on the removal of barriers–political, legal and institutional–that hinder people's participation in society.[18] The rationale behind equality of opportunity is that if everyone has equal access and opportunity to the same things then they will automatically reach a *de facto* equality.[19] This model of equality gained prominence in the nineteenth century.[20]

Proponents of formal equality of opportunity maintain that as a fundamental principle in a democratic society formal equality of opportunity disallows arbitrary treatment. This view claims that to allow for selective favouritism is against the foundation of democracy as it overrules consistency in decision-making process.[21] They make as the basis of their argument the assumption that formal equality of opportunity ensures that decision-making is logical, rational

[18] Hughes, "Principles" *supra* note 7 at 20; McLachlin, "Evolution", *supra* note 1 at 561.
[19] McLachlin, *supra* note 1 at 561.
[20] See generally Heather Maclvor, *Women and Politics in Canada* (Toronto: University of Toronto Press, 1996); Gleason Mona & Adele Perry, eds, *Rethinking Canada: The Promise of Women's History*, 6th ed (Ontario: Oxford University Press, 2006).
[21] Durojaye, *supra* note 14 at 106.

and fair to all individuals and that it promotes a neutral predisposition to policies, laws and actions. Thus, with formal equality, the aim is ensuring that any law, policy or action is neutral on its face.

However, this assertion is faulty for two reasons. First, it is premised on the belief that there is equalisation of the starting point of inequality. Second, it requires a comparative group to base its measurement of equality, and this comparative group is often the dominant group. The implications of these two assumptions are numerous and better explained with examples.

If one reviews spousal sexual assault, for instance, formal equality of opportunity will presume that removing marital rape exemption will increase the reporting rate of spousal sexual assault or better still deter spousal sexual assault. What it ignores is that there are internalized and normalized gender constructs that are often based on a patriarchal platform of gender roles. These constructs sometimes result in gender stereotypes and myths about women in society and presumptions on how women respond to sexual activities. This approach ignores the role of stereotyping and its effect on evidentiary procedures, judicial application of laws and more so the economic disadvantageous position of women and how this situation can affect victim's ability to effectively benefit from any legal protection offered by merely removing marital rape exemption from law on sexual assault.

Second, in its use of a strict comparator, formal equality of opportunity focuses on the dominant group as the benchmark for measuring the situation of victim group. For example, with respect to gender, men become the yardstick for measuring sex-based equality. Describing the implications of this feature of formal equality generally, Catharine MacKinnon states that the framework expresses the notion that women are equal only to the extent in which men are so "if

men don't need it, women don't get it".[22] This view not only obscures disadvantage because it fails to take into consideration individual or group experience, but it also overlooks systemic discrimination by discounting the broader implications of the law. Under the application of formal equality of opportunity, a person can be denied rights or afforded more rights if such rights are applicable to others who share similar traits with them.

A case in reference is *Bliss v Canada (AG)*[23]. The claimant, Stella Bliss, challenged the provisions of Section 46 of the *Unemployment Insurance Act*[24] that restricted pregnant women's right to claim regular unemployment benefit but only allows a claim under section 30 of the *UI Act*. She claimed that the *UI Act* to the extent that it denied her such rights to claim regular benefit violated the equality provision under the *Bill of Rights*[25] as it imposed a harsher treatment on pregnant women. Writing a unanimous judgment for the Supreme Court of Canada, Justice Ritchie found that the law was not discriminatory as it treated all pregnant people the same.

Bliss exemplifies what can go wrong when an approach to equality ignores differences. The non-recognition that pregnancy is exclusively a woman issue and thus they may require different treatment led to the Supreme Court of Canada's reasoning that the discrimination experience by the claimant in the case was not a sex-based distinction but rather one based on

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[22] Catharine A Mackinnon, *Are Women Human? and Other International Dialogues* (Cambridge: Harvard University Press, 2006) at 26. See also Catharine A Mackinnon, "Reflections on Sex Equality Under Law" (1991) Yale L J 1281.

[23] *Bliss v Canada* (Attorney General), [1979] 1 SCR 183, 92 DLR (3d) 417 [*Bliss* cited to SCR]. See also *Lavell v Canada (AG) - Isaac v Bedard* [1974] SCR 1349, 38 DLR (3d) 481 [*Lavell* cited to SCR] (The ruling of the Court in *Lavell* and *Bedard* was against the challenge to s 12(1) b of the *Indian Act* RSC 1952 C 149 that imposes a loss of status on "Indian" women who married non-Indian men. The Court inferred in the case that "the equal protection" of the law was not a tenet of the equality provision under the *Bill of Rights*). See also Brodsky Gwen & Shelagh Day, "Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? (1989) CACSW at 14.

[24] *Unemployment Insurance Act*, RSC 1971, c C-48. [*UI Act*].

[25] *Canadian Bill of Rights* SC 1960, c 44 reprinted in RSC 1970. [*Bill of Rights*].

pregnancy which was not an act of the law but of nature and the individual's exercise of choice and free will.[26]

Substantive Equality

Like formal equality of opportunity, substantive equality advocates the treatment of individuals in a non-discriminatory manner. Unlike formal equality of opportunity, however, substantive equality focuses on ensuring that any law[27] or application of the law serves a meaningful purpose to groups that have been historically disadvantaged based on personal characteristics such as race, sex, and marital status.[28] Substantive equality approach sometimes gives rise to a clash between judicial and legislative roles because it requires a broader review at policies, laws and programs of other state actors which may result in the judiciary encroaching into the law-making power of the legislature.[29]

One of the by-products of substantive equality is its focus on the improvement of the condition of disadvantaged groups. This means that sometimes state policies are expected to apply slightly differently to disadvantaged groups in society with nuanced understanding of the peculiar conditions of groups historically marginalized and disempowered through established social institutions and practices. The aim of substantive equality is therefore to ensure that groups who have been historically marginalized or disadvantaged – economically, socially, politically–are not ignored, burdened or given subordinating treatments by laws.[30] Substantive

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[26] *Bliss*, *supra* note 23 (The Court also stated that "equality before the law" meant "equality of treatment in the administration and enforcement of law. . ." at 422–33).

[27] The use of the term "law" except otherwise stated in this chapter refers to government' policies, legislations, actions and conduct.

[28] Hughes, "Principles" *supra* note 7 at 7; McLachlin, *supra* note 1 at 564.

[29] Fudge, *supra* note 6 at 235; Bruce Ryder, Cidalia C Faria & E Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Decisions" (2004) 24 SCLR (2d) 103–04.

[30] Jonnette Watson Hamilton & Jenifer Koshan, "Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBJL 19 at 25 citing Patricia Hughes, "The Supreme Court of Canada Equality Jurisprudence and Everyday life" (2012) 58 Sup Ct L Rev(2d) 245 at 38 [Watson Hamilton & Koshan, "Reinvention"].

equality thus serves as a manifesto for assessing government's action, advocating and protecting multitudes of interests and understanding dynamics of discrimination.[31]

Critics of substantive approach to equality sometimes focus on the ameliorative expectation of substantive equality as this sometimes requires affirmative or positive action. They often question the requirement that it may be necessary to treat a group differently to achieve equality because it results in what is commonly referred to as reverse discrimination.[32] The notion behind reverse discrimination is that perceived advantaged group are "discriminated" against because preference is given to members of disadvantaged groups. For example, if there is a general requirement that when members of a racial "minority" group and members of the "majority" group apply for a position, the hiring process should take into consideration members of the minority group. This does not necessarily mean that if members of such group do not qualify, they should be hired anyways, it just gives preference to the member of the minority group with similar qualifications as a member of the majority group in order to achieve a levelling up of socio-economic and political disparity.

Some scholars have also argued that substantive equality is a difficult concept to unravel as it is hard to measure and implement and sometimes could lead to inconsistency of result.[33] While it may be true that substantive equality unlike formal equality is difficult to predict, it is this very feature that makes substantive equality a desirable approach. The recognition that assessing inequality requires a contextualised approach should be at the heart of genuine equality which means that there is no universal approach to equality but rather a "context specific

[31] Hughes, "Principles" *supra* note 7 at 7,18.
[32] See generally Christopher McCrudden, "Rethinking Positive Action" (1986) 15:1 Indus LJ 219 at 220–221.
[33] See Paul Brest, "Foreword in Defense of the Antidiscrimination Principle" (1976) 90:1 Harvard L Rev 1.

analysis".[34] This variability is a very important feature of substantive equality because this approach reinforces the understanding that genuine equality must be fluid, flexible and open to renegotiation because equality, unlike rights "…is a process – a process of constant flexible examination, of vigilant introspection, and of aggressive open mindedness".[35]

Conceptions of Equality in Canada

The formal model of equality found expression in the *Bill of Rights*. Prior to 1983, the *Bill of Rights* served as the first omnibus federal legislation guaranteeing human rights in Canada. The *Bill of Rights,* among other things, provided for the right of the individual to "equality before the law and the protection of the law".[36] While the *Bill* and its equality provision served as an avenue to challenge government actions,[37] the formal wording of the equality provision which in turn led to a formalistic interpretative approach was one of the shortcomings of the *Bill of Rights*. An example is the *Bliss* case mentioned earlier where the Supreme Court of Canada found that a law which had a disproportionate discriminatory effect on pregnant women was not discriminatory because the state of pregnancy was viewed as a product of personal choice.[38]

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[34] See Charlene Hawkins, *The Race for Equality, But How Do We Remove the Hurdles? Affirmative Action Lessons for The Uk from Canada* (LLM Thesis, University of Toronto Faculty of Law, 2009) [unpublished] at 15.

[35] Rosalie Abella, "Limitation on the Rights to Equality Before the Law" in Armand de Mestral et al, eds, *The Limitation of Human Rights in Comparative Constitutional Law* (Cowansville, Qc.: Yvon Blais, 1986) 223 at 225; Fudge, *supra* note 6 at 236 (equality is an ever changing concept).

[36] *Bill of Rights*, *supra* note 25, s 1(b).

[37] See *R v Drybones* [1970] SCR 282, (1970), 9 DLR (3rd) 473. *In the case*, the accused using the equality provision under the *Bill of Rights* challenged Section 94(b) of the *Indian Act* RSC 1952 c 149 [*Indian Act*]-a provision of a federal statute which recommended harsher punishment for Indigenous Peoples found intoxicated off Reserve. The Supreme Court found that the provision was discriminatory. However, the Supreme Court noted that the judgment does not render the section null and void just inoperative based on the circumstances before it.

[38] *Bliss, supra* note 23; *Lavell, supra* note 23 and accompanying text.

The *Charter* and Language of Substantive Equality

In the framing of the equality provision of the Canadian *Charter*[39], feminist and women's groups played a pivotal role in ensuring that the provision of equality transcended the traditional stipulation of equality before the law guaranteed under its preceding counterpart – the *Bill of Rights.*[40] The process of enacting the provisions of the *Charter* was consultative. The federal government commissioned the Hays-Royal commission and tasked it with receiving contributions and submissions from individuals and groups. Several proposals for the wordings of section 15 was reviewed, amended and finally the section 15 as it presently stands was accepted.[41]

Section 15(1) of the *Charter* provides that: "Every individual is **equal before** and **under the law** and has the right to the **equal protection** and **equal benefit** of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[42] [Emphasis Added] While, section 15(2) provides that "[s]ubsection 1 does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[43]

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[39] *Canadian Charter of Rights and Freedoms* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 [*Charter*].

[40] The *Charter* came into effect in April 17 1982 but its equality provision was suspended for three years in order to give the Canadian government time to align its laws and polices with the equality provision. Thus the equality provision of the Charter officially came into effect in April 1985.

[41] See generally Anne F Bayefsky, "Defining Equality Rights" in Anne F Bayefsky & Diary Eberts, eds *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell 1985) at 10-11 [Bayefsky]. See also *Women, Human Rights and The Constitution. Submissions of the Canadian Advisory Council on the Status of Women to the Special Joint Committee on the Constitution, November 18, 1980 at* 57-58.

[42] *Charter, supra* note 39 s 15.

[43] *Ibid* s15(2).

In examining the language of section 15 of the *Charter*, Anne Bayefsky notes that the inclusion of the phrase "equal benefit of the law" and "equal protection of the Law" in section 15(1) of the *Charter* has moved analysis of equality from a formal sense to ensuring equality of results.[44] Hon Claire L'Heureux-Dube enunciated that equality guarantee under the *Charter* regime, achieves three purposes: It "elevated equality to a constitutional level […,] broadened the measure of equality rights […, and] broadens the reach of equality".[45] To her, the equality guarantee under the *Charter* is not the procedural, formalistic equal treatment but one that seeks to locate the presence of inequality and remedy it even if it has to treat people differently. She calls the *Charter*'s nuanced vocabulary of equality the "language of substantive equality".[46]

It is noteworthy that a majority of, if not all, judges in Canada when considering *Charter* cases have acknowledged that the language of the equality provision of the *Charter* is requires more than a formal interpretation. The recognition of equality before and under the law and the extension of this recognition to equal benefit and equal protection of the law enables deeper analysis of government's action. This means that government policies and laws cannot satisfy the goal of equality if they violate any of the four identifiable types of equality rights protected under the *Charter*.

Supreme Court of Canada and Substantive Equality

The process of defining the reach of the equality provision of the *Charter* has been a continuous task for the Supreme Court of Canada. From the first doctrinal approach to equality claims in 1989[47] to its most recent analytical approach to section 15 of the *Charter*,[48] the

[44] Bayefsky, *supra* note 41 at 22-23.
[45] L'Heureux-Dube, *supra* note 9 at 276.
[46] *Ibid*.
[47] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1[*Andrews* cited to SCR]
[48] *Quebec v A, supra* note 12; *Kahkewistahaw First Nation v Taypotat* 2015 SCC 30, [2015] 2 SCR 548 [*Taypotat* cited to SCR].

Supreme Court of Canada's approach to section 15 has been reformulated, re-examined and reinvented.[49] It has been noted that since its first unanimous decision on section 15 and the applicable framework in *Andrews*,[50] the Court has continually been confronted with framing a uniform methodology[51] for establishing the presence of discrimination.[52] This struggle to clearly articulate the framework for the determination of the presence of substantive inequality has led some scholars to describe the Supreme Court of Canada's approach to section 15 as "confusing, unpredictable, overly burdensome and excessively formalistic".[53]

In its first equality claim—*Andrews*[54]—the Supreme Court of Canada affirmed that the purpose of section 15 was substantive equality and rejected the formal approach to equality[55] on the ground that same treatment can sometimes result in inequality while different treatment may

[49] *Quebec v A*, *supra* note 12 at para 141 LeBel J dissenting; See also Koshan & Watson Hamilton, "Reinvention" *supra* note 30.

[50] *Supra* note 47.

[51] Note an analysis of the Equality provision of the *Charter* (and any other provisions of the *Charter*) often requires two major steps which is referred to as the Oakes test. The first step is determining if the impugned law or policy violates the *Charter* provision and the second requires determining if such violation is justifiable. See *R v Oakes*, [1986] 1SCR 103. These two steps arise form section 1 of the *Charter* which allows the government to infringe on the provisions of the *Charter* within a reasonable limit. Thus even if a law violates the provisions of the *Charter* but the government can justify its action and such justification is acceptable to the Court, the law will stand. However, in examining the Court's analysis of section 15 of the *Charter*, this thesis is not focusing on *Ch*arter challenge because sexual assault cases usually do not arise as Charter challenge, it however highlights the principle of substantive equality as identified by the Court in order to question if they have been and can be infused into legislation and adjudication of spousal sexual assault cases.

[52] The Supreme Court of Canada's approach to the equality jurisprudence can be divided into four eras: *Andrews* (1989-1998), *Law* (1999-2008), *Kapp* (2008-2012) *Quebec* (2013-till date). See also Sheilah Martin, "Balancing Individual Rights to equality and Social Goals" (2001) 80 Can Bar Rev 299 [Martin].

[53] Bruce Ryder and Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) 51 SCLR (2d) 505 at 517.

[54] *Supra* note 47.

[55] The rejection of formal equality and the affirmation that section 15 protects substantive equality has been one of the most consistent factor in the Supreme Court of Canada's analysis of section 15. See *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 at para 61[*Eldridge*]; *Vriend v Alberta*, [1998] 1 SCR 493 at para 83, 156 DLR (4th) 385[*Vriend*] ; *Law v Canada (Minister of Employment and Immigration*) [1999] 1 SCR 497 at 517; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 92, 173 DLR (4th) 1[*Corbiere* cited to SCR]; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 82, 175 DLR (4th) 193[*Winko*]; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at paras 14–16 [*Kapp*]; *Withler v Canada (Attorney General)*, 2011 SCC 13 at para 2, [2011] 1 SCR 396 [*Withler*]; *Quebec v A*, *supra* note 12 at para 331; *Taypotat* , *supra* note 48 at para 20.

not always indicate the presence of inequality.[56] The Court also noted that equality is a comparative concept that requires an analysis of section 15 to involve a broad and contextualised examination of the circumstance of the claimant.[57] Furthermore, the Court affirmed that section 15 has a remedial purpose that may trigger affirmative action. Another point made by the Court in *Andrews*'s case was the need to review the effect of the law because facially neutral laws may have unintended consequences, a point that enunciates that substantive equality does not require intent to discriminate.[58] More importantly, even though the Court listed contextual factors that may serve as pointers to presence of discrimination such as prejudice and stereotyping, the Court noted that any approach to section 15 should be flexible and fluid.[59]

Strangely, after the 1989 unanimous decision in *Andrews,* the Court became highly fractured in a series of 1995 cases usually referred to as the Equality Trilogy.[60] The lack of consensus in the three cases paved way for the *Law* era. The decision of the Supreme Court of Canada's in the *Law* case was a unanimous decision and has been described as an attempt by the Court to reconcile the division and difference evident in earlier approaches to determination of discrimination.[61] During the *Law* era, the Court relied on a human-dignity-based test[62] which led to the development of four contextual factors that should be considered in order to establish the presence of discrimination: a) The presence of pre-existing disadvantage, prejudice, stereotype and vulnerability experienced by the complainant; b) Relationship between the complainants' actual condition and the grounds that form the basis of the discrimination; c) Ameliorative

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[56] *Andrews*, *supra* note 47 at 164,169.
[57] *Ibid at 165-69* McIntyre J.
[58] *Ibid* at 165-66.
[59] *Ibid* at 169.
[60] See *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693 [*Miron* cited to SCR]; *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609[*Egan* cited to SCR]; *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449.
[61] *Supra* note 55 at para 39 Lacobucci J.
[62] *Ibid* at para 51 Lacobucci J. See also *Winko*, *supra* note 55 at para 75 McLachlin J (as she then was) (the purpose of section15 is to prevent violation of human dignity)

purpose on a more disadvantaged group; d) The nature and scope of interest affected.[63] Feminists, women's groups and scholars alike criticised the human dignity test for its capacity to result in a formalistic and unpredictable approach to equality because it required mirror comparator, that is, the group who possesses almost all similar characteristics with the Claimant[64] and also imposes extra burden on equality claimants.[65]

In 2008, the Supreme Court revisited the framework for analysing section 15(1) in *Kapp*.[66] Drawing from its first decision in *Andrews*' case, the Court established a two-step approach to inquiry into whether an impugned law is discriminatory: Does the law create a distinction based on enumerated or analogous ground? Does the distinction in purpose and effect create a disadvantage because it perpetuates prejudice and stereotyping?[67] The Court noted that an analysis of section 15 when it involves ameliorative programs included a dance between section 15(1) and 15(2). The claimant has the duty to show the presence of distinction based on enumerated or analogous ground after which the government under section 15(2) can prove that the program is ameliorative. If the government successfully establishes this ameliorative situation, a full review of section 15(1) may become unnecessary.[68] The Court by permitting the

[63] *Law, supra* note 55 at para 88.

[64] See *Hodge* v. *Canada (Minister of Human Resources Development)* 2004 SCC 65 para 22–23; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657, 2004 SCC 78. See also Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006) 5 *JL & Equality* 81; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24*Windsor YB Access Just* 111.

[65] See Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001), 27 *Queen's L.J.* 299; Martin, *supra* note 52; Watson Hamilton & Koshan, "Reinvention", *supra* note 30 at 31; Debra M McAllister, "Section 15 (1)- The Unpredictability of the Law Test" (2003-04) 15 NJCL 35.

[66] *Supra* note 55.

[67] *Ibid* at paras 24–25. Note the Court uses the term "perpetuating disadvantage" along side "perpetuating prejudice". (*Ibid at* paras *23–24).*

[68] *Ibid* at para 40. For a detailed analysis of the two-test process and its impact on section 15(2) See (*Ibid* at paras 41-45). For criticism of this decision and court's deference in cases of under inclusiveness of the program, See Patricia Hughes, "Resiling from Reconciling? Musings on *R v Kapp* (2009) 47 SCLR (2d) 255 at 256 [Hughes "Resilling"]; Margot Young, "Unequal to the Task": Kapp"ing the Substantive Potential of Section 15" (2010 50 SCLR (2d) 183[Young]. See e.g. *Goselin v Quebec (Attorney General)* 2002 SCC 84, [2002] 4 SCR 429[*Goselin*].

government to show that the impugned law has an ameliorative purpose that saves it without a section 1 analysis gave section 15(2) an independent status.

In 2013, the Supreme Court of Canada developed a new approach to addressing section 15(1) in *Quebec v A*[69] and affirmed it in a unanimous decision in the *Taypotat* case.[70] The subsequent section examines both cases with focus on the analytical framework established by the Court in order to enumerate the characteristics of substantive equality as it is currently invoked in Canada.

Quebec v A: The New Approach to Section 15(1)?

The claimant, a resident of Quebec, challenged the *Civil Code* of Quebec[71] on the ground that by its restrictive application to only civil union and married spouses to the exclusion of common law and/or unmarried spouses, it discriminated against the complainant based on marital status thus violating section 15 of the *Charter*. The challenged *Quebec's Code* regulates financial spousal responsibilities during marriage and after separation, divorce or death of a spouse including but not limited to issues of spousal support, compensatory allowance and family residence. The major issue on appeal before the Supreme Court of Canada was the determination of the appropriate contextual factors for determining discrimination, in particular whether the requirements for stereotype and prejudice are distinct, complementary or relevant factors that must be shown before a claim of discrimination can succeed.

Abella J, writing for the majority in *Quebec v A*, affirms that section 15 rejects same treatment and recognises that sometimes different treatment may be necessary. She also

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[69] *Supra* note 12.

[70] *Supra* note 48. The claimant, Louis Taypotat challenged the Election Code70 of the Kahkewistahaw First Nation located in Saskatchewan that requires persons with intent to be chief or Band leader to have a minimum of grade 12 certificate. Taypotat was 76 years old with a grade 10 certificate had been the chief of the Kahkewistahaw First Nation for almost three decades. He challenged the constitutionality of the requirement on the basis that the education requirement was a ground analogous to race and age.

[71] *Civil Code of Québec*, SQ 1991, c 64, arts 401–430, 432, 433, 448–484, 585 CCQ [*Quebec's Code*].

acknowledges that section 15 protects against adverse effect discrimination because it requires a review of both the purpose and effect of the law on a disadvantaged group.[72] She notes that protection of substantive equality is the central purpose of section 15 of the *Charter*.[73] Drawing from *Kapp and Andrew*, she states that there are two questions to be asked when undertaking section 15(1) review: (a) Does the law create a distinction based on enumerated grounds or grounds analogous to it?:(b) Does the distinction in purpose and effect perpetuate arbitral disadvantage based on enumerated grounds or grounds analogous to it?[74]

Before examining the features of substantive equality as identified in *Quebec* case and later affirmed in a recent unanimous decision of the Court in *Taypotat*, it is necessary to state that the *Quebec* case is particularly interesting not just for its creation of a new approach to section 15(1) but also because of the intersection between the dissent voice and the factual outcome of the case. Lebel J writing for the minority–Fish, Rothstein and Moldaver JJ–notes that based on the facts of the *Quebec v A* there is no violation of section 15(1) of the *Charter*.

The dissenting judges in this case concurred that section 15 protects substantive equality and requires a contextualised approach;[75] however, they viewed the values of substantive equality as one intrinsically linked to the concept of human dignity and personal autonomy.[76] They noted that the second question when determining a violation of substantive equality under section 15(1) is: Does the disadvantage create a disadvantage by perpetuating prejudice or

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[72] *Supra* note 12 at para 319. See Taypotat, *supra* note 48 at para 20.

[73] *Quebec v A*, *supra* note 12 at para 325.

[74] *Ibid* at para 331(Justice Abella downplays the role of prejudice and stereotyping in the determination of discrimination, she focused rather of the perpetuation of disadvantage (*ibid* at para 323)). But see McLachlin at para 418. Contra (*Ibid* at 192–203 LeBel J Dissenting). For criticism on the use of the term arbitrary see Jennifer Koshan & Jonnette Watson Hamilton, "The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness" online (29 May 2015), ABlawg.ca (blog) online:< www.ablawg.ca/wp-content/uploads/2015/05/Blog_JK_JWH_Taypotat_SCC_May2015.pdf> [Koshan & Watson Hamilton, "Arbitrariness"]. Note, the Court does not make reference to prejudice and stereotyping in Taypotat. See generally *Taypotat*, *supra* note 48.

[75] *Quebec v A*, *supra* note 12 at para 171.

[76] *Ibid* at para 139.

stereotype thus making the perpetuation of prejudice and/or stereotype vital to a finding of substantive inequality.[77] To the dissenting judges, a change in the historic negative attitude towards common law spouses reflects absence of animosity – prejudice – to unmarried spouses. They summarised their finding that any law that takes into consideration the actual position of a claimant by protecting what they perceived as the values of substantive equality–personal autonomy and dignity–which is embedded in choice, free will, and self-determination promotes the view that anyone in the claimant's position is deserving of concern and respect as individuals and cannot violate section 15(1).[78] Thus, on the facts of the case, the dissenting judges found that the discrimination arising from the law does not express or perpetuate prejudice or stereotype and therefore not discriminatory.[79]

The majority of the Court rejected the reasoning of the minority dissenting judges, especially their focus on prejudice, stereotype and justification that a law cannot be discriminatory when it respects personal choice and freedom on the basis of choice and free will. They noted that prejudice and stereotype are mere indices for the identification of discrimination but not necessary. However, in examining whether the discrimination created by the *Quebec Civil Code* was justifiably reasonable under section 1 of the *Charter*, they found that such discrimination was justifiable because it reflected the government's purpose which was to respect the personal autonomy and choice of unmarried spouses.[80]

Features of Substantive Equality in Canada

i. Distinction based on Enumerated Grounds

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[77] *Ibid* at paras 185, 171per LeBel J citing *Kapp*, supra note 55 at para 17.
[78] *Ibid* at paras 138–39.
[79] *Ibid* at para 281.
[80] *Ibid* at para 449, McLachlin CJC. But see (*ibid*) Deschamps, Cromwell and Karakatsanis JJ at para 408 dissenting in part in the result (only art 582 that denies unmarried spouses spousal support is unjustifiable). Contra (*ibid* at para 380) Abella J, dissenting in result (the Quebec's code is discriminatory and not justifiable under section 1)

The Supreme Court of Canada has held in plethora of cases including *Quebec v A* and *Taypotat* that not all distinction will violate the principle of substantive equality. The Court has noted that only those distinctions that are discriminatory and based on enumerated grounds analogous to it will violate section 15(1) of the *Charter*. The Supreme Court of Canada has also noted that the equality provision guards against four types of discrimination: intentional and unintentional discrimination, and direct and adverse effect.[81] The implication of basing discrimination on these four markers is that to establish a discriminatory distinction the Court will look beyond the purpose of the law to the effect and impact of the law. [82]

In relation to enumerated grounds, the Court notes that enumerated ground serves two purposes: First, it sets apart groups that require a special focus in order to achieve full equality; second, it also serves as an indicator to the likelihood of the presence of bias and discrimination.[83] The Court also recognises the presence of intersecting grounds of discrimination,[84] that is, the law may have a disproportionate impact on a member of a disadvantaged group based on combinations of different personal characteristics, such as race and gender. The Court therefore advocates for an open approach to enumerated grounds that allows for a contextualised review of whether a ground should be identified as analogous to enumerated grounds listed under section 15 of the *Charter*.[85]

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[81] Moreau, "Wrongs", *supra* note 4 at 293; ___. "What is Discrimination?" (2010) 38:2 Philosophy & Pub Affairs 143 at 154.

[82] *Quebec v A*, *supra* note 12 at para 326 per Abella J; *Taypotat*, *supra* note 48 at paras 20–21 (the law can create a disadvantage by denying benefit, imposing burden or exacerbating the situation of historically disadvantaged group). See also *Andrews supra* note 47 at 165; Eldridge, *supra* note 55 at 674, citing *Eaton v Brant Country Board of Education* [1997] 1 SCR 241 at para 66, 1997 142 DLR (4th)385; Denise Rèaume, "Discrimination and Dignity" (2002-2003) 63 La L Rev 645 at 679.

[83] *Corbiere*, *supra* note 55 at para 8; See Taypotat, *supra* note 48 at para 17. See Karen Busby, "Discussed, reformulated and enriched many times": The Supreme Court of Canada's Equality Jurisprudence" (Paper delivered at the Canadian Bar Association Annual National Constitutional and Human Rights conference June 2014) [unpublished] at 6 [Busby].

[84] *Taypotat*, *supra* note 48 at para 19 citing *Law*, *supra* note 55 at para 37.

[85] See e.g. *Andrews*, *supra* note 47 (citizenship is an analogous ground); *Egan*, *supra* note 60 (sexual orientation was recognised as analogous ground); *Miron*, *supra* note 60 (The Court recognised marital status as an analogous

ii. Perpetuating Arbitrary Disadvantage and/or Discrimination

In *Quebec v A,* the Court was confronted with the question regarding the nature of discrimination prohibited under section 15(1). The Court was in dissent with respect to the role of prejudice and stereotype in determining discrimination. Abella J, writing for the majority in *Quebec v A,* stated that prejudice and stereotype are not "discrete elements" a claimant must prove to establish the presence of discrimination.[86] Although she acknowledges that the presence of prejudice and stereotype can serve as indices to the presence of discrimination, she reiterates that the focus of section 15(1) is the impact of the law and not the motivating attitude behind the law.[87] She also notes that even in the absence of prejudice – erroneous negative or disparaging belief on the ability or capacity of an individual or their group[88] or stereotype – or an inaccurate description of the features to a group irrespective of the group's true ability,[89]the focus should be on whether the law perpetuates disadvantage.

The recognition that section 15 seeks to ensure that disadvantaged groups do not suffer additional burden or denied access to basic needs has led the Supreme Court of Canada to conclude that what is required in determining the presence of discriminatory distinction is a flexible and contextualised analysis of the circumstances of the Claimant or the group.[90] An attempt at a context-specific analysis requires the Court to look at the socio-economic condition of the claimant in a broader society. This means that the contextual factors required to establish

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ground); *Corbiere, supra* note 55 (off-reserve residence is an analogous ground) But see *Haig v Canada(Chief Electoral Officer,)* [1993] 2 SCR 995 [*Haig,* cited to SCR] (Province of residence is not an analogous ground); *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 (treating permanent resident differently from Canadian citizens for the purpose of some serious offence does not qualify as analogous ground); *R v Généreux* [1992] 1 SCR 259 (military personnel do not qualify as analogous ground); *Taypotat, supra* note 48 (education requirement is not analogous to age, race and residence on reserve).

[86] *Quebec v A, supra* note 12 at paras 325, 328-29.

[87] *Ibid* at para 325.

[88] *Ibid* at paras 196-97 LeBel J Dissenting; (*Ibid* at 326).

[89] *Ibid* at paras 201-02 LeBel J dissenting.

[90] *Ibid* at para 331, 325 Abella J; Taypotat, *supra* note 48 at para 16. See *Withler, supra* note 55 at para 66.

discriminatory distinction in each case will vary based on the facts of each case.[91] The Court in enunciating on the perpetuation of disadvantage also examined the place of historic disadvantage.

iii. Correspondence with Actual Characteristics

Lacobucci J, writing for a unanimous Court in the *Law* case in 1999, states that laws that do not take into consideration the actual circumstances and need of the complainant but have unintended consequences such as imposition of burden, denial of benefit in a way that worsens and emphasises the position of disadvantaged group in a negative way will be discriminatory.[92] This position was also affirmed by Abella J writing for a unanimous Court in the *Taypotat* case.[93] This substantive-equality perspective for looking at the law is a positive development as it underscores that the aim of substantive equality is to bridge the gap between historically disadvantaged group and not broaden it.[94] It also reconfirms that choice cannot be used as a justification for discrimination.[95] However, a focus on actual characteristics has the negative effect of resulting in a finding of justification for government's discriminatory action.[96] For example, as noted earlier, the minority in *Quebec v A,* found that the Quebec Code was not discriminatory because it took into consideration the actual situation of the complainant and this reasoning also influenced the factual outcome of the case when the majority considered whether the discrimination was justifiable under section 1.[97] More so, the Court has used the same argument for the consideration of complainant's circumstance to justify discriminatory law. For

[91] *Quebec v A*, s*upra* note 12 at 328. See also *Withler, supra* note 55 at para 37.
[92] *Supra* note 55 at paras 64–75 Lacobucci J.
[93] *Supra* note 48 at para 20.
[94] *Quebec v A*, *supra* note 12 at para 332.
[95] *Ibid* at para 336. See also *Lavoie v Canada*, [2002] 1 SCR 769 at para 5; *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 at 1236–38 (Court in these examined the complexities in the perceived concept of choice and free will).
[96] See e.g. *Goselin*, *supra* note 65; *Law*, *supra* note 55.
[97] *Supra* note 12 at paras 401–03 Deschamps, Cromwell and Karakatsanis JJ dissenting in part in result.

example, in the *Goselin* case, the Court considered the ability of a widow to resume work as a justification for exemption from welfare.[98]

Other Characteristics of Substantive Equality in Canada

As noted earlier, the Supreme Court of Canada recognised the place of ameliorative actions in Canada.[99] This means that the government should have the liberty to take special measures to improve the condition of disadvantaged groups without concern that such laws will be contested. Although this approach is a positive development for the protection of ameliorative policies, it has been criticised for its ability to give undue judicial deference to government's action by accepting government's stated purpose irrespective of the effect on members of disadvantaged groups.[100] For example, the Court held that, while the government is not obligated to provide benefit when it provides a general benefit, it cannot do so in a discriminatory manner,[101] even if a targeted ameliorative benefit becomes under-inclusive and thus ignores some members of the disadvantaged group who may be negatively affected by it.[102] More so, the Court held that all members of a group do not need to experience the adverse impact of a law for it to be discriminatory.

Also, the Supreme Court of Canada rejected the requirement of a mirror comparator by recognising that there may be intersecting grounds for discrimination.[103] Following the principle of substantive equality, the Court suggested that there should not be the imposition of extra

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[98] *Supra* note 65. See also *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76.

[99] *Kapp, supra* note 55 at paras 46-47.

[100] See Fudge, *supra* note 6; Watson Hamilton & Koshan, "Reinvention", *supra* note 30; Young, *supra* note 66. See also, Busby, *supra* note 83 at 12.

[101] *Haig, supra* note 85; Eldridge, *supra* note 55; *Vriend, supra* note 55.

[102] See e.g. *Cunningham v Canada* [1993] 2 SCR 143. For Criticism see generally Jonnette Watson Hamilton & Jennifer Koshan, "The Supreme Court, Ameliorative Programs and Disability: Not Getting It" (2013) 25 CJWL 56; Sophia Moreau, "R v Kapp: New Directions for Section 15" (2008-2009) 40 Ottawa L Rev 283.

[103] *Withler, supra* note 55 at paras 60, 65-66.

burden on an equality claimant.[104] The Court also stated that even though there is need to establish a "*prima facie*" link between the impugned law and the disproportionate impact faced by the equality claimants, there is no requirement that statistics must be introduced.[105] In other words, the Supreme Court of Canada highlighted that when the interest infringed upon is fundamental to participation in a society, it may be a violation of section 15.[106]

Notwithstanding the profound development of the principle of substantive equality in Canada and the Court's recognition that women are a disadvantaged group, women have not won a single equality case solely based on section 15 of the *Charter*. The only successful sex equality cases were cases made by men.[107] The Court has always found reasons to focus on either the ameliorative or targeted nature of the program or law to justify a finding of non-discrimination when women claim substantive inequality.[108] Chapter Four of this thesis explores in details the treatment of spousal sexual assault cases in order to determine if any of the principles of substantive equality identified by the Court has been infused into legislative and judicial analysis of spousal sexual assault.

Conception of Equality in Nigeria

In discussing the concept of equality in Nigeria, this chapter focuses on the country's post-colonial legal system. There is need to state that the entity "Nigeria" is a product of colonisation and its history is more complicated that it seems when one approaches it from a legal perspective. However, this chapter limits its analysis to the English legal framework

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[104] *Quebec v A*, *supra* note 12 at para 325.

[105] *Taypotat*, *supra* note 48 at 33. Note paucity and generality of statistics was nevertheless detrimental to the case. See *(Ibid)* at para 24-33. For criticism see Koshan and Watson Hamilton," Arbitrariness" *supra* note 74; Lillianne Cadieux-Shaw "A Web of Instinct: Kahkewistahaw First Nation v Taypotat" (16 September 2015) CanLII Connects (blog) online: www.canliiconnects.org/en/commentaries/38662.

[106] See e.g. *Eldridge*, *supra* note 55.

[107] *Schachter v Canada*, [1992] 2 SCR 679, 1992 CanLII 74 (SCC); *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34, [2004] 1 SCR 835.

[108] See e.g *Newfoundland (Treasury Board) v N.A.P.E*, [2004] 3 SCR 381, 2004 SCC 66.

adopted post-independence in Nigeria. Nigeria as a pluralist society operates under English Common law, Customary and Sharia laws. The concept of equality under these laws varies but given that the Constitution of the country embodies fundamental rights and equality provisions and stands as the Supreme Law of the land, analysis of equality will be discussed from the perspective of the Nigerian Constitution.

The principle of equality is given force under the *1999 Constitution*[109] and echoed throughout the Constitution as the foundation of the "state's social order".[110] Section 15(2) of the *1999 Constitution* provides that "[a]ccordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited. While section 17(2)(a) guarantees every citizen "equality of rights, obligations and opportunities before the law".[111] However, the potency of the equality provision under the *1999 Constitution* is weakened by the provisions of the same Constitution. This is so because express provision for equality is placed under the section titled "Fundamental Objectives and Directives Principles of State Policy".[112] This section outlines what is often referred to as "second generation rights".[113] Sections 6 and 6(6)(c) of the *1999 Constitution* which outline the powers of the Court make the entire provision under this section non-justiciable.[114]

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[109] *Constitution of the Federal Republic of Nigeria* 1999 [*1999 Constitution*].

[110] *Ibid,* Preamble (state is committed to "good government and welfare of all persons on the principles of **freedom**, **equality** and **Justice**") [Emphasis Added]; See also (*ibid* ch 2) ("The State social order is founded on ideals of Freedom, Equality and Justice" s17(1)).

[111] *1999 Constitution*, *supra* note 109.

[112] *Ibid* at ch 2.

[113] Jacob Abiodun Dada, "Human Rights under the Nigerian Constitution: Issues and Problems" (2012) 2:12 Intl j Soc Sci & Humanities 33 at 36.

[114] "The judicial powers vested in accordance with the foregoing provisions of this section…shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution".

The implication of the non-justiciability is that actions of the government that violate any provision stipulated under the heading "Fundamental Objectives and Directives of States' Policy" may not be subject to direct challenge by an individual. By implication, while the equality provision can serve as an interpretive aid for the judiciary, governments' action may not be subject to critical judicial review using the equality provision. To further impede the efficacy of the equality provision, section 6(6)(c) also states that judicial decisions that violate any provision under the second generation rights (including the equality provision) may not be challenged. Thus, both legislative and judicial decision may successfully violate the principles of equality under the *1999 Constitution*.

However, even though the Supreme Court of Nigeria has on different occasions acknowledged the non-justiciability of the provision under the "Fundamental Objectives and Directives Principles of States' Policy," the Court has also held that no provision of the Constitution (including the equality provision) is inferior or superior to another provision. Thus, all the provisions of the Constitution can be read in conjunction with one another.[115] The Court also stated that the legislature could make laws to make any provision under this section justiciable; meaning that the legislature can use the provisions of the section to initiate a change in law or policy.[116]

Notwithstanding the Court's pronouncement on the equal status of Constitutional provisions and mainly due to the non-justiciability of the equality provision, issues of inequality and discrimination have often been brought under section 42(2) of the *1999 Constitution*. Section 42(1) of the *1999 Constitution* protects against discrimination. The section provides that:

[115] *INEC v Abdulkadir*, (2013) LPELR-1515 (SC) at 102, SC 228/2002 Nikki Tobi JSC.
[116] *AG Ondo v AG Federation*, [2002] 9 NWLR 772 at 222.

> [a] citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person: "(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
> (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.[117]

The Supreme Court of Nigeria on different occasions undertook a review of section 42 of the *1999 Constitution*. The Court's approach to discrimination claims, particularly when brought by women, has often been narrow and conservative, and seems to be progressive only when the impugned law has no striking significance or is not controversial.[118] The Court always promoted a formalistic approach to equality that focuses on same treatment or equal application of law to everyone alike often using the dominant group as a yardstick. In sex-based discrimination cases brought by women, the Court used men as the defining starting point of inequality. While this formalistic approach led to some successful claims on sex-based discrimination, it however also impeded achievement of equality for women in several other cases.

For example, in April 2014, the Supreme Court of Nigeria in *Ujeke*[119] and *Anekwe*[120] – judgment was delivered the same day – decided to take a broader look at the concept of

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[117] *1999 Constitution, supra* note 109, s 42 (1) (a)- (b)

[118] Uche Ewelukwa, "Pre-colonialism, Gender, Customary Injustices: Widows in African Societies" (2002) 24 Hum Rts Q 425; Andrew Ubaka Iwobi "No Cause for Merriment: The Position of Widows under Nigerian Law" (2008) 20:1 CJWL 37.

[119] *Ujeke v Ujeke* [2014] 3-4 MJSC 149 (2014), 2014 LPELR 22-724 (SC). But see *Obusez v Obusez* 2001 CA [2001] 15 NWLR 377[*Obusez*] (The Court of Appeal while upholding that a woman is not a chattel if married under the Marriage Act implied that a custom which promotes such view may be applicable if the woman was married under Customary Law); *Nezianya v Okagbue* [1968] 3 NSCC and *Nzekwu v Nzekwu* [1988] 1 NSCC 581, 2 NWLR 104 at 573 (The Supreme Court found that denying a widow possession of her deceased husband's landed property is discriminatory but the Court was of the opinion that the right of the widow his limited to right of occupancy not right to hold title of the property for the property should, according to the custom revert back to the husband paternal family).

discrimination and found two customs void on the ground that they necessitated sex-based discrimination. The complainant in *Anekwe* challenged the Igbo customary law that prohibited the widow without a male heir from inheriting and occupying her deceased husband's house. The complainant had eight female children all of whom were deemed incapable of inheriting their late father's property, thus transferring property right to the deceased husband's male relative. In *Ujeke,* the complainant – a female – was also denied access to her deceased father's property because of her sex.

The Court identified that the discrimination arising in *Anekwe and Uje*ke was a sex-based discrimination. However, the Court using a formalistic approach to non-discrimination in *Anekwe*'s case placed a lot of emphasis on the use of a comparator, constantly making references to discrepancies created in the application of the law to men and women. For instance, Justice Ogunbiyi described such discrepancies in what she referred to as "obvious differential discrimination".[121] Justice Muhammad advocated "equality between sexes;"[122] while Ngwuta JSC focused on what he called "man's inhumanity to woman,"[123] all emphasising the need to ensure that the law treats both sexes equally and constantly comparing men to women.

While this approach had a positive impact in both cases, it overlooked the fact that the discrimination faced in *Anekwe* did not just arise from the sex of the complainant as a woman but from her inability to bear male children for that would have entitled her access to her deceased husband's home, thus the discrimination she faced was not just based on sex but the intersecting relationship between her sex and her matrimonial status as a mother without a male child as well as the historical preference given to male children over female children which influenced the

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[120] *Anekwe v Nweke* [2014] 3-4 MJSC 183.
[121] *Ibid* at 219.
[122] *Ibid* at 220–21.
[123] *Ibid* at 224.

challenged discriminatory cultural practices. Also, focusing on men vis-à-vis women ignores the systemic nature of the discrimination faced by women as a group in Nigeria which is often endorsed by the patriarchal system apparent in many institutions on which the country runs its affairs.[124] One cannot also ignore the fact that the *Ujekwe* case was commenced in the Lagos High Court in 1983 and it was logged in the Supreme Court's docket between 2000 and 2006 but judgement was not delivered until eight years after. The duration it took the courts and factors that led to such delay suggest a patriarchal order that resists change.

More so, a formalistic comparative approach to non-discrimination obscures inequality veiled with facially neutral laws. This shortcoming of the formalistic approach followed by the Supreme Court of Nigeria has been evident in the Court's analysis of rape laws. For example, the Supreme Court in dealing with rape cases often made references to the marital rape exemption that existed under the *Criminal*[125]and *Penal*[126] codes for decades when stating circumstances that do not qualify as rape, without examining the underlining myths and stereotypes that informed this perspective not even in Obiters.[127] There is no record of any case where the Court made reference to the discriminatory nature of the marital rape exemption. One can infer from this reality that facially neutral laws that exempt just some members of a disadvantaged group from a system of discriminatory practices may purportedly pass the non-discrimination test in Nigeria.

This is especially disturbing because the Supreme Court has constantly reiterated its commitment to guarding against a violation of fundamental human rights and held that such

[124] Note Nwali Sylvester Nqwuta glossed over this briefly when he stated that such laws reduced widows to chattels and part of the husband's estate. See *ibid* at paras a–f.
[125]*The Criminal Code Act* C 77, LFN 1990.
[126] *Penal Code Act* c P-3, LFN 2004.
[127] *See Boniface v State*, 2013 SC 168 at paras f-c Okoro J.

rights cannot be waived, denied or statutorily subsumed.[128] More so, section 42(2) of the *1999 Constitution* provides that "[n]o citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth". While marital status may not qualify as a circumstance of birth, if the provision is read in conjunction with the decision of the Court of Appeal in *Tolani* case,[129]one can conclude that marital status qualifies as a circumstance of birth because it is analogous to sex.

In *Tolani,* the complainant challenged the decision of the Kwara State's judicial service commission to terminate her appointment as a magistrate because they received an anonymous letter from a man stating that she was married and not single as stated in her application form. The complainant responded to the petition discounting the claim but the Commission dismissed her from the magisterial position. Sotenyo Denton -West JCA writing the leading judgment questioned if her marital status was of relevance to the appointment and stated that marital status was a protected ground under the *1999 Constitution.*[130] Thus reading section 42(2) with other provisions of the *1999 Constitution* that protect against discrimination, one can argue that the provision of 42(2) transcends the formal application of law equally to all and that if marital status is a protected ground and section 42 protects against deprivation arising from circumstances of birth then such deprivation can arise not just from the application of a law but from the purpose and effect of a law or policy if based on a protected ground. Flowing from the above, any law

[128] See *Egbuono v BRTS,* [1997] 12 NWLR 539 at 31; *Nasiru Bello & Ors v AG Oyo State* [1986] 5 NWLR 45 at 828; *AG Cross River State v Chief Okon* (2007) AFWLR 395 at 370; *Timothy v Oforka,* [2008] 9 NWLR 1091 at 204; *WAEC v Akinkunmi,* [2008] 9 NWLR 1091 at 151; *Nafiu Rabiu v State,* (1981) 2 NCLR 293; *Mohammed Vs Olawunmi,* [1990] 133 NWLR 458.

[129] *Tolani v Kwara state Judiciary Service Commission,* (2009) LPELR (CA) CA/IL/2/2005 (*Tolani* cited to LPELR)

[130] *Ibid* at paras 54–57. For criticism of Sotenyo Denton-West J's reliance on non-domesticated treaties and his expounding on the scope of discrimination See (*Ibid* Ignatius Igwe Agube & Chima Centus Uweze JJ at 64–88).

which has a negative effect or denies a protected group a benefit violates not just the provisions of section 42 of the *1999 Constitution* but the substantive provision of section 42(2).

At the same time, arguments can still be made with relative success that the principle of substantive equality is not alien to Nigeria. For example, the Nigeria Constitution's recognition of the multicultural nature of the country allows for what it refers to as federal character.[131] This means that government has introduced a quota system to ensure the participation of members of different tribes in social, economic and political development of the country. [132] The Nigerian government also introduced a quota system to ensure equity in admission process into federal and state Universities in Nigeria. This allows members of some ethnic groups to gain admission based on a different requirement in order to even up the education disparity among ethnic groups in the country, sometimes even introducing scholarship systems for these historically disadvantaged groups.[133] This differential treatment and affirmative steps by the government are important features of substantive equality.

However, despite some of these minor appearances of substantive equality, the principles underlying the concept of substantive equality is largely underdeveloped in the Nigerian jurisprudence. This condition of a clearly underdeveloped principle of substantive equality in the Nigerian Constitution constitutes, as subsequent chapters of this study show, the difficulties and challenges for adjudicating spousal sexual assault in the country, not least the law's perpetuation of the discriminatory practices that confine married women in vulnerable situations.

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[131] See *supra* note 109, s7 (establishes the office of the Federal Character Commission).
[132] *Ibid*, s8(1)(a).
[133] Segun Joshua et al, "Quota System, Federal Character Principle and Admission to Federal Unity Schools: Barriers to Learning in Nigeria" 2014 2:2 Intl J Interdisciplinary and Multidisciplinary Stud at 4-8.

Conclusion

This chapter examined the concept of equality and its variations. It discussed the shift from formal equality to substantive equality as a more nuanced way to engage equality laws. The chapter also examined the concept of substantive equality and highlighted some of the basic features of this approach in a bid to establish how substantive equality better serves to remedy past wrongs, unravel deeply rooted assumptions about disadvantaged groups and ensure that laws and policies in effect and application serve to promote equality for advantaged and disadvantaged groups alike. Discussion of the models of equality in this chapter proceeded through contextualized examinations of the principle of substantive equality in Canadian and Nigerian jurisprudences in order to show that the concept is not alien in the two legal systems that form the focus of the present study.

From the discussion in this chapter, some assumptions emerge to guide the arguments pursed in subsequent chapters of this study thus: (a) that the principles of substantive equality remain the most advanced approach to our conception of equality at present; (b) that substantive equality is not alien to the Canadian and Nigerian legal systems; (c) that in legal practices in Canada and Nigeria, the principles of substantive equality have often been circumvented for formal equality principles, and where applied at all, the substantive-equality principles have been half-heartedly pursued or accommodated in court proceedings; and (d) that if upheld, as this study suggests subsequently, substantive equality principles hold the potential of resolving some of the unfair practices and contradictions in Canadian and Nigerian jurisprudences involving spousal sexual assault cases.

The next chapter, which will undertake a review of the Nigerian law on spousal sexual assault, attempts to show how the resort to formalist rather than substantive equality approach

predisposes the Nigerian judicial system as an industry of injustice for married women by denying them the right to bring cases of spousal sexual assault before the Court. The chapter also serves to expose how the current evidentiary procedure under the rape laws in Nigeria can hinder any adjudication on spousal sexual assault. One key claim of the next chapter is that a strict application of existing sexual assault laws in Nigeria presently to spousal sexual assault cases without considerations of the principles of substantive equality will inexorably not result in justice for married women. Thus, chapter three of this study argues that a substantive equality approach to spousal sexual assault cases is not only necessary for adjudging spousal sexual assault cases, but also important for reviewing Nigeria's sexual assault laws. More specifically, the chapter shows that the principles of substantive equality can aid the Nigerian legislature with drafting of laws and initiating policies to protect married women against sexual assault.

Chapter 3: Spousal Sexual Assault in Nigeria: An Argument for a Substantive-Equality Approach

Introduction

> The development of substantive equality analysis that exposes the root causes of discriminatory legal treatment of marital rape will contribute to building the case for state accountability for marital rape and women's inequality.[1]

Heterosexual marriage is common in Nigeria with women more likely than men to be married between the ages of eighteen and twenty. [2] With women in Nigeria going into marriages at such young ages, there is a high tendency of being subject to a range of culturally and socially sanctioned domestic abuses in marriage, most of which go unnoticed or underreported.[3] One such reported case of socially-permitted abuse within the marital context is spousal sexual assault.[4] This reprehensible act poses a serious threat to married women in Nigeria because virtually all aspects of state apparatus – laws, cultural practices, religions – are united in condemning married women to accept sexual abuse in the hands of their husbands without being able to seek justice for their abuses.

The practice cuts across different regions, culture and class structure within the country.[5] It threatens economic, political and social development of the country and any law, custom or religion that lends no protection to women from this heinous act invariably endorses injustice

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[1] Fiona Sampson, "The Legal treatment of Marital Rape in Canada, Ghana, Kenya and Malawi-A Barometer of Women's Human Rights" online: (2010) Equality Effects at 4 <www.theequalityeffect.org/journal/maritalrapebarometer.pdf>. ["Sampson"].

[2] See National Population Commission (NPC) [Nigeria] and ICF International, "Nigeria Demographic and Health Survey 2013" (2014) Abuja, Nigeria, & Rockville, Maryland, USA: NPC and ICF International at 303 [hereinafter NDHS Survey].

[3] Amobi Linus Ilika, "Women's Perception of Partner Violence in a Rural Igbo Community," (2005) 9:3 Afr J Reproductive Health at 77–88.

[4] In this chapter, the term spousal sexual assault will be used interchangeably with the term marital rape to refer to the same act, that is, non consensual sexual penetration by a husband on his wife except otherwise stated.

[5] NDHS Survey, *supra* note 2 at 307-08.

and unfair treatment of women. The Supreme Court of Nigeria has held in a plethora of cases that fundamental rights in the *1999* Constitution[6] are inalienable and cannot be statutorily taken away.[7] Yet, the marital rape exemption which creates a ground of impunity for husbands to rape their wives without legal consequences is a violation of the tenets of equality and non-discrimination echoed throughout the *1999 Constitution*.

In 2015, the National Assembly, in response to activism from women's groups passed the *Violence Against Person* (*Prohibition*) *Act* (*VAPP*).[8] The *VAPP Act* dispenses with the marital rape exemption in its definition of rape. However, it has a limited application in Nigeria due to the nature of the federal system in the country. This federal system means that state legislatures have the power to make their own substantive criminal laws and may adopt or reject the provisions in the *VAPP Act*. Thus, apart from the Federal Capital Territory in Abuja where it remains a substantive law, the *VAPP Act* only serves as a framework for states of the federation and its provisions are not binding on any state until incorporated into their criminal laws. This situation means that while married women in Abuja can bring complaints against spousal sexual assault, married women in other states of Nigeria do not enjoy the same legal protection.

To further complicate the situation for married women, Nigeria is a very pluralistic society that is run with assemblages of laws that derive from a range of sources: the Constitution, legislation, English Common Law, customary practices, Islamic laws and judicial precedents. These plural sources of laws and the federal nature of the country serve to impede the place and implication of *VAPP Act* or any law purporting to criminalise spousal sexual assault in a country where women still remain defined by their sex, and gender roles remain deeply entrenched in the

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[6] *Constitution of the Federal Republic of Nigeria*, 1999, C 23, LFN 2004 [*1999 Constitution*].

[7] See *Egbuono v BRTS* (1997) 12 NWLR 539 at 31; *Timothy v Oforka* (2008) 9 NWLR 1091 at 204; *WAEC v Akinkunmi* (2008) 9 NWLR 1091 at 151.

[8] *Violence Against Persons (Prohibition) Act*, 2015 [*VAPP Act*].

country's social institutions. The various customary and cultural practices from diverse groups in the country combine with religious institutions to reinforce and perpetuate women's unequal status in society, thus creating a conducive atmosphere for spousal sexual assault to thrive.

This chapter reviews the legal framework for addressing spousal sexual assault in Nigeria through the lens of substantive equality. The chapter provides a situational and cultural analysis of the treatment of women in Nigeria in order to show the nature of the context that permits marital rape exemption. It further examines the provisions of the three substantive laws regulating spousal sexual assault in Nigeria: The *Criminal Code*,[9] and the *Penal Code*[10] and the *Sharia Penal Code*[11]. The chapter also undertakes an examination of the provisions of the new law that nullified marital rape exemption—*VAPP Act.* Given the gaps observed in the *VAPP Act*, the chapter describes the factors that necessitated the *Sexual Offences Bill* (SOB), presently awaiting presidential assent.[12] The *SOB*, if eventually assented to by the president, will effect significant changes to the *VAPP Act* and the *Evidence Act*. Yet, similar impediments that render the *VAPP Act* un-implementable in states of the federation inevitably face the *SOB*. This chapter basically argues that, as it is presently constituted and executed, Nigeria's legal system authorises spousal sexual assault. The chapter contends that the country's criminal laws, particularly aspects that focus on different forms of sexual abuse, need to be revised, interpreted and implemented using a substantive-equality principle that takes into consideration the patriarchal practices and contexts within which married women have remained treated as inferiors and denied legal rights to seek justice for sexual abuses on their person.

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[9] *The Criminal Code Act* Cap 77 LFN 1990 [*Criminal Code*].

[10] *Penal Code Act* Cap P 3 LFN, 2004. [*Penal Code*] (The enactment of the penal code-which mirrors the Indian Penal Code- repealed the applicability of Criminal Code to the Northern part of Nigeria on September 30 1960).

[11] *Sharia Penal Code Law, Zamfara 2000* [*Sharia Penal Code*].

[12] *Sexual Offences Bill,* 2013 [*SOB*].

Prevalence of Spousal Sexual Assault in Nigeria

The level of domestic violence – physical, sexual and emotional – in Nigeria has been described as "shockingly high".[13] The US State Department in its report states that domestic violence is common and not socially frowned upon in Nigeria.[14] In its 2013 report, CLEEN foundation (formerly known as Centre for Law Enforcement Education) affirmed that domestic violence ranks among the top four most committed crimes in Nigeria.[15] Yet, Nigeria, like most countries, lacks a comprehensive national data on the actual prevalence of spousal sexual assault. However, the best available research is the most recent survey conducted by National Population Commission. It should be noted that although the NDHS survey is the most recent and most comprehensive national survey on the nature and pattern of violence in Nigeria, it includes 38,948 women and 17,359 men randomly selected across every state in Nigeria. [16] Even though the selection reflects a national representation of most states in Nigeria, the participants represent less than one percent of the Nigerian populace.

The NDHS survey recognised that gender-based violence is a global endemic that violates women's rights.[17] In relation to sexual violence, the survey's overall estimate revealed that almost seven percent of selected women across every state in Nigeria within the age bracket fifteen to forty-nine (15-49) have experienced sexual violence at least once.[18] Twenty-five percent of ever married women who participated in the survey had experienced sexual, physical and emotional violence in the hands of their spouses with nineteen percent of the women having

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[13] Amnesty International, "Nigeria - Unheard Voices: Violence Against Women in the Family" 31 May 2005, AFR 44/004/2005, online: <www.refworld.org/docid/439463b24.html> at 1.

[14] US State Department, Country Reports on the Human Rights Practices for 2014, "Nigeria Human Rights Report" www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014 at 6.

[15] Kemi Okenyodo, CLEEN Foundation, Public Presentation of the Findings of National Crime and Safety Survey 2013. http://www.cleen.org/Text%20Report%20of%202013%20NCVS%20Findings.pdf at 6 [CLEEN].

[16] For method of selection see NDHS Survey, *supra* note 2 at 7–8.

[17] *Supra* note 2 at 301.

[18] *Ibid* at 301, 306, para 16.3.

experienced one or more of any form of violence within twelve months of the survey.[19] Focusing on the perpetrator of sexual violence, the survey revealed that fifty-eight percent of ever married women experienced sexual violence in the hands of current husband while twenty-two percent experienced sexual violence in the hands of former husband.[20] Amongst all women who participated in the survey, only thirteen percent experienced such violence in the hands of strangers and ten percent in the hands of friends and acquaintances.[21]

The survey further revealed that forty-five percent of women who experienced sexual or physical violence never told anyone or sought help, twelve percent never sought help but told someone while thirty-six percent told someone and sought help.[22] It also detailed that women who never sought help or told anyone were predominantly those who experienced sexual as opposed to other forms of physical violence.[23] This revelation was not surprising as the survey additionally showed that a high percentage of women believe that a husband was justified in beating the wife for refusing sexual activities.[24] Of note is the fact that the percentage of women who hold this belief as opposed to their male counterpart is relatively higher.[25] Also, the CLEEN Foundation in a survey of 11,581 respondents, reported than more than one in every three women had experienced domestic violence.[26]

The NDHS research serves as an indicator to the presence and pattern of spousal sexual violence. In order to understand why this heinous act continues to thrive in Nigeria, what follows

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[19] *Ibid* at 301, 307, para 16.4.
[20] *Ibid* at para 16.5.
[21] *Ibid*.
[22] *Ibid* at *para* 16.17.
[23] *Ibid* at 325,327.
[24] *Ibid* at 292–96.
[25] NDHS survey, *supra* note 2 at 295.
[26] CLEEN, *supra* note 15 at 4 (1 in every 3 women who participated in the survey had experienced rape/sexual assault with the higher percentage having experienced this in their homes but made no specific reference to whether it was a partner).

is a situational analysis of the status of women and how the social status accorded them contributes to their vulnerability to spousal sexual assault.

The Place of Women in Nigeria: General Indicators of Women's Inequality

Socio-Economic and Legal Situation of Women

The Gender and Women report of 2012 reveals that forty-nine percent of the population in Nigeria are women and that this population accounts for about eighty-two million of Nigeria's population which means that one in every four women in sub-Saharan Africa is a Nigerian.[27] The report also states that about fifty-four million of the Nigerian women population live in rural areas and depend on the use of land to make a living. Yet, men are five times more likely to own land in rural areas.[28] Also, the report discloses that women are more likely to work in informal sectors and often earn less than men. The informal sector reduces the chances of accumulating pension and also because it depends on wages, women cannot predict a constant stream of income.[29] Consequently, most women do not wield economic resources that may in turn influence their general decision-making ability including sexual and reproductive choices. [30]

More so, there are federal laws and institutional practices that endorse and perpetuate the views that women are inferior to men in Nigeria. For example, section 26(1) of the *1999 Constitution* allows men who marry foreigners to transfer Nigerian citizenship to their wives while women who marry foreigners cannot transfer citizenship to their husbands.[31] Also, the Nigerian immigration services in some countries require a letter of consent from the father if a

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[27] Ngozi Okonjo–Iweala & Sanusi Lamido Sanusi, "Foreword" Gender in Nigeria Report 2012: Improving the Lives of Girls and Women in Nigeria 2nd ed (2012) at I [Gender & Women Report].

[28] *Ibid* at para 4.3.

[29] *Ibid*.

[30] *Ibid* at para 15.5 (There is a direct correlation between married women's ability to make decision about their health, household purchase, family visit and their wealth and level of education).

[31] Funmi Falana, "Women's Day and the Gender Agenda" *Thisday*live (11 March 2013), online: <www.thisdaylive.com/articles/women-s-day-and-thegender-agenda/141787/> [Falana].

minor is seeking to obtain a Nigerian passport, mothers are only allowed to issue such letter if the father of the child in question is deceased.[32] The need for the father's consent as opposed to the mother is also extended to the *Marriage Act* in Nigeria. Section 18 of the *Marriage Act*[33] requires the written consent of the father of both parties if a child under the age of twenty-one is to be married and only when the father is dead, of unsound mind or does not reside in Nigeria can the mother give consent. The implication of these three provisions reflects a society in which the wife's identity is subsumed into that of her husband and only exists when the male figure is absent.

Also, there are other provisions of federal laws and institutional practices that indirectly punish women for their choices and thereby violate the principles of substantive equality by not taking into consideration the gender differences in men and women or using such differences as a ground for denying them benefit. For example, section 54(3) of the *Labour Act*[34] absolves an employer of the responsibility of covering medical services incurred by women employees on account of pregnancy while sections 55 and 56 of the *Labour Act* prohibit women from engaging in night work in some specific industry.[35] Some civil service provisions in some states of the federation saddle women with the responsibility of refunding training or travelling expenses when such trip or training is interrupted because of pregnancy.[36] More so, while the tax system in Nigeria is gender neutral, the Joint Tax Board has a standing policy that allows deduction for husbands with dependants – wives and children – but this privilege is not accorded to married

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[32] The Nigerian Immigration Services, "Standard Nigerian Passport (Green Cover)" <www.immigration.gov.ng/index.php?id=50>

[33] *Marriage Act*, c M-6, LFN 2004.

[34] *Labour Act*, c 989, LFN 1990 [*Labour Act*].

[35] See *ibid*, s 55(2).

[36] Falana, *supra* note 31.

women.[37] If a woman claims to have dependants, she has to prove this beyond reasonable doubt. Single mothers are exempted from any deduction because the policy requires them to tender a marriage certificate.[38]

The above are just a few of the federal laws and institutional practices that promote the violation of women's rights in Nigeria.[39] Apart from laws that endorse the lower status of women, as a pluralist state, Nigeria draws much of its value system from cultural practices. This is in recognition that "the traditions and culture of every society determine the values and behavioural patterns of the people of that society".[40] It is necessary to examine how cultural practices that may ordinarily serve the purpose of promoting a peaceful and harmonious living can perpetuate inequality and indirectly endorse the confinement of women to sexual and reproductive roles.

Cultural Practices and Women in Nigeria

Understanding that Nigeria is a creation of British colonialism is necessary when examining the treatment of women in Nigeria. The British colonial laws introduced some patriarchal common law perspectives on women into an already overly complicated indigenous patriarchal laws that relegated women as inferior agents of social, cultural and political

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[37] *Personal Income Tax Act*, 2011 as amended. See Taiwo Oyedele, "The Personal Income Tax Amendment Act 2011: Implementation and Matters Arising" Online: www.pwc.com/ng/en/pdf/pita-amendment-march-2012.pdf at 22.

[38] Adedokun Adeyemi, et al, "A Compilation of the Constitution, National and State Statutes and Regulation, Local Government Bye-Laws, Customary Laws and Religious Laws, Policies and Practices, and Court Decisions Relating to the Statuses of Women and Children, Applicable in Nigeria" National Centre for Women's Development, Abuja (NCWD) (2005) [Adeyemi, et al].

[39] For further reading on discriminatory practices see Adeyemi, *supra* note 37 (Women are mostly not allowed to stand as sureties for bail proceedings, dressing is regulated in some states for women, women in the North do not often travel alone nor can they apply for passport by themselves, female officers married to a male officer are denied rent supplement on the assumption is that her husband is the breadwinner, Banks and some private organisations lay off women who are pregnant and sometime refuse to hire married women, Some state requires female judges to marry within two years of appointment, etc.).

[40] Joy Ngwankwe, "Realizing Women's Economic, Social, and Cultural Rights: Challenges and Strategies in Nigeria" (2002) 14 CJWL 142.

existence. This section only makes references to some cultural practices in some parts of the country as examples of practices that discriminate against women in Nigeria, because of the limited space in this study to account for cultural practices that cut across the thirty-six states and the Federal Capital Territory of Nigeria, all of which comprise over three hundred ethnic nationalities.

One of the prominent cultural practices in Nigeria is the practice of polygyny. Polygyny allows a man to marry more than one wife at the same time. The rate of polygyny is higher in the Northern region of the country as opposed to the Southern region.[41] Polygyny is often justified as a means to stop extra marital affairs, punish an irresponsible wife, bring in a competition to correct a quarrelsome wife, or satisfy a man's sexual appetite.[42] But apart from polygyny, the practice of wife inheritance though rapidly declining is still applicable in some parts of Nigeria.[43] Under this cultural practice, the death of a husband does not signify end of marriage. The wife can be married out to another male figure in the family. This view endorses the perspective that a wife is part of the husband's estate and can be inherited alongside his properties. Also, predominantly, most cultures in Nigeria give preference to male children and devolve property through the patrilineal line sometimes omitting the eldest female in the family.[44] There are proverbs among some Nigerian peoples that reflect the societal view of women as inferior and oftentimes worthless offspring. For example, the Hausa people of Nigeria have a saying '*ba ay yi*

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[41] NDHS Survey, *supra* note 2 at 55.

[42] See generally Alistar Munro, et al, "The Lion's Share: An Experimental Analysis of Polygamy in Northern Nigeria" (2011) SSRN online: http://ssrn.com/abstract=1821283; Hon. Justice G.I.U. Udom Azogu "Women and Children-A Disempowered Group Under Customary Law" in Ajibola B, ed, *Towards A Restatement of Nigeria Customary Law* (Fed Min J L Rev Series, 1991) at 131.

[43] See Foluke O Dada, "The Justicieability and Enforceability of Women's Rights in Nigeria" 14:5 Global J Hum-Soc Sci E Econ 48 at 53[Dada]; Hadiza Iza Bazza, "Domestic Violence and Women Rights in Nigeria" (2009) 4:2 Societies Without Borders 175 at 183 [Bazza].

[44] On April 9 2010, The Supreme Court of Nigeria upheld the Benin primogeniture rule that requires the main house of the deceased devolves to the eldest male child in the family. See *Osula v Osula* (1995) 9 NWRL pt 419 SC 259. *Contra Ujeke v Ujeke* [2014] 3-4 MJSC 149 (2014); *Anekwe v Anekwe* [2014] 3-4 MJSC 183.

koma bi mace ta haifi maco" which loosely translates as "nothing is gained by a female giving birth to a female". The Yoruba people often compare women who have only female children to a witch.[45]

More so, there are widowhood practices which sometimes involve shaving the head and pubic hair of a widow and also placing her in isolation for a period between 7 and 31 days. During this period, some women are not allowed to bathe, while some are required to share a room with the dead body.[46] In contrast, no culture in Nigeria has an equivalent of this mourning practice for men. Oftentimes, men who lose their wives are treated as having faced an immense tragedy and encouraged to take another wife to cater to their needs.[47]

Another highly controversial issue in Nigeria is the issue of bride price and/or dowry.[48] There are customs that equate bride price to the purchase of a chaste woman. Thus, a man can return a woman who is not a virgin by breaking a calabash or by dropping half keg of palm wine in front of his in-laws' house and he may request a return of the bride price, sometimes double the initial amount.[49] Some cultures however view bride price as an appreciation of the bride's family. Irrespective of the notion behind bride price, it is sometimes used as a justification for viewing the wife as part of a husband's estate.[50]

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[45] "*Kaka ki o san lara aje o fi gbogbo ara bo obirin*," which loosely translates as, rather than express remorse the witch gave birth to all female children. [Translation here is mine.]

[46] See generally Akinbi, Joseph Olukayode, "Widowhood Practices in Some Nigerian Societies: A Retrospective Examination" (2015) 5:4 Intl J Humanities Soc Sci 67.

[47] *Ibid* at 68.

[48] See Adeyemi, *supra* note 38.

[49] But see *Edet v Essien* (1932) 11 NLR 47 [*Essien* cited to NLR] (the Court declared the custom that which stipulates that a child born to woman who divorced a man without refunding the dowry belongs to the husband as repugnant). *Contra* Adeyemi, *supra note* 38 (this custom is still relied on by some states and flows from the property right presumed to arise from payment of bride price).

[50] See Tomulope Monisola Ola & Olusegun Johnson Ajayi, "Values Clarifications in Marital Rape: A Nigerian Situation" (2013) 9:35 European Scientific J 291.

An examination of these cultural practices discussed above reveals problematic social perception of women. All these combined serve as a pointer to women's unequal status and the corresponding effect on the meaning ascribed to conjugal rights in marriage in Nigeria. It is in this cultural and legal setting that spousal sexual assault laws in Nigeria must be situated. A combination of these cultural practices and a federal law system further complicates the place of any law purporting to promote women's equality. In order to understand the criminal laws in Nigeria, one must understand the federal and pluralistic nature of the country.

Federalism, Pluralism and Criminal Law in Nigeria: Implications for Women

Nigeria is a federal state with law-making powers shared between a bicameral National Assembly and State Houses of Assemblies.[51] At the national level, the National Assembly which consists of two chambers, the upper house (the Senate) and the lower house (house of representatives) has exclusive jurisdiction over matters listed in second schedule part I of the *1999 Constitution* (Exclusive List).[52] The *1999 Constitution* recognises the creation of a state House of Assembly in every state in Nigeria[53]. This state House of Assembly shares concurrent jurisdiction with the National Assembly on matters listed in the Part II second schedule of the Constitution (Concurrent list).[54] In addition, Part II, second schedule item 2 of the *Constitution*, recognises the power of the National Assembly, by an Act or resolution of both houses of National Assembly, to make laws on matters incidental and supplementary which includes general offences, jurisdiction, power and procedures of the courts. Aside from the matters listed in the exclusive and concurrent list, section 4(7) of the *1999 Constitution* vests in the state House of Assembly the power to make laws on matters not listed in the exclusive and concurrent list

[51] *1999 Constitution*, *supra* note 6 s 4(1).
[52] *Ibid,* s 4(1–3).
[53] *Ibid,* s 90.
[54] *Ibid,* s 4(7) (a–c).

and this is where the state house of assembly derives its powers to make laws on substantive criminal law.

Following from the power of the State House of Assembly to make laws, most states in Nigeria have enacted laws in respect of substantive criminal laws with the exception of ancillary matters such as evidence, jurisdiction, power or rules of court which fall under the exclusive jurisdiction of the National Assembly. There are two methods states can use to incorporate a substantive criminal law: by domesticating the criminal law passed by the National Assembly into state laws or by enacting its own criminal rule.[55] Most states in Nigeria with the exception of Lagos state which has enacted its own criminal law, *Lagos State' Criminal Law* 2011, have domesticated substantive criminal laws and refer to it as the *Criminal Code Act* or *Penal Code Act* of their respective states. The *CCA* is applicable to the Southern region in Nigeria[56] and the *PCA* is applicable in the Northern region.[57] By implication, section 4 and second schedule of the *Constitution* can be said to limit the power of the National Assembly to make laws on substantive criminal laws and that its laws remain applicable only in the Federal Capital Territory–Abuja.[58] Thus, any substantive criminal law passed by the National Assembly in Nigeria has no binding effect on the states although it may serve as a framework for states to follow.

However, it has been argued that the perspective that informs the need for states to domesticate any law passed by the National Assembly before it can be applicable to them is

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[55] See Second Schedule Part 1 & 11 *1999 Constitution*. For further reading on jurisdiction and Law making see Omoba Oladele Osinuga, "Nigeria's Sexual Offences Bill 2013, Matters Arising" (July 21,2015) online: www://ssrn.com/abstract=2634134 or http://dx.doi.org/10.2139/ssrn.2634134 > [Osinuga].

[56] The Southern region is made up of the following states: Ekiti, Delta, Edo, Lagos, Ogun, Oyo, Ondo, Osun, Abia, Akwa-Ibom, Anambra, Bayelsa, Cross-River, Ebonyi, Enugu, Imo and Rivers

[57]The Northern region is made up of Adamawa, Bauchi, Yobe, Benue, Borno, Gombe, Taraba, Jigawa, Kaduna, Katsina, Kano, Kebbi, Kogi, Kwara, Nasarawa, Niger, Plateau, Sokoto, Zamfara and Abuja.

[58] *1999 Constitution*, *supra* note 6 s 299 (a).

erroneous and contrary to the *Constitution*.[59] First, the principle of specific and general law is applicable in Nigeria. This principle implies that if there is a particular law targeted at a specific issue then it takes precedent over other laws that generalise on the issue. For example, if the National Assembly passes a law specifically to target violence against women, it should take precedent over a general provision of the *CCA* or *PCA*. This principle is often referred to in Latin as *Lex specialis derogat legi generalis*. Also, the National Assembly's power to make laws on matter incidental to offences can be said to extend beyond matters in the exclusive list and when read in conjunction with section 4(5) of the *1999 Constitution* which provides that in the event of a conflict between an Act of the National Assembly or a law by the State House of Assembly, the Act of the National Assembly takes precedent.

Nevertheless, the standing principle in Nigeria especially with respect to substantive criminal law has been that an Act of the National Assembly requires domestication by states before it can be effective in those states. For example, during the process of enacting the *VAPP Act* the National Assembly's power to make laws on issues of violence for states was challenged. The Senate responding to these criticisms on the scope of its jurisdiction stated that the *VAPP Act* will only be applicable to the Federal Capital Territory – Abuja – and would only serve as a form of "treaty" for the states.[60] The implication is that other states are not bound by the provisions of *VAPP Act* except they formally incorporate it into their respective laws. Thus, in Nigeria, while husbands who rape their wives can be charged with spousal sexual assault/rape in Abuja, husbands in other states who commit the same offence are legally immune from

[59] See Osinuga, *supra* note 55 at 3–7.

[60] Nigeria, NA, Senate Debates, sess 4, (2015) Vol 1, No 54 col 1450 (14 April 2015) (Umaru Dahiru) at col 1454 Senator Umaru Dahiru [Nigeria, NA April].

prosecution, a situation that creates an unnecessary discriminatory distinction between married women in Nigeria based on place of birth or residence.

The federal nature of Nigeria is further complicated by the pluralistic nature of the country which allows religious laws to operate alongside legislations. In 2000, Governor Ahmad Sani Yerima (as he then was) of Sokoto State pushed for the incorporation of the Islamic legal system in form of Sharia law into his state law. Currently, twelve Northern states have enacted their own Sharia Law.[61] With the introduction of the Sharia law also came the institutionalisation of a sharia court which appoints judges vast in the dictates of the Islamic law to apply the provisions. The *Sharia Penal Code* applies to the following people: Persons who voluntarily consent to the jurisdiction of Sharia Court, persons who profess the Islamic faith and any court of law that elects to apply the provision of the *Code*.[62] It should be noted that the *Penal Code* like the *Sharia Penal Code* itself draws from the Islamic faith and that they both incorporate provisions that endorse some forms of violence against women such as the right of a husband to beat up his wife as a corrective measure as long as it does not result in grievous harm.[63] Also, the *Sharia Penal Code* recognises the offence of "zina" which is defined as having sexual relationship outside of marriage.[64] In the examination of the offence of zina, the Sharia Court often fuses the offence of rape under these provisions, thus a woman who alleges rape has to produce four males or eight female witnesses or she can be charged with zina or with making false accusation. While the man's testimony is often taken on the face value if he swears to his

[61] These states are Zamfara, kano, Sokoto, Katsina, Bauchi, Bornu, Jigawa, Kebbi, Yobe. Gombe, Kaduna, and Niger applies Sharia law to some part of the states that are predominantly occupied by muslims.

[62] *Sharia Penal Code*, *supra* note 11, s 3(1), (2).

[63] *Penal Code*, *supra* note 10, s55(1)(d). See *Akinbuwa* v *Akinbuwa* 8 (1998) CA/B/6/94, 13 (Court of Appeal of Benin held that physical discipline of wife within a reasonable degree is acceptable for disciplinary purpose).

[64] *Supra* note 11, s 126. The punishment for zina is 100 lashes of cane for an unmarried person and/ or one-year imprisonment for a married person. See (*Ibid*, s 126 (a–b)).

innocence, the woman's testimony is often viewed with distrust.[65] Also, an unproved allegation of rape or zina can result in the woman being charged with making false accusation or defamation which carries a penalty of 80 lashes of the cane.[66]

The intersection of the federal structure and pluralistic nature of Nigeria complicates any examination of substantive criminal laws in Nigeria.[67] The discriminatory distinction introduced by the selective applications of laws within Nigeria is particularly shocking because the Supreme Court of Nigeria has held that the *Constitution* is the framework that guides every legislative process. The Court focusing on the supremacy of the constitution affirmed that the *Constitution* applies to all levels of government and that the legislative powers of the states and the National Assembly are subject to the *Constitution*.[68] In other words, every law inconsistent with the dictates of the *Constitution* or in violation of fundamental human rights is null and void to the extent of its inconsistencies.[69] Despite these interventions, the substantive criminal laws in Nigeria seem to thrive on irregular discriminatory distinctions. For the sake of consistency and clarity, the *Criminal* and *Penal Codes* as applicable in the Federal Capital Territory will suffice as the benchmark for subsequent analysis since most states in Nigeria draw directly from these *Codes*. The *Zamfara Sharia Penal Code* will also be used subsequently since it was the first

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[65] See e.g. *Safiyatu Hussain Titudu v. Attorney General of Sokoto State* 3 (2008) 1 WHRC 309 (Safiyatu who claimed to have been raped by Yakubu Abubarkar-a divorcee was sentenced to death for zina and Yakubu acquitted because he pled not guilty; See also MOA Ashiru & OA Orifowomo, "Law of Rape in Nigeria and England: Need to Re-Invent in the Twenty-First Century" (2015) 38 JL Pol'y and Globalization 28 at 36 [Ashiru & Orifiwomo].

[66] *Sharia Penal Code*, supra note 11 s 124-125.

[67] For detailed reading on the scope, implication and discrepancies in the application of the Sharia Law see harmonised Sharia Criminal Procedure Code Annotated (2005) Centre for Islamic Legal Study, Ahamadu bello University Zaria 218 -317. Online: www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria/vol_4_14_chapter_5_part_IV.pdf>

[68] *INEC v Abdulkardir* (2003) LPELR- 1515 (SC), SC 228/2002 [*INEC* cited to LPELR); *AG Abia v AG Federation* (2002) 6 NWLR 103 at 264.

[69] *1999 Constitution, supra* note 6 s 1; *INEC, supra* note 68 at para a-c Nikki Tobi JSC; *Nafiu Rabiu v The State* (1981) 2 NCLR 293 at 326.

penal code and served as a framework for the *Sharia Penal Codes* applicable in the twelve Northern states that domesticated it in full or in part.

Legal Framework for Tackling Spousal Sexual Assault in Nigeria

The offence of rape and attempted rape is a felony under the *Criminal Code* and punishable with life imprisonment with or without canning or fourteen years respectively. Section 357 of the *Criminal Code* provides that:

> 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 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, is guilty of an offence which is called rape.[70]

Section 6 of the *Criminal Code* which is *in pari materia* with section 357 states that "unlawful carnal knowledge" means carnal connection which takes place **otherwise than between husbands and wife**" **[**Emphasis added]

Section 282 of the *Penal Code* stipulates that:

> A man is said to commit rape who, except in the case referred to in subsection (2) of this section, 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 believes herself to be lawfully married;(e) with or without her consent, when she is under fourteen years of age or of unsound mind.

While section 2 states that "sexual intercourse by a man with his own wife is not rape if she has attained to puberty".

Section 128 of the *Sharia Penal Code* provides that:

[70] *Supra* note 9, s 257.

> 1) A man is said to commit rape who, save in the case referred in subsection (b), has sexual intercourse with a woman in any of the following circumstances: -
>
> (i) against her will; (ii) without her consent (iii) with her consent, when her consent has been obtained by putting her in fear of death or of hurt; (iv) 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; (v) with or without her consent, when she is under fifteen years of age or of unsound mind. Mere penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Section 128 (b) provides that "sexual intercourse by a man with his own wife is not rape". The *Sharia Penal code* stipulates that the punishment for rape is 100 lashes of cane and/or a year imprisonment for an unmarried man and stoning to death for a married man with the requirement that the assailant pay the bride price that would have been payable to marry any woman in the same socio-economic status as the victim.[71]

To establish that the offence of rape was committed under the *Criminal, Penal* and *Sharia Penal Codes*, the prosecution is saddled with the responsibility of proving that there was penetration, that the sexual intercourse was unlawful – not between a husband and wife, that there was lack of consent or consent obtained by fraud and that the accused had intent to engage in such sexual intercourse irrespective of the presence or absence of consent.[72]

Carnal Knowledge/Penetration

The *Criminal, Penal* and *Sharia Penal Codes* define rape with focus on the word penetration. The Supreme Court of Nigeria has held in plethora of cases that penetration is the most important and first ingredient in establishing the rape of the complainant.[73] Also, the Court has further held that the slightest penetration is enough to prove rape even if there is no ejaculation, emission of semen or rupturing of the hymen.[74] The only type of penetration

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[71] *Ibid*, s 129 (a-c).
[72] See *Boniface v State*, 2013 SC 168 at paras f-c, Okoro J [*Boniface*]; *Isa v Kano State*, 2013 SC 35[*Isa*].
[73] *Iko v State*, [2001]14 NWLR 732 at 221,245 Kalgo J [*Iko*]
[74] *Ibid*; *State v Maigemu*, (1973) LLR 117 121; *R v Kufi*, [1960] WRNLR.

recognised by the Court as constituting the offence of rape is penetration via the vagina with the penis. Any other type of penetration may fall under indecent assault[75] which has no marital rape exemption although the Court has ruled in some cases that a husband may be guilty of assault but not indecent assault.[76]

Consent or Against Her Will?

The next step in establishing rape is to prove that the complainant did not consent to the penetration being the subject matter of the case or that her consent was obtained by means identified in the Codes. The *Criminal, Penal* and *Sharia Penal Codes* do not define the term consent, thus leaving the term open to interpretation by the Court. It should be noted that aside from lack of consent, the *Penal* and *Sharia Penal Codes* further require that the penetration must be against the will of the woman, thereby creating a two-fold test to determining if penetration was unlawful. Notably, the notion of consent does not apply to spousal cases because of the lack of recognition of marital rape as a crime. In other words, law presumes a married woman's perpetual and irrevocable consent to sexual relationship with her husband.

The literal interpretation of consent will be a positive and consensual affirmation from the parties in question, that is a "yes" as opposed to a "no".[77] Thus, when the *Criminal*, *Penal* and *Sharia Penal Codes* define rape to mean penetration without consent, such penetration has to be without a positive affirmation from the complainant. However, in practice this requirement of lack of consent has shifted to requiring the complainant to say "no" to the sexual intercourse. The implication of this requirement is a presumption of positive consent, that is, yes, until the

[75] *Iko*, *supra* note 73; *R* v *Khan*, [1990]2 All ER 78.

[76] See e.g *Alawusa v Odusote* (1941) 8 WACA 140 [*Alawusa*] (Shaving of a wife's pubic hair by the husband on the basis of custom does not amount to indecent assault but mere assault because of the existence of marital relationship).

[77] Adekunle Owoade, "A Note on Rape" (1990) I Ogun State U LJ at 25.

complainant retracts same not just by the use of the word "no" or "stop" but by forcefully communicating same to the accused, thus placing a burden on the complaint to withdraw consent and not a burden on the accused to ensure consent.

Meanwhile, the Supreme Court of Nigeria has stated that there can be two approaches to consent: a narrow technical approach and a broader approach.[78] The technical approach focuses on consent judgement when there is a meeting of the minds, that is, parties voluntarily and freely agree to terms that then constitute a Court's judgement. The broader approach requires striking a compromise that must be based on agreement by both parties.[79] The general element of both shades of consent is the freewill of both parties and the voluntary nature of such agreement. The Court of Appeal also defined consent in terms of agreement or permitting an act. [80] In the same case, the Court also recognised that consent can be withdrawn based on the circumstances of each case. The Supreme Court has further held that there are cases where consent has to be unequivocal. The Court notes that consent is an approval and though it can be implied in some cases, when it involves some acts done to a part of the body, consent should be "exact and unequivocal".[81]

Drawing from the Supreme Court's definitions of consent, rape under Nigerian Criminal Laws – at least the *Criminal Code*–can be simply stated as having sexual intercourse with a woman without her unequivocal and exact agreement or her agreement when tainted by lack of freewill or voluntariness. It is disheartening however that the Supreme Court in reviewing consent under rape cases has introduced the need to establish that such penetration was against

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[78] *Abdulkarim* v *Incar (Nigeria) Ltd*, (1992) LPELR-26 paras f–g (SC) Nnaemeka Agu, J.

[79] *Ibid*, paras g-a Ogwuegbu, J 36.

[80] *Ogundipe* v *Oduwaiye* & Anor (2013) LPELR-20474 Para f (CA) Ikyegh JA citing Oxford Advanced Learner's Dictionary (7th Edition) at 309.

[81] *Okekearu v Tanko* (2002) LPELR-2437 Niki Tobi, J ("consent to amputate a part of the body should be exact and unequivocal" paras g–b).

the will of the woman. To this end, the Court often demands the presence of proof extraneous to the act to establish that the complainant vehemently resisted the accused. For example, the Supreme Court has in *Igboanugo v State*[82] stated that to prove lack of consent, the prosecution can introduce evidence of torn pant, bra and clothes of the victim. In other cases, the court has looked for signs of struggle, screams, and lacerations on the victim. There is no record of any case where the word "no" was sufficient to establish lack of consent.[83]

While this approach of seeking extraneous evidence may be consistent with provisions under the *Penal and Sharia Codes* which require some level of resistance because these codes state that the penetration must be against the will of the woman, the approach remains a faulty interpretation of the *Criminal Code* which only requires lack of consent or consent obtained by other unlawful means. One can draw from the Court's re-definition of rape to mean forceful sexual intercourse as opposed to sexual intercourse without consent as one of the factors responsible for the requirement of resistance.[84]

Vitiation of Consent

Under the *Criminal*, *Penal* and *Sharia Penal Codes*, a complainant may be said to have consented to the sexual activity being the subject matter of the rape under duress or deception. There is need to differentiate between placing the complainant under duress and employing a deceptive tactic to obtain consent. The use of duress to obtain consent requires the use of threat, harm, force or basically putting the complainant in fear of her life. The Court has not sufficiently

[82] [1992] 3 NWLR 228 at 176.

[83] *Akpan v The state*, (2014) LPELR-22740 (CA) [*Akpan*].

[84] *Ahmed v Nigerian Army*, (2010) LPELR-8969 (CA) Peter-Odili, JCA ("It may be stated differently by saying that rape, means a forcible sexual intercourse with a girl or woman without her giving her consent to it" at paras e-a); *Tometim v The State*, (2014) LPELR-22788(CA) GALINJE JCA ("On the charge for rape, I wish to state clearly that it is a forceful sexual intercourse with a girl or a woman without her consent to it…" at para f-a); *Egunmi v The State* 2013 2 SCNJ 85 (rape is described as aggressive carnal knowledge of a woman); *Posu v State*, [2011] 3 NWLR Fabiyi J at 414[*Posu*] (rape is described as having unlawful carnal knowledge of a woman forcefully).

developed the scope of what constitutes harm or force but it has differentiated consent obtained through these means as a form of submission as opposed to true consent. It should be noted that a claim of submission often requires the same degree of force and not mere coercion. For example, in *R v Olugboja*[85], the complainant was raped by two brothers. While she actively resisted sexual intercourse with the first brother, the second brother claimed she did not resist. The Court held in the case that having been subject to intense physical violence when she fervently resisted the first brother, her perceived consent, which was described as submission, can be seen to arise from fear and not consent.

Unlike consent obtained by placing the complainant under duress, consent obtained by fraud, on the other hand, requires agreement to the sexual act by the complainant. In this situation, the complainant willfully agrees to such sexual act because of a mistake as to the identity of the accused or the nature of the act. Although fraud may vitiate consent, it is necessary to note that not all types of fraud will vitiate consent to sexual intercourse. For example, if a man has sexual intercourse with a woman on the pretext of reciprocal financial gains and refuses to fulfil this agreement, this may not amount to fraud. Fraud in relation to sexual intercourse means that the complainant's consent is not antecedent to a later act to be done by the accused.[86] One can deduce two things from fraud vitiating consent: First, the complainant must have consented because she assumed the accused was someone else or she believed the act was of a different nature. Second, the accused must have misrepresented who he is or the nature of the act to the complainant.[87]

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[85] [1981] ALL ER 443.

[86] See e.g. *R v Linekar*, 1995 QB 250.

[87] See *R v Flattery*, 1877 2 QBD 41 (a medical doctor charged with rape for deceiving the patient into believing the sexual relationship was for medical reasons), *R v Williams*, 1923 1 KB 340 (a music tutor being deceptive as to the purpose of the sexual act with the client as his way to treat breathing problem). Contra *R* v

This approach to consent by the Court in Nigeria is highly problematic. First, sexual offences are one of the few offences that have been interpreted to require a revocation of consent or some level of resistance. In cases of assault, robbery or stealing, the law places no onus on the victim of such crimes to resist or show that they made extra effort to ensure that such crime was not committed. In fact, in other offences, victims are often advised and expected to show little or no resistance to avoid provoking their assailant but to put their faith in the justice system.[88] Also, it is even more disheartening that consent obtained by placing a complaint under duress is defined as consent at all. This is because such approach presumes that whatever happened between the parties was consensual but only a crime because such consent was preceded by harm. The Supreme Court of Nigeria has stated that "[c]onsent induced by fraud or tricks is not a real consent",[89] thus any consent obtained under this circumstance should not be described as consent in the first place.

Assessing the Credibility of the Complainant

In rape and other sexual offences, the Nigerian courts and the *Evidence Act*[90] allows a certain degree of questioning that is geared towards assessing the credibility of the complainant. There are two main ways the credibility of a complainant is tested in Nigeria: introduction of past sexual history and corroboration of victim testimony.

The *Evidence Act* generally allows a party in a case to test the credibility of the complainant and other witness to serve three purpose: "test the accuracy, veracity and credibility of the witness, ascertain the identity of a witness and to shake their credibility by injuring their

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Clarence, 1888 22 QBD 23 [*Clarence*] (lack of knowledge of husband's venereal disease not fraud vitiating consent)

[88] Agha-Jaffar & Tamara, *Demeter and Persephone: Lessons from a Myth* (Jefferson NC: McFarland & Company 2002).

[89] *Babalola v The State* (1989) LPELR-695(SC) at para g Nnaemeka Agu JSC (as he then was) citing *R* v *Williams* 1953 1 QB 660.

[90] *Evidence Act*, 2011 as amended [*Evidence Act*].

character".[91] There is generally no limitation to the question that can be asked to sling mud at a witness. Courts however have the discretion not to compel the witness to answer the question put to them if it is deemed irrelevant to the fact but only serves to injure the character of the witness.[92] In contrast, evidence of bad character or past convictions of the accused is prohibited and deemed irrelevant while evidence of his good character is admissible.[93]

In specific relation to sexual offences, prior to the amendment of the *Evidence Act* in 2011, the accused under the old *Evidence Act*[94] had the right to introduce evidence of past sexual history of the Complaint.[95] This could include evidence of her sexual activities with anyone including the accused. This option served two purposes. First, it tested the truth of the complainant's testimony, and second, it affirmed the likelihood of the complainant to consent to sexual relationship with the accused. However, the amendment to the *Evidence Act* placed a limitation on the use of past sexual history but did not completely eliminate it. Under the new *Evidence Act*, the accused can only ask questions on past sexual history between him and the complainant.[96]

Despite this seemingly positive development in regards to the *Evidence Act*, the fact that the *Evidence Act* allows questions of past sexual history is still problematic. The latitude given to the defence to introduce questions on past sexual history is based on two egregious myths: First, that if a woman has previous sexual intercourse with the accused then she is likely to consent again, and secondly, that the accused is reasonably justified in presuming consent based on past sexual encounter with the complainant. Using past sexual history as a tool to justify rape projects

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[91] *Ibid*, s 223.
[92] *Ibid*, s 224.
[93] *Ibid*, s 81, 82. But see (ibid s 82(2) (a-b), 180(c)) (Evidence of bad character is allowed as a rebuttal when the accused's good character is made a point in reference by the defence. Also when the bad character is the fact in issue, or when the accused is the only witness for the defence).
[94] *Evidence Act*, c E-14, LFN 2004 [*Evidence Act*, 2004].
[95] *Ibid*, s 211.
[96] *Supra* note 90, s 211.

what has been identified as "behavioural consent".[97] This means that the court operates under the assumption that the accused may presume the complainant was consenting based on the attitude or past attitude of the complainant. For example, if the pattern of relationship between the accused and the complainant is such that the accused is forceful and coercive which usually prompts the complainant, who may have initially indicated lack of consent, to become submissive, motionless or non-resistance, he may be justified to, on another occasion, presume that her resistance or indication of lack of consent was not genuine. Such relationship obviously reiterates a pattern of abuse but rather than acknowledging this, the introduction of such past sexual history will form the justification for the accused's belief in consent.

More so, allowing past sexual history to justify the accused's belief in consent or the complainant's likely consent to the sexual act is ironic because the reason behind prohibiting the evidence of accused's bad character is to prevent judges and juries from drawing conclusions on the likelihood of the accused's guilt from past actions while the same likely presumption that a former willingly sexual partner may always be willing seems to account for the introduction of the evidence of the complaint's past sexual history.

Notably, section 277 of the *Evidence Act* gives judges the discretion to prohibit questions that are indecent and scandalous especially when they are tenuous to the facts in issue, while section 228 mandates the court to disallow any offensive or insulting question. However, the *Evidence Act* does not define questions that will be viewed as insulting or scandalous, thus leaving courts with the discretion to decide what line of questioning is prohibited. However, when one examines the Nigerian courts' approach to the evidence of complainants in rape/sexual

[97] Melanie Randal, "The Legal treatment of Consent in Canada", online: (2011) Equality Effect www.theequalityeffect.org/pdfs/ConsentPaperCanadaMR.pdf 1 at 27.

assault cases and the maintenance of the requirement of corroboration, one wonders if the Court is ideologically well-equipped to further the cause of sexual assault victims.

Corroboration: Practice or the Law?

The general rule of evidence in Nigeria is that there is no specifically required amount of evidence or number of witnesses before an accused can be convicted of a crime.[98] However, the *Evidence Act* provides for corroboration of evidence under certain circumstances: breach of marriage, evidence of an accomplice,[99] perjury charges,[100] road traffic offences,[101] evidence of an unsworn child,[102] sedition.[103] Despite the fact that rape/sexual offences are not one of those offences that requires corroboration, it has become a matter of practice by the Nigerian courts to require corroboration or at least confirmatory evidence of the complainant's testimony and in the absence of which the court often cautions itself against the use of an uncorroborated complainant's testimony, sometimes even erroneously stating that it is a legal requirement.[104]

The Court defines corroboration as "…evidence, tending to confirm, support and strengthen other evidence sought to be corroborated."[105]The corroborating evidence does not have to directly relate to the evidence it corroborates as long as it, in some way, confirms in part the victims' narration of the event being the subject matter of the suit.[106] To constitute corroboration, the Court requires the following: The evidence is meant to be independent of the

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[98] *Evidence Act, supra* note 90, s 200.

[99] *Ibid*, s198(1) (Although an accused can be convicted on an uncorroborated evidence of the accomplice, the Act ask the Court to be cautious in relying on such evidence).

[100] *Ibid*, s202.

[101] *Ibid*, s 293 (where the witness is not an officer who was in possession of a mechanical device to confirm the offence was committed).

[102] *Ibid*, s209 (3) A child under the age of 14 who gives testimony because he is deemed capable of understanding right and wrong but too young to be sworn in).

[103] *Ibid*, s204.

[104] *Rabiu v The State* (2005) 7 NWLR Pt 925 at 491 paras c–e Awotoye, JA.

[105] *Ogunbayo v The State* (2007) 8 NWLR (Pt.1035) at 157[*Ogunbayo*]; *Iko, supra* note 73 Kalgo, J at 240-241

[106] *Ogunbayo, Ibid*.

complainants' testimony, it must show that the crime in question was committed and also shows, in some degree, that the accused committed the offence.[107] A list of factors that can constitute corroboration are medical evidence, circumstantial evidence occasioned by struggle and evidence by injury,[108] semen stains,[109] statement of the accused,[110] the way the complainant walked after the offence, the state of the complainant, torn cloths.[111]

The problem with the requirement of corroboration outside the fact that it has no basis in Nigerian laws as it relates to rape is multifaceted. First, there is often little or no evidence aside from the complainant's testimony to establish rape as most rape cases happen outside the view of the public and rape examinations are often non-existence, especially when the complaint is not immediate. Also, there is no strict guideline or factors to use to determine what constitutes corroboration. The Court has stated that corroboration is a subjective requirement which often depends on the facts of each case. Even though the Court has in some cases acknowledged scholarly criticism against the requirement of corroboration, the Court opines that it has the duty to caution itself against an uncorroborated evidence of a sexual assault complainant.[112]

This common law principle find expression in Mathew Hales's dictum when he discussed what he perceived as the ease with which a rape accusation can be made and the likely innocence of the accused.[113] He warned that testimonies of women – victims of rape – should be reviewed with utmost caution. Hale was not alone in his cautionary tale against the innocent male accused.

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[107] *Boniface*, *supra* note 72 at paras a-f Muntaka-Coomassie, J citing *R v Baskerville* (1916-17) ALL ER reprints 38 at 43, Lord Reading CJ.

[108] *Posu*, *supra* note 84 at 393 Adekeye J.

[109] *Ibid*.

[110] *Essien*, *supra* note 49.

[111] *Akpan*, *supra* note 83.

[112] For some of the scholarly criticism of the requirement of corroboration see, Y Osinbajo, *Cases and Materials on Nigerian Law of Evidence* (Lagos: Macmillan Nigeria Publishers Ltd, 1992); OS Oyelade, "Corroboration," in Akintola & Adedeji (eds), *Nigerian Law of Evidence: A Book of Readings* (Ibadan: University of Ibadan Press, 2006) 116.

[113] Mathew Hale, The History of the Pleas of the Crown 634 (1st American ed. Philadelphia 1847) (1st ed. London 1736) [Hale].

Dean Wigmore, a prominent scholar, wrote extensively on the evidentiary procedure for rape cases. He explored the myths of the lying woman when he stated that

> The unchaste (let us call it) mentality finds… expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however... is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.[114]

Wigmore focused on protecting the accused from false accusations by a complainant even to the extent of requiring juries to insist on a psychiatric examination of the complainant to assess her mental state and sieve out false complaints.[115] Wigmore's assumption was premised on the belief that juries were likely to be prejudicial against the accused because they would be emotionally stirred by the complainant's account of the event. Although Wigmore's assertion on the need for psychiatric evaluation had no basis in science or law,[116]the underpinning assumption that women lie about sexual assault propels the Nigerian courts to require that the evidence of the complainant be supported by independent evidence. Consequently, plethora of research had established that Judges in Nigeria hardly ever return a guilty verdict in the case of rape with most of the guilty verdict being defilement of children.[117] It is either the requirement of penetration is not sufficiently proven or corroboration not established. Also, a focus on corroboration as a way to stop false accusation ignores scholarly articles and surveys that reveal that women often do not report rape cases due to shame and the stigma attached to the offence of rape.

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[114] 3A John H Wigmore, *Evidence ion Trail at Common Law* § 924a at 736-37 (James H Chadbourn rev ed, 1978) (Boston: Little, Brown & Co).

[115] *Ibid.*

[116] Leigh B Bienen, "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in s 924a on the Treatise of Evidence" (1983a) California 19:2 Western L Rev 235-68

[117] Olatunji OA, 'Penetration, Corroboration and Non-Consent: Examining the Nigerian Law of Rape and Addressing Its Shortcomings' (2012) 8 UILJ 79 at 88.

Of note is the fact that the Supreme Court stated that based on the fact of a case, the high court may convict based on uncorroborated evidence because the court often has a first hand opportunity to assess the credibility of the witness by looking at the demeanor of the complainant and the accused.[118] The problem with this assertion is that a focus on demeanor presumes that every victim of rape or sexual offence behaves in a certain way. Thus, the court can use its presumptive assumption on how a rape victim or an accused will act on the stand to determine if their testimony is true or false. Focusing on demeanor further reinforces the myths that women who are raped have a certain way about them and when they do not fit into such perceived or expected models, they are most likely making up the rape to either punish the accused or cover up an illicit sexual act.

The Unlawful Component

The Supreme Court has been unequivocal in affirming that a prerequisite for sexual intercourse to constitute rape is the unlawful nature of the act.[119] In defining unlawful, the Court has tailored its definition to follow the provisions of the *Criminal, Penal* and *Sharia Penal Codes* by stating that carnal connection is only unlawful when it is in violation of the law, that is, not between husbands and wives.[120]

This archaic logic and age-long principle on rape in marriage is once again traceable to Hales's dictum which became a jurisprudential reference under the English common law. Hale stated that "the husband cannot be guilty of the rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract, the wife hath given up in this kind unto her

[118] *Musa v The State*, (2013) LPELR-19932-SC, SC 409/2011.
[119] See *Isa, supra* note 72 (note this is a judgement delivered in 2016 after the passing of *VAPP* into law).
[120] *Ibid; Idowu v The State*, [1998]3 NWLR 582 at 394.

husband which she cannot retract."[121] Strangely, just like the Hale's dictum recognised that even though the sexual act in question is rape when he used the term "rape", the *Criminal, Penal* and *Sharia Penal Codes* do not refute that such sexual act could occur under all listed circumstances such as: without consent, consent by force, harm or threat of harm, etc. The Codes are only concerned with the fact that such act would not constitute "legitimate rape". Apart from the consent argument, there are other theories used to justify the existence of the marital rape exemption such as the property, unity and privacy theory. The unity theory purports that the husband and wife become one and to charge a man for rape would be to charge him for the rape of himself. Likewise, the privacy theory focuses on the need to protect the marital union and for governments to stay out of the marital bed.[122]

Other Avenues for Prosecuting Spousal Sexual Assault?

Despite the fact that the *Criminal, Penal* and *Sharia Penal Codes* exempt husbands from prosecution of rape, there are other corresponding provisions in the *Codes* that may, arguably, be avenues for recourse for a wife. For example, Sections 214 of the *Criminal Code*, 284 of the *Penal Code* and 130 of the *Sharia Penal Code* recognises as a crime the act of engaging in sexual activity with a woman or man against the order of nature. Also, sections 231 of the *Criminal Code* and 285 of the *Penal Code* recognises the offence of indecent assault while section 138 of the *Sharia Penal Code* recognises the offence of gross indecency. Although, the codes, with the exception of the *Sharia Penal Code* which defines non-vaginal sexual intercourse as sodomy, do not define what would constitute "the order of nature" and indecent assault.[123]

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[121] Hale, *supra* note 113 at 629.

[122] See Jenifer koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience" (The Equality Effect, 2010), online: http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf at 10-12.

[123] But see *Magaji v The Nigerian Army* 2008 LPELR- 1814 (SC) (2004) SC. 204 paras f-g Oguagu JSC (as he then was) (The Supreme Court affirmed the conviction of the accused for having anal intercourse with another

However, deriving from the reasoning of the court in the English case of *R v Kowalski*[124]where the English Court noted that the principle of marital rape exemption relates only to vaginal intercourse and not anal, it is debateable whether with a judicial challenge, a wife would be able to make a claim for indecent assault or intercourse against the order of nature if the act of penetration was not vaginal or involved other objects. [125]

Also, although the *Criminal* and *Penal* and *Sharia Penal Codes* do not draw a distinction between when and when otherwise a wife might bring a claim for rape, the common law exception in conjunction with specific provisions of the statutes based on the status of marriage might apply. In Clarke[126] and O'Brien[127], a judicial precedent for the Nigerian courts, the English Court noted that the presence of judicial separation, decree nissi, or initiation of divorce proceedings may all be an exception to the marital rape immunity. More so, section 370 of the *Criminal Code* and section 384 of the *Penal Code* criminalise contracting double marriage except when the parties are divorced, judicially separated or the husband has been consistently absent for 7 years during which there is a presumption that he is dead. The implication of this provision is that divorce, judicial separation and consistent absence of a husband can terminate a marriage. Thus, if read alongside the English judicial precedents in Nigeria, one may presume that the presence of these factors may affect the legal presumption of consent in marriage. [128]

Moreover, section 262 of the *Criminal Code,* 263 of *Penal Code* and 222 of the *Sharia Penal Code* recognise the offence of simple assault. Yet, whether the Nigerian courts would have

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man. The court also stated that the order of nature refers to sexual penile penetration through any hole other than the vaginal)

[124] (1988) 86 Cr App R 339, CA.

[125] *Contra Alawusa*, *supra* note 76 and accompanying text.

[126] *R* v *Clarke*, [1949] 2 All E R 448 (Leeds Assizes)

[127] *R* v *O'Brien*, [1974] 3 All E R 663 (Crown Ct. Bristol).

[128] But see Ashiru & Orifowomo, *supra* note 64 at 33 (Under Islamic Law, a divorced woman can still be taken to bed by her husband within three months of the divorce, this is known as idda-a waiting period, before he can be treated as a stranger liable of being charged with rape of his ex-wife).

interpreted assault that occurred in an attempt by a husband to exercise his "right" to sexual activity as a crime is debateable. If the Nigerian courts rely on the obiter in the English decision in Clarence's case – another English precedent in Nigeria – which stated that assault committed upon a wife while attempting sexual intercourse may be punishable,[129] wives may be able to sue their husbands for the means through which husbands attempted to engage in sexual activity but not for the actual non-consensual sexual act. Despite these seemingly available avenues for married women to seek legal protection against sexual assault, there are no reported cases of judicial adjudication on sexual offences arising from marital contexts in Nigeria.

Some scholars have noted that the absence of cases on sexual assaults in marriage is not surprising when one considers the expectation of privacy and a culture of silence around sexual issues.[130] These cultural attitudes contribute to muffle women's discussion of experiences sexual abuse in their marriages in public and in general. Also, it has been noted that reporting sexual assault by a partner may result in divorce which in the Nigerian context usually brings dishonor to a woman and her family, not to talk about the harsh economic reality this resort may bring upon the woman in question.[131] Thus, women are expected to endure any form of hardship in marriages.[132] When these factors are placed side by side with the laborious evidentiary procedures for establishing proof of rape discussed above, even if spousal sexual assault is criminalised in Nigeria, it may be impossible to successfully prosecute any spousal sexual assault case.

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[129] *Clarence*, *supra* note 87.

[130] See generally Eric Y Tenkorang, Collins Nwabunik &Pearl Sedziafa, "Domestic and Marital Violence Among Three Ethnic Groups In Nigeria" (2015) J Interpers Violence[Tenkorang]; Bazza, *supra* note 43 at 180-81

[131] *Ibid*.

[132] Tenkorang, *supra* note 130.

Agitations from women's groups over the precarious position of married women in Nigeria forced the National Assembly to enact a broader legal definition of rape, ensure equality between sexes (their focus was on making a gender neutral rape law) and ultimately respond to activism from women's group. This process led to the passing of the *VAPP Act* into law in May 2015. The *VAPP Act* is an amalgam of eight bills on gender-based violence that were tendered before Nigeria's House of Assembly in 2002. First framed as the *Violence Against Women Act*, the bill was rejected by a male-dominated house of representatives, first because of the gendered nature evident in the title and the express prohibition of marital rape.[133] Aside from the objection from the house, oppositions to the bill arose from three major organisations in Nigeria: The Association of Catholic Medical Practitioners of Nigeria based in Imo State, The Foundation of African Cultural Heritage, and The Action Family Foundation, Abuja. They argued collectively, among other things, that the application of the bill will "destroy Nigeria's cultural, religious identity and lead to cultural chaos, moral perfidy and social anarchy".[134]

Without specifically referring to how the recognition of marital rape as a crime violates the Nigerian culture, their grievance with the bill was presumably in line with the general perception in Nigeria that there can be no rape in marriage. This cultural argument arose from socially authorised gender role and domestication of women which informed presumptions that one of the duties of a wife was having sexual relationship with her husband. However, reference to culture in Nigeria is a complicated concept. As stated earlier, Nigeria consist of over 250 ethnic nationalities each with distinct and sometimes interrelated cultural beliefs and practices. With the advent of colonialism came the pressing desire to protect what was perceived as a

[133] Cheluchi Onyemelekwe & Ifeoma Okekeogbu, "The Violence Against Persons (Prohibition) Act: A Cheld Brief" (2015) Centre for Health Ethics Law and Development (CHELD) online: <domesticviolence.com.ng/wp-content/uploads/2015/06/Violence-Against-Persons-Prohibition-Act-2015-A-CHELD-Brief1.pdf> [Onyemelekwe&Okekeogbu]

[134] Nigeria, NA April, *supra* note 60 at col 1450, 9.

colonial intent to destroy Nigerian cultures. Yet, it appears that this need to protect cultures often arose as buffer to perpetuate patriarchy and resist necessary changes that could liberate the situation of women in the country. Oftentimes, this resistance comes with archaic definitions of cultures and claims that past practices which have no logical resonance in present social existence must be upheld as untouchable customs and traditions. These resistances refuse to accept the fluidity of cultures and customs, and the need to reform social systems in ways that take into consideration contemporary reality.[135] Thus, one must argue that given present realities, the change in economic participation and the status of women in marriage, any culture that presumes women's constant submission to sexual abuse is archaic, against equity and repugnant and should be jettisoned. Nigeria has formally done away with tons of practices that were justified on the basis of culture such as, the killing of twins, the burying of virgins with a deceased monarch, and even recently the Supreme Court has condemned denying female children right to property on the basis of culture. Hence, spousal sexual assault should not be sustained on the guise of culture protection.

Unfortunately, the culture and religion arguments seem to hold sway at the National Assembly because the *Violence Against Women Act* was later rephrased and titled *Violence Against Persons* (*Prohibition*) *Act* in 2008 and express prohibition of marital rape expunged and a less direct law enacted. The reasoning behind the narrow approach to the *VAPP Act* can be viewed through the statement of the Chairman of the National Assembly when he was addressing perceived controversial issues raised by oppositions to the bill. The Chairman of the National

[135] See *Alfa & Omega v Arepo* (1963) ALL NLR 95 (The Court held that Customary laws are fluid and change with current realities of any society; Tobi Niki, *Sources of Nigerian law*, (1996 Lagos: MIJ professional publishers Ltd) at 109 citing *Lewis v Bankole*, (1908)1 NLR, 81 Osbourne CJ (as he then was) (the most striking features of … custom, to my mind, is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individualistic characteristics".

Assembly urged Senator Umaru Dahir, a senate representative for Sokoto State who served as the chairperson for Senate Committee on Judiciary, human rights and legal matters, to return with a more acceptable, less controversial bill stated that "he should consider the bill, remove unnecessary or controversial clause". He admonished fellow senators thus:

> Let us make progress slowly, this is Africa, we still have our traditions to respect, we cannot be like the west in matters such as this, we have our local circumstance to protect and our local sensibilities to be conscious of… if there are areas you can adjust to suit local circumstances that will be better instead of adopting the whole said morals of the international provision on this matter. [136]

The Chairman's statement while not specifically directed towards marital rape exemption is interesting especially given that the long title for *VAPP* has been based on "[a]n act to eliminate **all forms of violence in private** and public life, prohibit all forms of violence against persons and to provide **maximum protection** and effective remedies for victims and punishment of offender: and related matters" [137] [Emphasis added]. From his comment, one can deduce that the focus of the House was not in engaging the issues in *VAPP* including the issue of spousal sexual assault by their merit but rather on cultural assumptions, stereotypes and traditions. Or just maybe, once again, the National Assembly chose to overlook the kind of violence inherent in spousal sexual assault and on the gendered nature of this violence.

Nonetheless, in the definition and treatment of rape, the *VAPP Act* introduces a gender neutral definition of rape and also includes penetration of any orifices in the body and with any object including the penis.[138] Also, the marital rape exemption is not included in the definition of rape, it creates provision for compensation of victims[139] and lastly it introduces the creation of sex offenders' registry. It should be noted that this chapter examines the *VAPP Act* in order to

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[136] Nigeria NA April, *supra* note 60 at col 1458 (Chairman in Chair).
[137] *VAPP Act, supra* note 8, "Long Title".
[138] *Ibid*, 1(1)(a).
[139] *VAPP*, *ibid*, Pt 12, s 37, Pt 14.

review the implications of any law purporting to criminalise spousal sexual assault in Nigeria. As stated earlier due to the federal structure of Nigeria, the *VAPP Act* does not amend the *Criminal* and *Penal Codes* applicable in other states with the exception of Abuja. While highlighting the flaws in the *VAPP Act*, the subsequent section argues for three things: an express criminalisation of spousal sexual assault in the *Criminal* and *Penal Codes* of other states,[140] an amendment of evidentiary requirement in respect of the judicial approach to assessing credibility and lastly a contextualised approach to the issues of consent and credibility in examining spousal sexual assault, that is, a substantive-equality approach to spousal sexual assault adjudication.

Spousal Sexual Assault and Substantive Equality

The *VAPP A*ct maintains the evidentiary procedure on rape as applicable under the *Criminal, Penal* and *Sharia Penal Codes*.[141] Given the complexities arising from the evidentiary procedures discussed above especially the assessment of credibility through the requirement for corroboration and use of past sexual history how will this requirement be met in a marital relationship where the sexual violence usually takes place in the privacy of the home almost away from public eyes? Also, the consistency of sexual relationship between spouses means that questions bordering on past sexual history may often work against the complainant. Unlike stranger rape where the courts have often relied on circumstantial evidence such as tearing of the hymen, presence of semen, torn cloths and other eye-witness account, in a marital relationship where sexual assault may play out in a subtler manner, how can justice be achieved for married women and their dignity protected? Even if every state in Nigeria eventually domesticates the *VAPP Act*, the socio-economic and political status of women coupled with cultural and religious

[140] This section excludes the *Sharia Penal code* due to the complication arising from it being a new legal system. The implication of any federal law on the sharia Penal code is subject to debate however, the Code should be subject to the supremacy of the Constitution.

[141] This is with the exception of the requirement that the sexual act be unlawful-as between husbands and wife. Given that the exemption is not provided under the VAPP such requirement is deemed moot.

expectations demanded from married women as well as prevailing public perception on spousal sexual assault will combine to ensure that married women never realise justice and equality when it comes to sexual assaults done on their person by their husbands. In effect, it would require a firm ideologically-positioned action that would be specifically modelled to redress institutionally entrenched discrimination against married women in particular. What follows is a review of the *VAPP Act* premised on an assumption of its projected applicability in all states of Nigeria in order to show its fundamental weaknesses.

The neutrality evident in a formal approach to equality that purports the treatment of all women alike is a facade that can endorse, sustain and perpetuate inequality. It presumes, for example, that by the removal of the marital rape exemption, married women will be protected against spousal sexual assault. By this presumption, it postulates that a broader definition of rape will foster reporting sexual assault encounters and subsequently change public perception on marital rape. in other words, this approach is self-serving and rests on the belief that once the marital rape exemption is removed, the law is not responsible for any inequality arising from the framing and interpretation of the law because the law is neutral and has served the purpose of universal fairness evident in treating all women in the same way. The apparent flaws in this thinking calls attention to how substantive equality approach could remedy the shortcomings of formal equality. Substantive equality looks beyond the neutrality of laws and policies. It shifts the focus to the impact and effect of laws and policies on disadvantage groups.

As a historically disadvantaged group, married women have been subject to the marital rape exemption under the Nigeria laws which created, endorsed and fostered a society where spousal sexual assault was acceptable. This reality has left married women vulnerable and propagated the agenda of Patriarchy. It also reinforced and ingrained in the society the rights of

the husband to sexual intercourse with his wife, even without her consent. Following from the marital rape exemption and other cultural practices that seek to domesticate women, marital rape exemption has obscured the real experiences of married women from the narration of sexual assault. In order to break this cycle, the argument of this study is not simply an express criminalisation of spousal sexual assault across all states in Nigeria, but also a recognition that the letter of the law can only serve as a preliminary process to remedying an entrenched injustice. Both in the adjudication of spousal sexual assault and in the consideration of factors that subjected women to this precarious position, a substantive-equality approach must be adopted when matters of such monumental injustice and inequality is being addressed.

The *VAPP Act* expressly criminalises wife-beating, despite the fact that wife-beating is presumably covered under the assault provision of the *Criminal, Penal and Sharia Penal Codes*. Also, in January 2014 the Nigerian government, despite activism from international organisations and some human rights organisations in Nigeria decided to criminalise homosexual union by enacting the *Same Sex Marriage Prohibition Act* (2103).[142] This decision was despite the fact that there are provisions in the *Criminal, Penal* and *Sharia Penal Codes* that already outlaw consensual sexual relationship between same-sex individuals.[143] The government responded with the law as a way of reinforcing government's stand on the issue, albeit an unnecessary response. If the National Assembly could go out of its way to criminalise a consensual act between two adults even in violation of freedom of choice, association and non-discrimination, the legislature should not overlook an actual act of violence that has been identified as not just a violation of women's rights but also inimical to the health of women and

[142] See Mandyen Brenda Anzaki, "Anti-gay Law in Nigeria" The Lawyers' Chronicle Online: <thelawyerschronicle.com/anti-gay-law-in-nigeria/>

[143] See *Criminal Code*, *supra* note 9, s 214, 217; *Penal Code*, *supra* note 10, *s284; Sharia Penal Code*, *supra* note 11, s 130.

economic development of the country.[144] Substantive equality recognises that sometimes different treatments may be necessary to achieve the goal of the law.

Furthermore, substantive equality requires that an extra burden is not imposed on an already disadvantaged group. The National and States' Houses of Assembly should be ready to undertake a review of the elements of the offence of rape particularly the definition of consent. This is because without an affirmative consent, the court often places an additional burden on the complainant to actively resist the violence of sexual assault. Also, the evidentiary procedures, especially in the use of past sexual history, should be prohibited. All these evidentiary procedures create additional requirements for the state to meet in order to establish rape. Given the judicial requirement of corroboration, the National Assembly can expressly preclude the need for corroboration.

The Court has held that judicial discretion means that courts should do what is just and fair in the circumstances of each case.[145] The Court has also recognised that there are laws which "serve to protect the selfish perpetuation of male dominance",[146] and that irrespective of how "well pivoted" a law is, fundamental human rights cannot be sacrificed, waived, altered or statutorily ignored.[147] A recognition of this fact should move courts to employ a contextualised and purposive approach to the laws on spousal sexual assault. It is only with a broad and purposive approach that accounts for women's experience that one truly comes to terms with the dimensions of spousal sexual assault.[148] This means that the Court should identify the myths and stereotypes that underpin most of the evidentiary procedures especially the requirement for

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[144] NDHS Survey, *supra* note 2 at 310.
[145] *Akinyemi v Oduya Ino*, (2012) LPELR- 8270 (SC), SC 85/2012.
[146] *Anekwe v Nweke*, (2014) LPELR- 22697 (SC), SC 129/ 2013 paras a–b Clara Bata J.
[147] *AG Cross Rivers v Oke*, (2006) AFWLR 395 at 370.
[148] See Charlene Hawkins, *The Race for Equality, But How Do We Remove the Hurdles? Affirmative Action Lessons for The Uk from Canada* (LLM Thesis, University of Toronto Faculty of Law, 2009) [unpublished] at 15.

corroboration. Rape/sexual assault is a unique and gendered crime that cannot be treated in isolation. It is an indicator of subjugation of women based on sex and marital status. It has been argued that even in the absence of actual violation of women through sexual assault, women are socialised to live under the constant fear that their femininity can be used as a weapon to subdue them.[149] There is therefore need to recognise that spousal sexual assault as a gender-based crime constitutes a sex-based discrimination and should be dealt with in that light.

More so, substantive equality requires that laws do not exacerbate the situation of a disadvantaged group or endorse their disadvantageous position. There are provisions in the *VAPP Act* that endorse myths and stereotypes about women and also serve to limit the effectiveness of any law criminalising spousal sexual assault. For example, section 8 of the *VAPP Act* criminalises making false allegation with the aim of initiating an investigation or criminal proceeding with threat of a fine of two hundred thousand naira or 12 months' imprisonment. The criminal laws in Nigeria already create mischief laws against false accusations, perjury and false statement.[150] The introduction of a specific law targeted at making false accusation under the *VAPP Act* reinforces the distrust for women since most of the crimes in *VAPP Act* are gendered crimes. The evidentiary procedures with respect to proof of rape in Nigeria is underpinned with a plethora of myths about women even to the extent of motivating the requirement for corroboration and the introduction of a provision against false accusation into an *Act* that aims to tackle predominantly gender-based violence. These conditions help to formalise the myths that women often lie about rape and these presuppositions may affect judicial predisposition to claims brought under the *VAPP Act.*

[149] Sampson, *supra* note 1 at 12-13.

[150] See *Criminal Code, supra* note 9 s 117; *Penal Code supra note* 10 s 156, Sharia Penal *Code, supra note* 11 s 10.

More so, these myths have the tendency to impede reporting spousal sexual assault. The only way to determine if a person made a false claim is either by them coming forward or after the case has been lost. Given that this provision does not criminalise perjury – which would be false testimony on oath – but rather criminalises making false statements to initiate a criminal charge, it leaves room for a husband to retaliate by initiating a proceeding against his wife under this section. This section needs to be deleted from the *VAPP Act*.

The *VAPP Act* defines indecent exposure in two ways: first, exposing one's genital organ or a part to cause distress; and second, exposing one's genital organ or a part in a way that tempts or induces another to commit a crime. [151] While the first definition of indecent exposure is generally acceptable, the second definition can lead to the inference that a person is liable for dressing in a provocative manner that induces another to commit an offence. While the law is gender neutral, it is targeted at women and seeks to control, not just how they dress but ingrain in their consciousness a system of victim-blaming. It allows for an atmosphere where women's choices are motivated by fear of retribution through sexual assault. This provision encourages victim-blaming by endorsing the myths that some women are asking to be raped.

More so, the provision is a short-sighted perspective on rape because it promotes the myth that only certain type of women gets raped, ignoring marital rape. For example, while a focus on dressing may seem like a good (albeit irrelevant) advice for unmarried women, it does not create a safety net for married women. They cannot regulate what they wear or which room in the house they stay in. They are therefore faced with the same threat compounded with fear of losing custody of children, fear of financial bankruptcy, social stigma and worst still a rigorous judicial process of proving rape.

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[151] *VAPP Act*, supra note 8 s 26(1)(2)

The substantive criminal and ancillary laws on rape in Nigeria are currently far from protecting and promoting the equality rights of married women. The *VAPP Act* is a first step towards the realisation of the formal equality rights of women but until it is domesticated by other states, it creates a discriminatory distinction based on place of birth or residence. More so, even with the domestication of the *VAPP Act* by other states of the Nigerian federation, the legislature has to review the evidentiary procedures especially the use of past sexual history and judicial requirement of corroboration in the examination of rape and also redefine consent as a positive contemporaneous act. Equally, the judiciary has to disabuse its mind from rape myths and be conscious of how these myths influence its approach to rape trials if ever married women are to benefit from any legal provision purporting to criminalise spousal rape/sexual assault.

It is noteworthy that currently there is a new bill passed by the Senate arm of the National Assembly in June 2015 but still awaiting presidential assent. The bill is based on a controversy over the age of consent. The *Sexual Offences Bill* (*SOB*) if eventually passed into law will amend the provisions of the *VAPP Act*, the *Criminal* and *Penal Codes* and the *Evidence Act*. However, given the federal structure, the *SOB* may also require domestication by the Houses of Assembly of other states with the exception of Abuja before it can be applicable in other states unless the National Assembly invokes its power to make laws on matters incidental to offences under the *1999 Constitution*.[152] Also, any amendment introduced to the *Evidence Act* 2011 by the *SOB* should be applicable across all states of the federation because the power to make laws on ancillary criminal matters such as the evidentiary procedure is an exclusive jurisdiction of the National Assembly.[153] While this study does not examine the totality of the provisions of the

[152] *1999 Constitution, supra* note 6, Part II Schedule II, item 2

[153] *Ibid, Part I second schedule*. See also *SOB, supra* note 12, Schedule I, item 1(1–3). (stipulating that the law shall be given precedent over any law on sexual offences with necessary moderation)

SOB, it examines in brief the specific changes it is likely to introduce to the *VAPP Act* with respect to spousal sexual assault if passed into law. The suggestion going forward is that if *SOB* is reviewed by the House to address concerns over the age of consent, the House should also take into consideration the following highlighted provisions.

Sexual Offences Bill

The *SOB* protects against the offence of rape, sexual assault and indecent act in gender-neutral terms. I propose that the definition of rape, sexual assault and indecent act under the bill is redundant. Rape is defined as vaginal and penile penetration.[154] Indecent act is defined as contact between genital organs, breasts or buttocks of a person or an animal (the bill is not clear if it includes penetration) and exposure to pornographic material.[155] Sexual assault is defined as causing vaginal penetration with any part of the body or an object or causing penetration of other orifices on the body with any part of the body or an object.[156] Indecent act can be defined with focus on pornographic material but if the bill must maintain the offence of rape, sexual assault should be defined to include all non-consensual touching of a sexual nature rather than focus entirely on penetration. The need to merge this provision is such that there should be no loophole for defense lawyers to seek lesser sentence for the act of rape or sexual assault.

Also, the use of the word "unlawful" should be deleted from the definition of rape and sexual assault. Although the bill defines unlawful to include an act which happens in a coercive circumstance, under fraud or false pretence or with someone incapable of understanding the nature of the act, it has the ability to place additional burden on the complainant and could also draw on the definition of unlawful under the *Criminal Code* which includes sexual relationship

[154] *Ibid, s 2.*
[155] *Ibid, s* 5(a–d), 50.
[156] *Ibid, s 4(1)(a)(i)–(ii), (2)*

outside of marriage. More so, the *SOB* in the definition of rape inadvertently creates a different test. It states that the act causing penetration should be unlawful and intentional,[157] should be without consent[158] or consent by force, intimidation or threat.[159] The bill then defines "unlawful and intentional" as acts occurring in a coercive circumstance – force, person of authority, threat of harm to the complainant or another person,[160] under false pretence or fraud – impersonating someone, non-disclosure of life threatening sexually transmitted disease, pretence as to nature of the act[161] and with a person who cannot appreciate the nature of the act, such as when someone is asleep, unconscious, a child, mentally impaired, under the influence of a stupefying product.[162] The framing of the bill may lead to the presumption that the complainant has to establish the unlawful element before the proof of lack of consent.

Notably, the *SOB* defines consent as freedom, capacity and choice.[163] This definition of consent is broad as it requires a context-specific examination of the facts of each case to be able to determine the presence of true freewill. The onus will lie on the Nigerian courts to undertake a contextualised approach to examining consent especially in spousal sexual assault cases. The *SOB* also makes allowance for an evidentiary presumption and a conclusive presumption about lack of consent. The bill provides for a conclusive presumption of lack of consent where the accused deceived the complainant as to the nature of the act or impersonates somebody the complainant would have consented to.[164] The evidentiary presumption of lack of consent operates under the following circumstances: where the accused used violence or threatened to

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[157] *Ibid*, s 2(1)(a).
[158] *Ibid*, s 2 (1)(b).
[159] *Ibid*, s 2 (1) (c).
[160] *Ibid*, s 43(1)(a), (2) (a)–(c).
[161] *Ibid*, s 43 (1)(b), (3) (a)–(c).
[162] *Ibid*, s 43(1)(c), (4) (a)–(f).
[163] *Ibid*, s 42.
[164] *Ibid*, s 45(2) (a)–(b).

use violence on the complainant or another person,[165] where the complainant was detained, sleeping, unconscious or the accused applied a stupefying substance without the consent of the complaint[166] or where the complainant by reason of a disability cannot communicate lack of consent.[167] This provision is a positive development in the legislative approach to consent but it has its shortcomings. The section only recognises violence immediately preceding the sexual act constituting rape even in the event of continuous series of sexual activity.[168] This limitation allows for the presumption of continuous consent and irrevocable consent to sexual activity. That is, it promotes the belief that once a person consents to a sexual act without violence and revokes consent during sexual intercourse, any violence used then cannot be said to inform the continuing sexual intercourse constituting the offence of rape or sexual assault. Also, it ignores marital situations where a person may consent to a sexual act based on past pattern of violence and not necessarily the immediate violence. The legislature can extend the definition of violence to any violence used to initiate, sustain or finish a sexual act after the indication of lack of consent while the judiciary can create a context by examining the situation of the marriage.

The *SOB* like the *VAPP Act* also limits the use of past sexual history to sexual experiences between the accused and the complainant but unlike the *VAPP Act*, the *SOB* requires the accused to seek the leave of the court upon application of either party before adducing evidence of past sexual history.[169] The Court can grant such leave if it borders on a specific instance of sexual activity that is deemed relevant to the fact in issue or seeks to rebut a previously adduced evidence by the prosecution. The court may also grant such leave if the sexual history serves to explain an injury, disease or pregnancy and its probative value does not

[165] *Ibid, s* 44(2) (a)–(b).
[166] *Ibid,* s 44(2) (c)–(e).
[167] *Ibid,* s 44(2) (f).
[168] *Ibid* s44(3).
[169] *Ibid,* s 34 (1)–(3).

outweigh the need to protect the privacy and dignity rights of the party. In reaching its decision, the court is obliged to take into consideration the rights of the accused to fair trial. This is a positive step from what obtains under the current *Evidence Act*. However, this requirement is still problematic because Nigeria does not run a jury system. Thus, it is the same judge who sits on the case that hears the evidence of past sexual history to determine its relevance to the fact in issue. While in a jury system this provision may preclude the jury from hearing such evidence it is an impractical requirement under a system where it is just the judge. One wonders if judges can disabuse themselves from such evidence.

Furthermore, the *SOB* replicates some of the discriminatory provisions of the *VAPP Act* such as the provision on false allegation,[170] and the provision on indecent exposure.[171] These two provisions reiterate myths about women's propensity to lie about sexual assault and should be deleted from the bill.

Despite the limitations of the *SOB*, the bill introduces some positive changes to the criminal laws in Nigeria. Section 31 of the *SOB* empowers the court to declare a witness in a sexual offence trial a vulnerable witness taking into consideration the dignity of the witness and trauma arising from the sexual offence.[172] The court can either do this based on its discretion or on the application by the prosecution when taking into consideration the following: whether the witness is the victim, the mental state of the witness, the age, race, culture, relationship between the witness and the accused, etc.[173] The court is also urged to take into consideration the impact and effect of the sexual assault and may even allow an expert witness to determine if any witness

[170] *Ibid* ("Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that of the offence complained of" s 38).
[171] *Ibid*, s 22.
[172] *Ibid*, s 31 (2), (8).
[173] *Ibid*, s 31 (1) (a)–(c), (2) (a)–(k).

should be declared a vulnerable witness. If a person is declared a vulnerable witness the bill allows the court to prescribe all or some of the following protective measures: the witness can give evidence under protection, that is, in a protective witness box, preclude a publication of name or information that can lead to the identification of the person in any media outlet, the court may order the trial to take place in a closed court or allow the witness to give evidence through an intermediary.[174] More so, where the accused has no counsel, the court has to serve as an intermediary who interprets and rephrases the accused questions to the complainant.[175]

The *SOB* also mandates government to bear the responsibility for the treatment of an accused person or victims of sexual offences.[176] These treatments include but not limited to drug or alcohol counselling for the accused, counselling for the victims' medical treatments for physical injury sustained, etc. The *SOB* is a progressive step towards enacting a law that may protect the rights of women against spousal sexual assault. However, the bill requires some amendment on the issues addressed above. It will also require that judges are willing to undertake a purposive review of the provision of the *SOB* and disabuse their minds from myths and stereotypical assumptions that undergird prosecution of rape cases under the *Criminal, Penal* and *Sharia Penal Codes*.

Conclusion

This Chapter examined the legal and socio-cultural status of women in Nigeria in relation to spousal sexual assault and legal means to criminalise it. The examination of the status of women served to reveal how women are socially perceived in Nigeria and the role this social perception plays not only in the domestication of women as sexual beings but also in sanctioning

[174] *Ibid, s 31*(4) (a)–(e).
[175] *Ibid, s* 31 (13).
[176] *Ibid, s* 35 (1)–(6).

women as inferior to men. The Chapter further reviewed the legal frameworks for tackling sexual assault cases in Nigeria. It examined the *Criminal, Penal and Sharia Codes* and the definition of sexual assault in conjunction with the evidentiary procedures in order to expose the shortcomings of these laws. The Chapter highlighted the provisions of the *VAPP Act* (and *SOB* briefly), introduced to remedy the lapses in the *Codes*, and noted the immanent flaws in the laws because of their overly formalist approach to equality and evidentiary procedures in sexual assault cases. It showed how substantive equality can be used to advocate and inform the elimination of institutional and legal barriers that militate against the reporting and effectively tackling issues of spousal sexual assault. It further examines how the principles of substantive equality can serve as an interpretive aid for the Judiciary in addressing evidentiary procedures in spousal sexual assault cases with specific focus on the determination of consent and assessment of credibility. Given the plural nature of Nigeria as well as roles cultural and religious practices play in inferiorizing women, this chapter examines how an unequivocal criminalisation of spousal sexual assault can further serve as a symbolic act to protecting married women. While advocating a substantive-equality approach to reviewing spousal sexual assault laws in Nigeria, this next chapter shows that even substantive equality when half-heartedly deployed could stand in the way of justice. Accordingly, the subsequent chapter undertakes an examination of spousal sexual assault adjudication in Canada. Since sexual assault laws in Canada show remarkable substantive-equality approach, the chapter looks at some specific dynamics that could invariably weaken genuine application of this approach to spousal sexual assault adjudication.

Chapter Four: Legal and Judicial Treatment of Spousal Sexual Assault in Canada: A Substantive Equality Analysis

Introduction

The marital rape exemption was part of the Canadian *Criminal Code* until 1983. Since then, the Parliament of Canada, in response to activism from feminist and women's groups, has made consistent effort in the legislation on sexual assault including spousal sexual assault to ensure the protection of women from this heinous crime. In relation to sexual assault, the *Criminal Code* has been amended three times: 1983, 1992 and 1995. The cumulative effect of these amendments has led to the following: (a) the removal of the marital rape exemption; (b) the amendment of evidentiary requirement especially corroboration, recent complaints, use of past sexual history and reputation and the production of personal record; (c) de-emphasis on sex and recognition of the violent nature of rape, and (d) ensuring a more stringent response to sexual violence, and (e) requiring judges to infuse an equality-based analysis to the assessment of evidentiary procedures, especially in the use of past sexual history and personal records.[1]

Notwithstanding these positive developments, researchers have yet to record significant improvements of these legislations on adjudication of spousal sexual assault cases in Canada. Several studies have actually questioned the manner of judicial treatment of spousal sexual assault cases. The recurring theme in most of these studies is that some judges tend to assess elements and evidentiary requirements of sexual assault differently when parties are or were in a spousal relationship. This chapter, building on these studies, reviews reported cases of spousal

[1] See Jennifer koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience", online: (2010) The Equality Effect at 12 <www.theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf> [Koshan]. See also Karen Busby, "Sex Was in the Air": Pernicious Myths and Other Problems with Sexual Violence Prosecutions" in Elizabeth Comack, ed, *Locating Law: Race Class Gender and Sexuality* Connections, 3rd ed., (Halifax: Fernwood Publishing, 2014) 257–93.

sexual assault available on QuickLaw (Q/L) which were decided between May 27, 2011 and April 24, 2016. This chapter uses the *JA* case as the beginning point for the present study. The *JA* case is important to this study because the Supreme Court unequivocally stated in its decision on the case that the presence of a relationship between parties does not and should not detract from judicial assessment of the notion of consent as contemporaneous, active and revocable. The final number of cases reviewed for this study is ninety.

In the *JA* case, the accused was charged with sexually assaulting his partner while she was unconscious. McLachlin CJC writing for a majority of the Supreme Court, affirmed that while the presence of a spousal relationship may have an impact on the *actus reus* and *mens rea* when assessing the elements of a sexual assault charge, it does not detract from the necessary steps required for determining if the complainant consented.[2] Thus, the Court reinforces the notion that judicial assessment of all sexual assault charges should be approached in the same fashion irrespective of the perpetrator of the crime and the relationship between the accused and the complainant. This chapter contributes to the conversation on the limitation of criminal law in tackling spousal sexual assault in the absence of a substantive-equality approach. The argument here is that a substantive-equality methodology is significant for adjudicating spousal sexual assault because it puts into consideration the myths and stereotypes that prejudice victims of spousal sexual assault. It also takes into consideration the broader social, political, cultural and economic atmosphere within which such heinous crimes thrive.

[2] *R v JA*, 2 SCR 440 at para 64, 2011 SCC 28, [2011] [*JA SC*]; *R v JA*, 2010 ONCA 226 LaForme J dissenting in part at para 139 [*JA*, CA].

Notes on Methodology

The search term used in this chapter is the same search term used by Jennifer Koshan in her study on marital rape cases in Canada between 1980 and 2010.[3] The terms are "sexual assault" or "rape" in the same paragraph as one of the following words: "partner" OR "girlfriend" OR "boyfriend" OR "spouse!" OR "wife" OR "relation!" or "consent" with the time limit May 27, 2011 – when the *JA* case was decided by the Supreme Court and April 24, 2016 – when the last search was conducted on QuickLaw.

The justification for using the *JA* case as a breakpoint is first because of its significance as the cut-off point when the Court clearly acknowledged that spousal sexual assault cases should be treated the same when assessing consent. Second, several scholars have undertaken research on judicial adjudication of spousal sexual assault cases prior to the final decision in the *JA* case in May. For example, Jennifer Koshan undertook an analysis of spousal sexual assault cases from 1983-2010.[4] Elaine Craig examined the interpretation of consent in spousal sexual assault cases between 1998 (after the *Ewanchuk* case) and 2009.[5] Melanie Randal, Ruthy Lazar and Christine Boyle also reviewed the treatment of consent in spousal sexual assault cases prior to the decision in the *JA* case.[6] Most of this research calls into question the erroneous judicial belief that the analysis of consent, honest but mistaken belief in consent, and the use of evidentiary procedures in spousal sexual relationship is different based on the peculiar status of

[3] See Koshan, s*upra* note 1 at 30, n 200.
[4] *Ibid* at 56–57.
[5] See generally Elaine Craig, "Ten Years After Ewanchuk the Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence" (2009) 13(3) Can Crim L Rev 247 [Craig].
[6] See Christine Boyle, "Sexual Assault as Foreplay: Does Ewanchuk Apply to Spouses?" (2004) 20 Crim Reports 359 [Boyle]; Ruthy Lazar, "Negotiating Sex – The Legal Construct of Consent in Cases of Wife Rape in Canada" (2010) 22:2 CJWL 329 [Lazar]; Melanie Randal, "The treatment of Consent in Canadian Sexual Assault Law", online: (2011) The Equality Effect, 2011) <www.theequalityeffect.org/pdfs/ConsentPaperCanadaMR.pdf> [Randall]

the marriage.[7] They also noted that while some judges engage the equality rights of the complainant in assessing spousal sexual assault cases, most judges pay lip service to the concept of equality and often erroneously based their analysis on myths and stereotypes about married women.

The final case search for this thesis turned up 2366 cases although only 2350 cases were available.[8] The research focused on parties who were legally married (including exes) or in common law unions (including former partners). There were cases where the court used the term "domestic relationship" or "marriage-like" union to describe the parties. These cases were included. However, the research explicitly ignored "boyfriend" "girlfriend" and other relationships short of a legal or common law union especially where the parties never cohabited. The number of cases was eventually narrowed to ninety. Once the final list was collated, a Quicklaw cite to other reasoning and application on records in respect of each case was examined. A list of all the cases used in this study is in the appendix attached to this chapter and the term "see also" is used to reference citation on other reasoning, application or appeal of the cases listed where available.

It should be noted that while the cases reviewed in this study are a significant representation of all the cases reportedly adjudicated upon within the past 57 months, there are several limitations to this research. First, the use of case analysis does not depict the actual representation of the prevalence of spousal sexual assault. This is because it has been noted that most spousal sexual assault cases go unreported.[9] Also, for the cases reported, the burden is on

[7] Boyle, *ibid;* Craig, *supra* note 5; Lazar, *ibid.*

[8] It is difficult to determine the reason behind the non availability of the

[9] See Martha Burczycka, "Trend in Self Reported Family Violence in Canada 2014" in *Family Violence*, Statistics Canada, Family Violence in Canada, A Statistical profile 2014, Catalogue No 85-002-X (Ottawa: Statistics

the police to investigate and then refer the case to the Crown attorney.[10] The Crown also has prosecutorial discretion in determining whether a case should be pursued with such decision usually based on the available evidence and the likelihood of conviction and public interest.[11] To determine the actual prevalence of spousal sexual assault in Canada, one would have to conduct a country-wide survey.

Also, the scope of the master thesis, inadequate non-existence of reasons, for judgment, and cost are factors that play a role in this research. To undertake a more comprehensive research on cases adjudicated on spousal sexual assault, it may be necessary to review court files to get detailed information on reasoning of judges in some of these cases. It is challenging to assess cases that were determined by the jury since the rationale behind the verdict in those cases is often unavailable. Also, judgments delivered orally may not be transcribed while in some situations judges give minimal reason for judgment. To access court files would require not only funding but a significant amount of wait time. More so, the use of English terms to conduct this search means that the record of cases from Quebec are relatively low in comparison to other provinces.

Notwithstanding these recognised limitations, for the purpose of this research, cases found on QuickLaw represent cases that are likely to become precedents for other courts. Also, a case analysis is one of the appropriate ways to determine judicial interpretation of the elements and application of evidentiary procedures to spousal sexual assault cases. The cases analysed in this thesis seek to provide answers to two questions: First, has the statement of the Supreme

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Canada, January 21, 2016) at 12 (70% of those who experience spousal violence never reported to the police with the least likely reported form of spousal violence being spousal sexual violence).

[10] *Ibid* at 11 (majority of the spousal violence brought to the knowledge of the police between 2009 and 2014 did not resort in charges being laid)

[11] See "Office of the Director of Public prosecution: Decision to Prosecute" in The *Public Prosecution Service of Canada Desk Book* (2014, Catalogue No: J79-2/2014E-PDF) Online: <www.ppsc-sppc.gc.ca > at 2.3.

Court in the *JA* case made any impact in the assessment of spousal sexual assault cases? Second, is the notion of substantive equality infused into the assessment of spousal sexual assault cases following the *JA* case?

Background to Criminal Law on Spousal Sexual Assault in Canada

The marital rape exemption that existed under the English common law was part of the 1892 *Canadian Criminal Code*[12] until its amendment in1983.[13] One of the arguments for upholding the exemption was the belief that adjudicating rape in marital contexts would be nearly impossible.[14] Arguments on evidentiary procedure drew largely from the sexist nature of rape laws that was heavily coloured by distrust for women. This distrust led to the introduction of arduous evidentiary procedures that thwarted any legislation on marital rape. Some of these evidentiary requirements was the use of past sexual history and also the judicial requirement of corroboration, timely reporting and the use of force by the accused and subsequent resistance from the complainant.[15] These evidentiary procedures were justified on the ground that "a trial will seldom be fair if the accused has the means available to raise a reasonable doubt and is prohibited from doing so".[16]

[12] *Criminal Code*, RSC 1892 c C-29. The last codification of the marital rape exemption was featured in the *1970 Criminal Code*. See *Criminal Code*, RSC 1970, c C-34, s 266[*Criminal Code*].

[13] Bill C-127 *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, 1st Sess, 32nd Parl, 1982, (as passed by the House of Commons 4 August 1982).

[14] Sonya A Adamo, "The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries" (1989) 4 Am UJ Int'l L. & Pol'y 555 at 560. For other arguments in support of the marital rape exemption see generally Koshan, *supra* note 1; Constance Backhouse & Lorna Schoenroth, "A Comparative Survey of Canadian and American Rape Law" 6:48 Can-US LJ 48 at 53-54 [Backhouse & Schoenroth].

[15] See Mohr Renate & Julian Roberts, "Sexual Assault Law in Canada: Recent Developments in in Julian V Roberts & Renate M Mohr eds, *Confronting Sexual Assault: A decade of Legal and Social Change*, (Toronto: University of Toronto Press, 1994) at 3–19.

[16] David Paciocco, "The Constitutional right to Present Defence evidence in criminal cases," *(1985) 63 Can Bar Rev* 519 at 543.

One of the most prominent tools used to motivate outrage from women against the marital rape exemption and existing evidentiary procedures in Canada came from research that focused on the prevalence of rape, including marital rape, and also police attitude to rape victims and the triviality of sentencing.[17] By the 1970s and 80s, feminists and women's groups in Canada were beginning to speak out against the treatment of rape victims and the marital rape exemption.[18] Although there were variations in what different feminist and women's groups believed to be the appropriate response to rape issues, there was consensus on the need to abolish the marital rape exemption.[19] Feminist activists employed the concept of equality to argue for the recognition and protection of women's sexual integrity and bodily autonomy.[20] With the enactment of the *Charter*[21] especially the introduction of the equality provision, it became imperative that the government amend laws that may violate the tenets of section 15 of the *Charter*.[22] Section 15(1) guarantees not only equality before and under the law but also equal protection and equal benefit of the law without discrimination, including sex-based discrimination.[23]

[17] See Laureen Snider "Legal Reform and Social Control: The Dangers of Abolishing Rape" (1985) 13 Int'l J Soc L 337 at 340 [Snider]. See also Backhouse and Schoenroth, *supra* note 14 at 53, citing Lenore Walker, *The Battered Woman* (New York: Harper Colophon Books, 1979) at 108. See e.g Marilyn Stanley, The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127. Report No. 1 (Ottawa: Department of Justice, 1985); Lorenne Clark and Debra Lewis, *Rape: The Coercive Price of Sexuality* (Toronto: Women's Educational Press, 1977).

[18] Koshan, *supra* note 1 at 12.

[19] *Ibid* at 14.

[20] Backhouse & Schoenroth, *supra* note 14 at 53-54; Boyle, *supra* note 6 at 197.

[21] *Canadian Charter of Rights and Freedoms* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 [*Charter*].

[22] See Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedom*, 5th ed (Toronto: Irwin Law, 2005).

[23] Although the *Charter* came into effect in April 17 1982, its equality provision was suspended for three years in order to give the Canadian government time to align its laws and polices with the equality provision. Thus the equality provision of the Charter officially came into effect in April 1985.

Legal Frameworks for Addressing Spousal Sexual Assault in Canada

There are two aspects of the *Criminal Code*[24] relevant to a charge of sexual assault: the general provision on assault and the specific provision on sexual assault. Section 265(1) of the *Criminal Code* defines assault as intentionally applying force to the person of another or threatening to apply force without their consent. This definition also includes impeding or begging while openly carrying a weapon.[25] In relation to the use of threat, the focus is on the victims' state of mind as at the time the threat is employed, that is, if the victim believes the accused has means to carry out such threat.[26] The section further stipulates that the provision on assault also applies to sexual assault.[27]

Sections 271, 272 and 273 of the *Criminal Code* apply specifically to sexual assault.[28] The three-tiered offences of sexual assault are "simple" sexual assault,[29] sexual assault with weapon, threat to a party or causing bodily harm,[30] and aggravated sexual assault – wounding, maiming or disfiguring or endangering the life of the complainant.[31] In order to preclude any doubt or presumption as to the application of the sexual assault laws to marital unions, section 278 of the *Criminal Code* expressly states that spouses can be charged with the offence of sexual assault irrespective of their living arrangement.[32]

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[24] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].
[25] *Ibid*, s 265 (1) (a)–(c).
[26] *Ibid*, s 265 (1) (c).
[27] *Ibid*, s 265 (2).
[28] Note Bill C-127 enacted ss 246.1, 246.2 and 246.3 to amend the 1970 Criminal Code. However, these sections are now ss 271, 272 and 273 respectively.
[29] *Criminal Code*, *supra* note 24, s 271.
[30] *Ibid*, s 272 (1) (a)–(c).
[31] *Ibid*, s 273(1).
[32] Formerly s 246.8 1983 Criminal Code.

Definition, Specific Elements of Spousal Sexual Assault in Canada

Although the *Criminal Code* does not define what constitutes sexual assault, the Supreme Court of Canada in *R v Chase*[33] notes that a contextualised approach that takes into consideration all facts of the case is necessary in determining the sexual nature of an act.[34] The accused in the *Chase* case was found guilty of assault for grabbing the breast and trying to touch the private part of the complainant. The Supreme Court rejected the court of appeals approach that the breast was a secondary character synonymous to a man's beard. Also, in the *V(KB*) case, a father who applied pressure to his son's genitals as a form of punishment was found guilty of sexual assault. [35] In the *Nicolaou* case, the court noted that the intent to humiliate by using the complainant's sexuality is enough to translate an act to sexual assault. [36] In the *Bernier* case, the accused was found guilty of sexual assault for non-consensual touching breast as a joke. [37] In summary, to constitute sexual assault, sexual gratification is not a necessary prerequisite as any act of a sexual nature that violates the integrity of the complainant is first an assault and may constitute sexual assault.[38]

To establish a charge of sexual assault, the Crown must establish that the accussed had the necessary *actus reus* (physical aspect) and *mens rea* (mental intention). Under the *Criminal Code*, consent is what differentiates an acceptable sexual act from a violent act of a sexual nature. *The actus reus* for sexual assault is the physical touching of the complainant without

[33] [1987] 2 SCR 293, 45 DLR (4th) 98 [*Chase* cited to SCR].
[34] *Ibid citing* SJ Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987) 29 *Crim LQ* 200 at 204.
[35] *R v V(KB*), 1993 SCC 109.
[36] *R v Nicolaou*, 2008 BCCA 300.
[37] *R v Bernier*, [1998] 1 SCR 975, 124 CCC (3d) 383.
[38] *Chase*, *supra* note 33 at 11.

consent, while the *mens rea* is the accused's intent to touch the complainant in a sexual manner despite the knowledge and/or willful blindness or recklessness to such lack of consent.[39]

Consent in the Context of Actus Reus

In 1992, the Parliament introduced the notion of affirmative consent into the *Criminal Code.*[40] This act was in response to feminist and women's group agitation that the common law approach to consent which required the complainant to resist and also the theory of implied, advance and ongoing consent informed several judicial interpretation of consent in Canada. [41] The aim of the amendment was to define consent in a way that will impose an obligation on the parties to ensure that consent is voluntary and active.[42]

Consent under the *Criminal Code* is addressed in two ways: when consent is present and when consent it is absent.[43] Section 273.1 (1) of the *Criminal Code* defines consent as a "voluntary agreement of the complainant to engage in the sexual act in question." The provision further provides that no consent exists when:

> (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.[44]

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[39] *R v Ewanchuk*, [1999] 1 SCR 330 at para 23, 169 DLR (4th) 193 [*Ewanchuck*]. Note intent required for sexual assault charge is a general and not a specific intent. See *R v Daviault*, [1994] 3 SCR 63.

[40] Bill C-49, *An Act to amend the* Criminal Code *(sexual assault)* 3rd Sess, 34th Parl 1991–92 (as passed by the House of Commons 15 June 1992). The bill introduced ss 276, 276.1, 276.2 [Bill C-49].

[41] See Karen Busby, "'Not a Victim until Conviction is Entered'- Sexual Violence Prosecution and Legal 'Truth'" in Elizabeth Comack, ed, *Locating Law*, 2nd ed., (Halifax: Fernwood Publishing, 2006) 258[Busby, "Not a Victim"]; See also Richard Barnhorst & Sherrie Barnhorst, *Criminal Law and The Canadian Criminal Code* (Ontario: McGraw-Hill Ryerson 1999). See also *R v Park*, [1995] 2 SCR 836 at 38,47 L'Heureux-Dubé J (criticising the common law approach to consent) [*Park*]; *R v Esau*, [1997] 2 SCR 777 paras 34,49-51,64 – 68 Mclachlin & L'Heureux-Dube dissenting [*Esau*].

[42] Busby, "Not a Victim' *supra* note 40 at 266-67.

[43] Koshan, *supra* note 1.

[44] *Criminal Code*, *supra* note 24, s 273 (2) (a)–(e).

Section 265 which deals with assault also provides that there will be no consent when the complainant does not indicate lack of resistance, submits to the accused out of fear or the accused applied or threatened to apply force to the complainant or third party or uses a position of power or authority or was deceptive.[45] The Court has held that the fear experienced by the complainant is subjective and needs not be reasonable and that she is under no obligation to communicate such fear to the accused.[46]

In establishing the *actus reus* for sexual assault, consent is utterly subjective. That is, it focuses on the state of mind of the complainant at the time of the sexual activity.[47] The Court has held that it is an erroneous interpretation of the law on sexual assault to require the complainant "to offer some minimal word or gesture of objection" or to equate "lack of resistance… with consent".[48] The notion of implied consent which served as one of the justifications for maintaining the marital rape exemption was rejected by the Supreme Court when it held that consent to sexual act is either present or absent.[49] The Court also clarified that consent requires active participation not passivity, submission, silence or ambiguity, that is, an accused has to ensure the complainant said "yes" or that she never said "no" for absence of yes equates a no.[50]

In the *JA* case,[51] the Supreme Court of Canada examined the scope of consent under the Canadian *Criminal Code*. The accused, JA, was charged with the sexual assault, aggravated sexual assault, violating probation order and rendering unconscious KD, his partner of seven to

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[45] *Ibid, s* 265 (3) (a)–(d).

[46] *Ewanchuk, supra* note 39 at para 39. (Note credibility is called into question to determine if she consented out of fear).

[47] *R v M(LM),* [1994] 2 SCR 3[*ML*] *Ibid* at paras 26,29–30.

[48] *Ibid* Sopyinka J (as he then was).

[49] *Ewanchuk, supra* note 39 at para 31 Major J (as he then was).

[50] *Park, supra* note 41. *See also, Esau, supra* note 41 at paras 34,49–51,64–68 Mclachlin & L'Heureux-Dube dissenting.

[51] *Supra* note 2.

eight years. KD testified that during a sexual encounter, JA applied pressure on her neck to the point where she became unconscious. She testified that she woke up to see that JA had not only tied her hands behind her back but that he had inserted a dildo into her rectum. She stated that JA removed the dildo a few seconds after she gained consciousness and they both had consensual vaginal intercourse. She lodged a complaint to the police (which she later recanted) two months later stating that while the vaginal sex was consensual, she did not consent to anal penetration.[52]

The trial judge found the accused guilty of sexual assault and violating probation but not aggravated assault in the absence of evidence that the injury was more than "fleeting" or rendering unconscious.[53] She found that the complainant did not consent to being anally penetrated during a state of unconscious and in the alternative, she could not have consented in advance to the sexual activity that happened while she was unconscious.[54] The Ontario Court of Appeal overturned the trial judge's ruling on the ground that there was no sufficient evidence to establish lack of consent.[55] However, the court was divided as to whether a person can consent in advance to a sexual activity. Simmons J was of the opinion that a person can consent in advance to sexual activity,[56] while LaForme J argued that consent requires an active mind.[57] The crown appealed as of right to the Supreme Court asking the Court to determine if the principle of advance consent exists under the *Criminal Code.*

[52] *R v A(J)*, [2008] ONCJ 195 (CanLii)[*AJ*].
[53] *Ibid* at para 45.
[54] *Ibid* at para 8.
[55] *JA*, CA, *supra* note 2 Simmons JA (for the majority) at para 55; (*ibid* at para 114) LaForme J.A dissenting.
[56] *Ibid* at para 75.
[57] *Ibid* at paras 117, 123.

Fish J, writing for the dissent, focused on free will, noting that the *Criminal Code* seeks to protect bodily autonomy not infringe on freedom of choice.[58] He noted that the question before the Court should be whether a conscious complainant can consent in advance to a sexual act which he answers in the affirmative.[59] He reasoned that a strict requirement of an active mind may have unintended consequences on married couples since it risks criminalising "simple" acts such as kissing or touching a sleeping spouse.[60]

On the other hand, McLachlin CJ writing for the majority interpreted sections 273.1 (2) (b) and 273.1(2) (2) which recognises the right to revoke consent to include the requirement of a conscious mind. Her logic was simple: if the Parliament recognises the right to revoke consent, only a conscious person can revoke consent.[61] Although she acknowledges the complexity that may arise where parties are involved in ongoing relationship, she nonetheless equivocally states that to the law requires consciousness throughout the act of touching deferring to the Parliament the responsibility to say otherwise.[62] More importantly, she affirms that while the presence of a spousal relationship may have an impact on the *actus reus* and *mens rea* when assessing sexual assault charge, it does not detract from the necessary steps to determining if the complainant consented.[63]

The *JA* case is an important decision to judicial assessment of consent in spousal sexual assault cases. One area related to consent that was raised at the trial level is the impact of

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[58] *JA SC*, *supra* note 2 at paras 72 – 73, 110 – 11.
[59] *Ibid* at para 80 (Fish, Binnie & LeBel JJ dissenting).
[60] *Ibid* at paras 63, 74 McLachlin, (*Ibid* para 129) Fish J. This line of reasoning is not particularly strange or new. After the Ewanchuk case, defence counsels and critics gave the same reason for questioning the Court's rejection of implied consent, what is interesting was his recognition that even the smallest touch can have a profound effect on victims. One can only assume from his reasoning that by virtue of a spousal union, that effect is not so profound. For research to rebut this line of reasoning See Boyle, *supra* note 6; Craig, *supra* note 5.
[61] *Ibid* at paras 3, 40, 53 McLachlin (Deschamps, Abella, Charron, Rothstein and Cromwell JJ concurring).
[62] *Ibid* at para 65.
[63] *Ibid at para 64.* See also *JA CA*, *supra* note 2 (CA) LaForme J dissenting in part at para 139.

consensual choking or bodily harm on consent, that is can a person consent to bodily harm during sexual activity? The Crown argued that KD's consent was vitiated by intentional infliction of bodily harm, that is, the unconsciousness. The trial judge rejected the argument because she found that KD consented to the choking and the unconsciousness she experienced was "transient" and did not occasion bodily harm.[64] The Court of Appeal also rejected the argument of the Crown on the vitiation of consent because of the charges levelled against the accused, however, the Court noted that the trial judge misapplied the law in her assessment of bodily harm.[65] The Supreme Court declined to comment on this issue of law because it was not a question put before the Court.[66]

The decision of the Supreme Court in the *JA* case on consent has been a subject of debate attracting different opinions. Some scholars lauded the decision of the Court because it not only affirms what the law is on consent but protects women, who by virtue of their state of mind, are vulnerable to sexual exploitation.[67] However, there were those who criticised the decision of the Court because it downplayed the harm inherent in the concept of strangulation promoting the myth that danger and harm are synonymous to pleasure especially for parties who have history of rough sex or BDSM (Bondage and Discipline, Dominance and Submission, Sadism/Masochism).[68] The following implication of the analysis may lead to the inference that past sexual history is a necessity when parties have an history of rough sex. Also, following the argument of the dissent on the free will and choice, some scholars criticised the decision of the

[64] *JA SC, supra* note 2 at para 11.
[65] *Ibid* at 17.
[66] *Ibid* at para 21.
[67] See Karen Busby, "Every Breath You Take: Erotic Asphyxiation: Vengeful Wives and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24:2 CJWL 336-37 [Busby, "Breath"]; Lise Gotell, "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R. v J.A*" *24:2 (2012)* CJWL 359-388; Mike Blanchfield "Woman can't Consent to Sex while Unconscious, Supreme Court Rules" The Toronto Star (27 May 2011).
[68] Busby, "Breath" *supra* note 67 at 336–37.

majority on the ground that it infantilises women.[69] Some also support the argument of the dissent that parties in ongoing union stand to suffer the unlikely consequences of the Court's decision.[70] It has also been argued that while the position of the majority at a first glance promotes women's equality right, the abstract nature of the analysis fails to take into consideration the full social context in which sexual violence occur.[71] The neutral language employed by the Court when discussing the historical stereotypes associated with sexual assault cases ignored not just the circumstance of the case but the broader context of sexual violence where women are disproportionately represented as victims and men the perpetrators.[72]

The underlining of the dissent reasoning in the *JA* case emphasises the facts of the case rather than the question of law before it. Some scholars noted that the dissent pin-pointed facts from the case to support their argument with focus on pre- and post- assault conduct, that is, the fact that the alleged assault was preceded and followed by consensual vaginal sex.[73] Interestingly this focus on facts conveniently ignored the obvious record of the accused which included conviction of assaults some of which were against the complainant and the fact that he was in breach of a no contact order. The focus on fact displayed a misplacement of the issue before the Court which was the legal parameters of consent as stated by law.[74] The general concern raised amongst most feminist and women's scholars is that given the cautiousness with which the majority tip toed around the issue relating to the right to consent to bodily harm during sexual activity and the strong analysis of the dissent on advance consent, the issue may still be open for

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[69] Rosie DiManno, "DiManno: Supreme Court's Consent Ruling Infantilizes Women" The Star (29 May 2011), online: The Star. [DiManno}. For analysis of this line of reasoning and alternative approach see Elaine Criag, "Capacity to Consent to Sexual Risk" (2013) 17:1 *New Criml L Rev* 103-34.

[70] See Kazi Statna, "Supreme Court decision on Sexual Consent: What the decision mean for Sexual Assault in Canada" May 27, 2011 [Statna].

[71] Jennifer Koshan, "Consciousness and Consent in Sexual Assault Cases" June, 2011 online: www.ablawg.ca/wp-content/uploads/2011/06/blog pdf [Koshan, "Consciousness"]

[72] *Ibid.*

[73] Koshan, "Consciousness" *supra* note 71.

[74] *Ibid.*

discussion and/or a reversal by subsequent decisions of the Court.[75] More so, the decision of the Supreme Court can be subject to a constitutional challenge. Notwithstanding, this concern, the notion of consent as it currently stands under the Canadian *Criminal Code* is clear: consent must be positive, active, contemporaneous with the sexual act in question and revocable at any point.

Honest but Mistaken Belief in Consent

Usually, an accused in a sexual assault trial can either raise the defence that the complainant consented or that he believed she was consenting. This evaluation which usually goes towards disproving the *mens rea* for sexual assault focuses on the state of mind of the accused at the time of the alleged sexual assault.[76] The Parliament as part of series of the 1992 amendment to the *Criminal Code* enacted section 273.2 which placed a limit on the use of the defense of honest but mistaken belief in consent. By virtue of section 273.2 (a) (i)–(ii) of the *Criminal Code*, an accused who seeks to rely on the defence must not have been voluntarily under the influence of an inebriating substance, reckless and/or wilfully blind and he must have taken reasonable steps to ascertain consent.[77] This provision places a burden on the accused not to speculate about the complainant's mindset or assume that the complainant wants the touching, even though she never says "yes" or "no".[78]

An accused may be considered reckless when he is aware that the complainant may not be consenting, that is, she does not say "yes" or that she says "no".[79] According to the rulings of the court, the following circumstance may quality as being reckless: persisting after the complainant's expression of lack of interest;[80] relying on stillness, inactiveness, ambiguity or a

[75] See generally Statna, *supra* note 70.
[76] *Ewanchuk*, *supra* note 39 at paras 4,5.
[77] *Criminal Code*, *supra* note 24, s 273.2 (a) (i)–(ii).
[78] *Ibid* at paras 45–49.
[79] *R v Briscoe*, 2010 SCC 13, [2010] 1 SCR 411 at para 22 citing *R v Sansregret* (1983) 34 CR (3d) 162 at 584 [*Briscoe*].
[80] *Ewanchuk*, *supra* note 39 at paras 51- 52; *Esau*, *supra* note 40 at para 79; *ML*, *supra* note 49 at para 272 Fraser CJ dissenting.

lapse of time,[81]etc. Wilful blindness on the other hand means that the accused deliberately refuses to confirm the complainant's consent, even though he is under the suspicion that she may not be consenting.[82]For example, an accused who, following a series of violent and threatening act, engages the complainant sexually.[83] The *Criminal Code* requires that the court determines if there is evidence from the trier of fact to support such defence before putting it to a jury.[84]

Evidentiary Rules and Relevance: Past Sexual History

The general rule of evidence purports that only evidence that is relevant, admissible and material to the facts in issue should be considered in trials. However, the fact that evidence is relevant does not automatically make it admissible. There is a recognition of two types of relevance: legal and logical.[85] Logical evidence relies on common sense and experience to determine if the evidence in issue makes the existence or non-existence of another material fact probable or less probable to determine its relevance.[86] Legal relevance on the other hand concerns itself with the probative of prejudicial value of an evidence, that is, whether the probative value of an evidence is outweighed by its prejudicial and unfair impact on the case or parties. Any exclusion of relevant evidence is often an exercise of judicial discretion usually informed by taking into consideration the harm or value of allowing or disallowing such evidence.[87] However, fairness requires that juries be precluded from hearing evidence whose prejudicial value outweighs their probative value, judges are not held to the same strict standards.

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[81] *Ewanchuk, supra* note 39 at para 52.

[82] *Briscoe, supra* note 79.

[83] See *R v Sansregret,* (1983) 34 CR (3d) 162.

[84] *Criminal Code, supra* note 24, s 265(4), s 273.2(b) See *Ibid* at para 15; *Ewanchuk, supra* note 39 at para 63 – 64; *R v Osolin*, [1993] 4 SCR. 595 at 648–49.

[85] See *R v Mohan* [1994] 2 SCR 9, 1994 CanLII 80 [*Mohan*].

[86] *R v Collins*, 2012 ONSC 6571 at paras 18,19 [*Collins*]. See *R v Cloutier*, 1979 CanLII 25 (SCC), (1979) 48 CCC (2d) 1 (SCC) at 27*; Watt's Manual of Criminal Evidence*, 2010, (Thomson Carswell: Toronto, 2008) at s 3.0.

[87] *Mohan, supra* note 85 at 20 – 21.

Judges are presumed capable of disabusing their mind from prejudicial evidence and taken by their words if they purport they were not influenced by the prejudicial evidence.[88]

Prior to 1983, *Canada's Evidence Act,*[89] codified from the English common law, made the introduction of complainant's sexual reputation and history relevant to a trial of sexual assault.[90] This rule was based on the twin myths that an unchaste woman was more likely to consent to sexual act and that she was more likely to lie about sexual assault.[91] The removal of the marital rape exemption was accompanied with evidentiary reform such as the abrogation of the introduction of complainants' sexual reputation to impugn credibility and also placed a limitation on the use of past sexual history evidence.[92] While the defense could introduce evidence of past sexual history between him and the complainant, he could not use such evidence in ways that reinforce the twin myths cited above. Also, evidence of past sexual history between the complainant and a third party can only be introduced under three circumstances: to clarify identity, to rebut the Crown's evidence on the complainant's sexual reputation and lastly evidence relating to a specific instance of consensual sexual activity between the parties that may lend reality to an honest belief in consent.[93] In relation to spousal sexual assault, this provision would have made it nearly impossible to successfully adjudicate on any spousal sexual assault case given the likelihood of consistency of sexual relationship between spouses.

Although offering little protection to women especially married women, the 1983 so called "rape shield" were subject to *Charter* challenge in several cases.[94] The Supreme Court while disallowing evidence of sexual reputation watered down the effect of the "rape shield" by

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[88] *R v O'Brien*, 2011 SCC 29 at para 18, [2011] 2 SCR 485. See *R v Seaboyer, R v Gayme,* 1991 2 SCR 577 [Seaboyer cited to SCR]. (The issues raised in Gayme and Seaboyer were decided by the court in the same judgment)

[89] *Canada Evidence Act*, RSC 1970, c E-10.

[90] *Ibid*, s 4 (2).

[91] Busby, "Not a Victim", *supra* note 41 at 274; Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984), ch 1 at 14 – 16.

[92] *Criminal Code, supra* note 24 s 276, s 277

[93] *Bill C-127, supra* note 13 enacting ss 246.7,246.6 of the *Criminal Code*.

[94] *Seaboyer, supra* note 88.

allowing evidence of past sexual history when it did not go to credibility and when its probative value outweighed its prejudicial value.[95] The Court expressed its belief that judges (presumably disabused of myths and stereotypes on rape victims) would hardly allow such evidence, except when necessary. The amendment introduced by Bill C-49 in 1992 while changing the definition of consent as described earlier also responded to the use of past sexual history evidence. The bill stated the defence must file an affidavit before the court stating the relevance of such evidence. The court must proceed to hold a hearing outside the view of the jury to determine the relevance of such evidence and a court is directed to allow such evidence only if its probative value outweighs any unfair or prejudicial impact it may have on the complainant or the case.[96] In determining the probative value, the court should take into consideration all interest, including the accused's right to fair hearing and full defence, the need to rid sexual assault trial process of myths and stereotypes, society's interest in encouraging reporting sexual assault, the complainant's integrity, right to dignity, privacy and more importantly her right to equal benefit and protection of the law.[97]

Use of Personal Records

Defence tactic of seeking private personal record of complainants has been described as a backlash to the limitation placed on the use of past sexual history.[98] The Supreme Court's response to the request in *R v O'Connor*[99] to permit the use of private record sparked a lot of outrage from feminist and women's groups. The Court's decision provided a great latitude for

[95] For a strong dissent highlighting the myths behind the use of past sexual history see *Ibid* L'Heureux-Dube dissenting at 26.

[96] *Bill C-49*, *supra* note 40, enacting ss 276.1, 276.2 and 276.3 of the *Criminal Code*.

[97] Note the Supreme Court upheld this section as constitutional in *R v Darrach,* 2000 SCC 46, [2000] 2 SCR 443. It has been argued that the Court's analysis was narrow and restrictive and also that it allows any doubt in relation to use of past sexual history to be resolved in favour of the accused which has the possibility of thwarting the effectiveness of the provision. See Busby, "Not a Victim", *supra* note 41 at 266-67.

[98] *Ibid* at 278.

[99] [1995] 4 SCR 411.

the defense to use private records of the complainant. In response to the decision in *O'Connor*, Parliament amended the *Criminal Code* with the aim of ensuring a fair assessment of an application for the use of private records of the complainants by the defense. [100] The provision stipulates that the defence must establish the relevance of such document before a court can grant access to such record. By virtue of the amendment, an application for the use of personal record is one of the circumstances where the interest of the complainant becomes the concern of the Crown attorney. A complainant or the third party who holds such record has the right to be represented by counsel. The Supreme Court upheld and applied the new provisions of the *Criminal Code* in *R v Mills*.[101]

Judicial Treatment of Spousal Sexual Assault: Modelling Substantive Equality Reasoning?

The principle of equality has been described as embodying "[the] fondest dreams, the highest hopes and the finest aspirations of Canadian society".[102] The Court has stated that the equality guaranteed under the *Charter* transcends formal treatment of all individuals to ensuring that everyone has equal benefit and protection under the law.[103] In identifying notable instances of disadvantaged groups, the Supreme Court enunciated that women constitute a historically disadvantaged group and also that marital status is a ground analogous to sex under section 15 of the *Charter*. [104] Thus, married women occupy a domain of historically disadvantaged group. The removal of the marital rape exemption achieved formal equality as it treated all married women the same way with unmarried women. However, the Supreme Court of Canada's conception of

[100] Bill C-46, *An Act to amend the Criminal Code* (production of records in sexual offence proceedings), 2nd Sess, 35th Parl. 1997, (as passed by the House of Commons 25 April 1997) enacting ss 278.1 to 278.91 of the *Criminal Code*.

[101] [1999] 3 SCR 668 [*Mills*].

[102] *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*] Cory J

[103] *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 332 Abella J dissenting in result [*Quebec v A*] (*ibid* at para 331); *Taypotat Kahkewistahaw First Nation v Taypotat* 2015 SCC 30, [2015] 2 SCR 548 at para 20 [*Taypotat*].

[104] *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693.

substantive equality requires that in assessing laws and policies that affect married women, courts at all level should ensure that policies and laws in purpose and effect do not widen the gap between married women and others but rather should narrow it.[105] Also, such laws and policies must take into consideration the broader social conditions that could constrain married women's pursuit of equality and justice, including but not limited to the role of prejudice and stereotyping. Following from this, this section examines how the court's commitment to substantive equality and ensuring equal benefit and protection of the law plays out in the adjudication of spousal sexual cases since *JA*.[106]

Preliminary Observation

Information about Accused and Complainant

In relation to the sex of the parties, almost all the cases examined involved a male accused person and a female complainant. In the ninety cases reviewed only two cases turned up where women were accused of sexual assault on their male spouses. In one of the two cases, the wife was charged with aggravated sexual assault for non-disclosure of HIV status.[107] In the other case, the wife was charged with sexually assaulting her ex husband while he was under her care as a foster child but before their marriage. The Court found that the alleged assault never took place while the foster relationship existed.[108] Aside from these two cases, there was one case where the husband had previously complainant with assault prior to the sexual assault charge against him.[109] Also, there were five cases where the accused (all men) maintained during trial

[105] *Quebec v A*, *supra* note 103 at para 332 Abella J dissenting in result. See also See B Hough, "Equality Provisions in the Charter Their Meaning and Interrelationships with Federal and Provincial Human Rights Acts" in AW MacKay, CE Beckton & BH Wildsmith, eds, The Canadian Charter of Rights: Law Practice Revolutionized (Halifax: Faculty of Law, Dalhousie University, 1982) 306 at 312.

[106] See section on "Methodology" for how cases where selected and eventually narrowed.

[107] *R v DC*, [2012] SCC 48 [*DC*].

[108] *R v BS*, 2012 ONSC 2178 [*BS*].

[109] *R v VJ*, 2015 ONSC 3672.

that the complainant (female spouse) was the sexual aggressor during the act resulting in the sexual assault charge.[110]

The racial background of accused persons and complainants is generally difficult to determine from trial records. There were only twenty-one cases where it was clear that either the complainant and/or the accused were visible minorities and seven cases where I could determine that the accused and/or complainant were Indigenous peoples. This information surfaced mostly when courts was giving background to the history of the relationship between the accused and the complainant or during sentencing, that is when discussing the history of accused or the use of the Gladue report.[111] It is not particularly surprising that the number of visible minorities who report spousal sexual assault are relatively low given several factors: lack of knowledge that spousal sexual assault is a crime, the possibility of deportation for the accused, social and cultural pressure on the woman, etc.[112] One or more of these reasons play significant roles in most of the spousal sexual assault cases examined where it was identified that the complainant or accused was a new comer to Canada.

References to Culture and Deportation in the Spousal Sexual Assault in Cases Examined

In specific reference to newcomers, the role of culture as a motivating factor in the occurrence and reporting of sexual assault and impact of likely deportation on reporting of

[110] *R v Labelle*, [2015] 2015 ONSC 696 [*Labelle*]*; R v JSY*, 2013 BCCA 451 aff'g 2011 BCSC 1280 [*JSY*] (Strangely even though he claimed she initiated the sex and he was "passive" and didn't want the act, he relied on the defence of honest but mistaken belief in consent); *R v RH* 2012 ONCJ 673 [*RH*] (claimed wife asked for anal sex and he tried it but didn't like it); *R v KM*, 2015 ONCJ 680 [*KM*] (wife initiated the sex and didn't let him go when he tried to); *R v JW*, 2009 ABQB 332 [*JW*] (claimed complainant controlled all sexual relationship).

[111] The Gladue report is a pre-sentencing report emanating from s 718(2)(e) of the Criminal Code which focuses on alternatives to incarceration – restorative justice- where appropriate. While this section is not "a get out of jail free card", it requires a judge to take into consideration the special circumstances (especially the Indigenous status) of the accused person during sentencing.

[112] Sherene Razack, "The 'Sharia Law Debate' in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture" (2007) 15 Feminist Legal Studies 3-32; ____, *Casting Out: The Eviction of Muslims from Western Law and Politics* (University of Toronto Press, 2008).

spousal sexual assault is very difficult to determine using a case analysis. Notwithstanding, out of the twenty-one cases that specifically referenced that either the accused and/or the complainant is of a different racial background, culture or ignorance of the Canadian legal system was referenced in ten cases. Complainants and accused persons seem to be on a different spectrum of cultural influence with complainants at the receiving end of the negative implication from cultural inference.

In one case, the husband allegedly said that "he paid thousands of dollars for their wedding and it was not for [the wife] to say no."[113] In another case, the complainant alleged that the accused told her that it was part of the "Canadian custom and culture" to have sexual intercourse with wife multiple times a day and also threatened that she could be deported which she believed because was also ignorant of the "Canadian custom and culture".[114] In two cases, the complainants, when questioned as to the delay in reporting, stated that they were unaware that spousal sexual assault was a crime in Canada because it was not in their culture.[115] In three cases, the complainants stated that they were constrained by culture which is why they never left especially because the society and family members may not look favourably on divorce or the reporting of assault.[116]

In reference to the role of culture, threat of deportation and how it plays out on an accused and sometimes complainants, the court noted in the *Q(M)* case that the accused felt culturally entitled to a sexual relationship with his wife.[117] In the *NR* case, the accused allegedly told the police that sexual activity between him and his wife was a private affair not discussed in

[113] *R v HP*, 2016 ONSC 2342 at para 35 [*HP*].
[114] *R v SSA*, 2015 ABPC 97 at paras 19,28,36,30.
[115] *R v HE*, 2015 ONCA 531 at para 11[*HE*]; *R v MG*, 2012 ONSC 5722 at para 66 [*MG*].
[116] *R v NR*, 2012 ONSC 6611 at para 14 [*NR*]; *R v RSH*, 2013 ONCA 676 at 77 (the court noted that the complainant is still estranged from her father for reporting the sexual assault) [*RSH*]; *R v MQ*, 2010 ONSC 61 at paras 13.
[117] *R v Q(M)*, 2012 ONCA 224 at paras 56,61.

his culture.[118] In the *DS* case, the court referencing the implication of deportation stated that the complainant's accusation is to ensure that they accused is deported because she has done it before with a previous partner[119], while in the *JSS* case, the accused is alleged to have threatened the complainant with deportation.[120]

However, with reference to judicial adjudication of spousal sexual assault, culture seemed to play little role and was, in fact, expressly rejected as a mitigating factor or an excuse for sexual violence. In the *HE* case, the Court of Appeal condemned the sentencing of the trial judge who took into consideration the "cultural impact" of the accused's move to Canada by relying on the wife's statement that she was shocked by the consequences of her husband's actions in Canada. The judge gave a global sentence of eighteen months and a year probation for a pattern of violence described as "longstanding and ongoing" left a different impression.[121] The accused in this case was charged with assault on his children (which included locking them outside the house for 40 minutes barefoot in minus 40-degree snowy winter) and with series of sexual assault on his wife. The sexual assault to his wife had spanned over a period of sixteen years with three of those years spent in Canada. Notably, the Court of Appeal invoking the principle of equality of all before and under the law as a "crucial Charter value" implied that cultural beliefs may serve as an aggravating and not a mitigating factor and varied the sentence to a global term of four years' imprisonment.[122]

Pattern, Timing and Reporting of Spousal Sexual Violence in the Cases Examined

One area of concern identified in this research is the fact that the status of the relationship does not seem to deter spousal sexual assault. In the cases examined, thirty-six of the

[118] NR, *supra* note 116 at para 71.
[119] *R v DS*, 2015 ABPC 159 at para 66 (6) [*DS*].
[120] *R v JSS*, [2014] BCJ 3375 at paras 21,30 [*JSS*].
[121] *HE*, *supra* note 115 at para 12.
[122] *Ibid* at paras 33,62.

complainants experienced spousal sexual assault during the marriage while thirty experienced such assault after the end of the marriage or when they had signified intention to end the relationship. Six experienced such assault during and after the break down of the relationship, with two complainants having experienced the alleged assault before the relationship.[123] It was difficult to determine the period when eighteen of the complainants experienced such violence. The court noted at some point during its decision in seven out of the eighteen cases that the parties had strained marriages. In the other eleven cases, the information was not available.

Noteworthy too is the fact that women who experienced spousal sexual assault after the end of the relationship mostly recorded intense physical assault accompanying the sexual violence. The alleged reasons for almost all the sexual assault was jealousy, an attempt at reconciliation, as a punishment for perceived infidelity or a way to show fidelity, and a way to show superiority.[124] In a few cases, the accused showed outlooks or exhibited attitudes that showed he viewed the complainant as his property or that sex was his entitlement.[125]

Notably, in some cases, the court was very succinct and straightforward in rejecting this erroneous notion that women were their husbands' property and sex entitlement. For example, in

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[123] The two is in reference to two complainants who eventually married the alleged perpetrator. See *BS, supra* note 108; *R v DG*, 2014 BCCA 84 (the accused started a relationship with the complainant while she was 13 and they later got married, he was charged with sexual assault which allegedly occurred at the point when he was 18 and she was under 14 and was found guilty).

[124] See e.g *R v BDN*, 2015 ONSC 6613[*BDN*] (the accused claim his intention was to "make love make peace" as he thought love making was a step towards reconciliation at para 12); *R v* JTM, 2014 ABPC 125[*JTM*] (claimed he was checking his ex-spouse private part to see if she shaved which would mean she was seeing someone else); *R v JH*, 2012 NLTD(G) 122 [*JH*] (he flipped out when she said she wanted to end the union); *R v BS*, 2012 ONCJ 447 [*BS*] (jealous she was seeing someone else and wanted to propel reconciliation); *R v NJD*, 2013 NBQB 184 [*NJD*] (ex-spouse alleged to have said "your are mine" after she refused sex at para 4); *R v DD*, 2015 ONSC 5865 (The accused, her estranged spouse, knocked on her door and asked for sex which she refused, he responded with "I will dominate you today bitch" and proceeded to anally and vaginally penetrate her while choking her at para 8); *R v OEC*, 2013 MBCA 60 [*OEC*][he asked his ex-spouse to spread her leg and he sniffed her vagina to ascertain fidelity]; *DS*, *supra* note 119 (husband allegedly said " I will do what I feel like" when she refused sex at para 13).

[125] *R v Arloo*, 2012 NUCJ at 74 B Tulloch J Sentencing [*Arloo*]; *R v Burke*, [2014] BCJ No. 2667 [Had the complainant tattoo "property of Jody Burke" on her**];** *R v Mastronardi*, 2006 BCSC 1681[The accused had the complainants tattoo "property of Mastronardi on their stomach [*Mastronardi*]; *MQ, supra* note 116 at para 14.

the *NJD* case and the *OEC* case, the court noted that no woman belongs to another person,[126] describing the reasoning in the *JTM* case as "unacceptable".[127] However, in the *CDH* case, the court implicitly concurred with this erroneous perspective when it noted that the accused who had been charged for sexually assaulting his ex-partner and was also in breach of court order to avoid contact with her was justified in expressing anger when he saw emails that revealed that his wife might be having an affair. The trial judge described his anger as "understandable" because "he was still her husband". The trial judge also described the harassing emails from the accused to the complainant as "passionate love to anger at the complainant for being unfaithful".[128] The Crown appealed this decision and the Court of appeal rebuked the trial judge's reasoning as promoting myths and stereotypes.

Judicial Assessment of Definition and Elements of Sexual Assault

Of the ninety cases examined in this study, the discussion of elements and definition of sexual assault was brought to bear in five cases. This is not surprising since eighty-two of the cases reviewed involved vaginal, anal, and penile penetrations while nine cases involved digital penetration, vaginal contact, threat of rape, and forced oral sex and/or fellatio.[129] In one of the four cases where the definition of sexual assault was discussed, the complainant testified that she had informed the accused, her ex-spouse, that she was not interested in getting intimate with him and she even had a lock installed on her door.[130] On the day in question, the complainant testified that she took a sleeping pill and woke up, felt weird and noticed a wetness in her vagina. She

[126] *NJD*, *supra* note 124 at para 4 – 6; *OEC, supra* note 124.
[127] *JTM*, *supra* note 124 at para 32.
[128] See *R v CDH, 2013* ONSC 7789 at para 32,42 rev'd *R v CDH*, 2015 ONCA 102 [*CDH*].
[129] See *R v JMH*, [2012] PEIJ 10, 2012 PECA 6; *R v Mavros*, 2013 BCSC 2430 [*Marvos*]; *R v Smith*, 2011 ONCA 564[*Smith*] (This case involved three complainants. He was also charged with sexual assault for actual vaginal-penile penetration in the other cases); *OEC, supra* note 124; *R v JH*, 2013 ONCA 693[*JH*]; *R v BRE*, 2012 NSSC 253; *R v Berry*, 2013 BCSC 1878 [*Berry*]; *JTM, supra* note 124; *R v AB* ,2013 NUCJ 15.
[130] *R v NW*, 2013 ABCA 393 [*NW*].

confronted the accused saying "what did you do last night… this is some form of sexual assault…we are room mates." He laughed but later apologised saying "I', sorry sweetie…I didn't think until after".[131] During the trial, the accused testified that he went to the complainant's room but he only kissed her forehead to bid her goodnight. He stated that he apologised to her but not because he sexually assaulted her but rather as a show of remorse for how she felt and to state that "you can accuse me all you want but I didn't do that". [132] Reading the facts together, the trial judge found him guilty of sexual assault, but his conviction was overturned on appeal for lack of proof of *actus reus* – the sexual touching. The Court of Appeal noted that there was lack of any evidence to establish sexual intercourse but the wetness was simply evidence of a "non-articulated event".[133]

In the second case, the accused entered into what was described by the court as a marriage-like union with more than one complainant.[134] Throughout the relationship, he maintained that he was a certified and practicing gynaecologist and obtained their consent to perform vaginal checks digitally in order to determine if they had any venereal disease. Relying on *Chase,* he argued on appeal that the vaginal examinations was not carnal or sexual in nature because he performed them as a medical personnel following medical procedures. He also argued that he had no sexual intention while conducting the vaginal examination. The BC Court of Appeal affirmed that the legal intent required for the offence of sexual assault is general intent and the motive of the accused is irrelevant. The Court also took into consideration the fact of the case where the trial court noted that the vaginal check was part of the accused's way of

[131] *Ibid* at para 3.
[132] *Ibid* at para 5.
[133] *Ibid* at para 14.
[134] *R v Mastronardi*, 2014 BCCA 302 at para 2. (Note this case involved multiple complainants who entered into marriage-like union with the accused).

humiliating and dominating the complainant sexually and affirmed that the vaginal examination violated their sexual integrity, thus constituting sexual assault.[135]

In the third case, the accused allegedly sniffed the complainant's vagina and also ordered her to kneel on the bed with legs apart for hours while he questioned her on sexual matters. He was found guilty of sexual assault.[136] In the fourth case, the accused inspected the vagina of the complainant, his ex-spouse, which according to him was in order to confirm if her pubic hair was shaved as a sign that she was having sexual relationship with someone else. He was found guilty of sexual assault.[137] The last case involved an accused who told the complainant he wanted her to have the experience of being raped after she resisted his sexual demand. He employed force with the aim of sexually assaulting the complainant even though he eventually did not succeed. He was also found guilty of sexual assault.[138]

In the cases examined, seventy-nine of the accused persons were charged with simple sexual assault while five were charged with sexual assault with a weapon,[139] one was charged with sexual assault with an imitation of firearm,[140] Two charged with aggravated sexual assault[141] and four were charged with sexual assault causing bodily harm.[142] Courts accepted belt, scissors, an object resembling a gun, sword, and knife as weapons. However, the delineating line between sexual assault and sexual assault with weapon seems to be the active and/or contemporaneous use of the weapon during the assault. For example, in the *BS* case, the accused

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[135] *Ibid* at para 19–21.
[136] *OEC, supra* note 124.
[137] *JTM, supra* note 124.
[138] *AB, supra* note 129.
[139] *R v Sall*, [2011] SCCA 197, CanLII 6494 (NL CA); *BS, supra* note 124 (found guilty of sexual assault); *BDN, supra* note 124; *R v BSS*, 2015 ONSC 3330; *Mastronardi, supra* note 125.
[140] *R v Ahmadzai*, 2013 BCCA 410 *Ahmadzai*].
[141] *DC, supra* note 107; *BSS, supra* note 139. (note some accused were charged with sexual assault with weapon and aggravated sexual assault or sexual assault and sexual assault with weapon).
[142] *Arloo, supra* note 125*; JSS, supra* note 120; *R v JRS*, 2013 BCSC 1363 [*JRS*]: *HP, supra* note 113.

was charged with sexual assault with weapon but found guilty of sexual assault.[143] The accused in breach of a recognisance attacked the complainant in her home with a knife drawn to her neck. She was able to grab the knife just before he shut the door and threw it outside, the sexual assault took place immediately behind the close doors. The Court found that the knife was no longer a threat as at the time of the sexual assault and the complainant could not be said to be in fear of her life from the knife. Also, in *CDH*,[144] the accused, who was in breach of a no contact order, was acquitted of sexual assault but convicted of simple assault even though the complainant alleged that the accused had used force to get her to the room and also had a knife in his pocket because she could see the handle. He was found not guilty of the sexual assault and assault with weapon. The court reasoned, among other things, that he never brought out the knife or actively used it. Ironically, he pled guilty to breach of a no contact order and recognisance not to possess weapon including knives.[145]

In relation to bodily harm, fifteen accused persons allegedly choked their spouses either during the commission of the sexual assault or preceding the alleged sexual assault.[146] Some of the accused persons were charged separately with choking to overcome resistance,[147] while most of these charges were "simple" sexual assault. It is difficult from the case analysis to determine why the Crown brought charges of sexual assault instead of sexual assault causing bodily harm. However, one can speculate that in some cases the accused pled guilty to a lesser charge of

[143] *BS*, *supra* note 124.
[144] *CDH*, *supra* note 128.
[145] *Ibid*.
[146] Judicial understanding of the act of strangulation during sexual assault/intercourse has been called into questions by some scholarly writings. See generally Busby, "Breath", *supra* note 67.
[147] See e.g *BSS*, *supra* note 139 (convicted of sexual assault and choking separately). See also *R v ASH*, 2015 ONSC 3316. See *R v RNA*, 2012 BCSC 1527 [*RNA*]; *Mavros*, *supra* note 129.

sexual assault and saved the state the expenses and time of trial and also saved the complainant the trauma of testifying.[148]

Also, in *Smith*, the complainant alleged that she dreamt she was being raped and woke up to find the accused having sexual intercourse with her.[149] He was charged with indecent assault. It is difficult to determine why the charge laid against him in respect of that assault was indecent assault, particularly since the trail record is not made available. However, on appeal, it was noted in passing that the accused was supposedly also asleep when he was sexually assaulting her.[150] The court acquitted him of the charge. The judgment was overturned on appeal and a new trial ordered. Like most cases where a new trial is ordered, there is no record of a new trial.

The discrepancies in charges and verdicts arising from sexual assault charges may also lead to the inference that there is a downplaying of harm arising from sexual assault not accompanied by extraneous physical violence. For example, in the *HE* case, the sentencing judge, on four different occasions, referred to the fact that the wife sustained no injuries in reference to the sexual assault.[151] The judge ignored the fact that not only was the sexual assault in question accompanied by choking and slapping, but also that sexual assault in itself is a violent crime that harmed the victim in more ways than physical injuries. The judge's definition of "no injuries" presumably came from his suggestion that the complainant did not seek any medical attention for the sexual assault. This was despite the judge's recognition that the

[148] See e.g *R v Tobac* 2014 NWTSC 76 (the accused is said to have punched, kicked, gagged, choked and used a knife during sexual assault on his estranged spouse, he pled guilty to sexual assault); *JTM, supra* note 124 (the accused broke into the complaint house in breach of probation and choked, pushed and digitally penetrated her. He pled guilty to sexual assault).

[149] *Smith, supra* note 129 at para 44. See also *R v Kearn*, 2012 SKQB 531). [*Kearn*] (acquitted of sexual assault but convicted of assault causing bodily harm).

[150] *Ibid* at para 44.

[151] *Supra* note 115.

psychological and emotional injury would be "longstanding".[152] Oddly enough, while the Court of Appeal rejected that the description of "no injuries" was a "misstatement of evidence", it also noted that the wife was bruised by the abuse, sexual and otherwise, and that not seeking medical help did not mean that there were no physical injuries.[153]

Defining injuries in terms that suggest some form of violence that accompanied sexual assault risks promoting the erroneous view that sexual assault is a sexual rather than a violent crime. In other words, it is not the sexual act that is violent, but rather some violent acts that accompanied it, such as verbal and physical bashing. This problematic requirement of extraneous physical injury plays a role not only in judicial assessment of whether a sexual assault has taken place but in reviewing consent in spousal sexual assault cases. For example, in the *HP* case, the court noted that there was absence of medical evidence to prove specific injury alleged to have arisen from non-consensual anal sex.[154] In the *BJW* case, the court also noted, among other things, that while the chances are slim that any one would consent to another person inserting a fist and a twelve-inch wine bottle into their vagina, there was no medical evidence to prove injury.[155] In the *CDH* case, the trial judge acknowledged that the nurse who attended to the complainant after the alleged sexual assault noted that there was bruising to the left shoulder and minor swelling on the cheek. However, the court emphasised that while the nurse found evidence of clear vaginal discharge which might be consistent with consensual sexual relationship there was no record of vagina tearing or injury to evidence use of force.[156] The judge found *CDH* guilty of simple assault alleged to have occurred during the alleged sexual assault, but interpreted

[152] *Ibid* at 16.
[153] *Ibid* at para 34.
[154] *HP*, *supra* note 113 at para 303.
[155] *R v BJW*, 2011 ONSC 5584 at para 61.
[156] *CDH*, *supra* note 128 at para 31. (Note judgment was reversed on appeal and a new trial ordered. I found no record of the new trial).

the absence of a vaginal tear or injury as lack of evidence to support a sexual assault claim. The judge stated that the injuries on the complainant were in fact "very minor injuries".[157]

Consent: Active, Contemporaneous and Revocable?

The contest over consent plays a prominent role in spousal sexual assault cases. This situation is not surprising given that majority of, if not all, spousal sexual assaults take place in the privacy of the parties' homes. Three significant issues often arise in considerations of consent in spousal sexual assault cases: (1) cases of clear non-consent; (2) cases where the accused claims consent; and (3) cases where the accused raises the honest but mistaken belief in consent. Generally, in relation to spouses, cases of clear non-consent usually arise when the complainant is asleep, unconscious, or incapable of consenting. The decisions of trial and appellate courts in these cases usually vary, with positive results arising from cases where there is electronic evidence of the sexual assault or cases where the accused does not make a blanket denial of the act.

In the ninety cases reviewed, six cases involved a sleeping or unconscious partner.[158] In three of these six cases, consent was not contested. In two out of those three cases where consent was not in issue, the complainants who were ignorant of the assault, found video evidence of the assault.[159] In the third case, the complainant woke up during the sexual assault.[160] The three accused persons were found guilty of sexual assault. However, in the remaining three cases, the accused persons were acquitted. In one of the three cases where the accused persons were found

[157] *Ibid at para* 45.
[158] See *Berry*, *supra* note 129; *JH*, *supra* note 129; *R v RVC*, 2012 BCPC 502 [*RVC*]; *Kearn*, *supra* note 149; *NW*, *supra* note 126; *Smith*, *supra* note 129.
[159] *Berry*, *supra* note 129; *JH*, *supra* note 129.
[160] *RVC*, *supra* note 158.

not guilty, the accused in the case made a blanket denial that the assault never took place.[161] The guilty verdict entered by the trial judge was vacated on appeal not because the accused contested consent but on the fact that the sexual act itself was never proven to have happened. In the second case, the complainant claimed to have dreamt that she was being raped, when she woke up she found the accused was sexually assaulting her, he was charged with indecent assault and found not guilty.[162]

In the *Kearn* case, the complainant was drunk when the accused found her. According to her testimony, he physically assaulted her, dragged her into the trunk of his car and took her home. She further recounted that she resisted going home with him because he was being aggressive. With respect to the sexual assault charge, the complainant stated that she had no memory of what transpired except that she woke up with pain while the accused was trying to remove her tampon. The accused testified that although the complainant was drunk, they had talked and she had sobered up before the sexual relationship which he said was consensual as she was happy to be home with him. He also stated that he had removed her tampon on several occasions before the reported incident. The court noted that even though the complainant might have been too impaired to drive, the sexual activity was consensual, ignoring the fact that the complainant had no recollection of the cat due to her impairment.[163]

It is particularly difficult to evaluate how and why judges come to the decisions that they make because judgment decisions on record are very minimal. However, the Supreme Court has noted in the *JA* case that consent requires an active mind that is capable of revoking consent. In

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[161] *NW*, *supra* note 130.

[162] *Smith*, *supra* note 129.

[163] *Kearn*, *supra* note 149 at para 70. (Note there were other inconsistencies with the complainant statement but she never had a recollection of the sexual assault. Notably the court found him guilty of assault because even though the assault may have resorted from him trying to get her into the truck, he was reckless to whether bodily harm occurred)

Ewanchuk, the Supreme Court also places the onus on the accused to take reasonable steps in circumstances known to him to ascertain consent. The fact that the complainant does not remember that the sexual activity occurred because she was too impaired should not have led to inference of consent but rather non-consent at least in respect of the *actus reus*. Consent in reference to the complainant has to do with the state of mind of the complainant at the time of the assault, which may be difficult to determine from an impaired complainant, except that she does not have a recollection of the event. Also, in *kearn* case, the court made no reference on record to the fact that the accused was trying to remove the tampon after the alleged sexual act. One would presume that a complainant may not have sexual relationship with a tampon still in her.

The *Kearn* case can be contrasted with the *Kinney* case,[164] except that the *Kinney* case does not involve spouses. The complainant testified that she was drunk and passed out in the bedroom. When she woke up, she found the accused was having sex with her. She pushed him off and walked out. The testimony of the accused was that they were together in the living room and walked into the bedroom holding hands. The Crown also conceded that witness would attest to the fact that the complainant willingly went to the bedroom with the accused. The complainant told the police something consensual might have happened but she had no recollection but noted that she could not deny what she did not recall. The court reasoned that it was possible some of the sexual act preceding the assault was consensual. However, citing *JA* and *Ewanchuk*, the trial judge stated that even if consent was obtained it could not apply to the period in which the complainant was unconscious as consent requires not just an active mind but must be

[164] *R v Kinney*, 2012 YKTC 51.

contemporaneous to the sexual act in question and revocable.[165] The accused was found guilty of sexual assault. This judgment was affirmed on appeal.[166]

Another case where consent was not put in issue is the *DC* case where the wife was charged with sexual assault because she allegedly kept her HIV status from her spouse without using protection during sex.[167] She was found guilty but the verdict was overturned on appeal and affirmed by the Supreme Court because allegedly the viral loads were such that the complainant was not at significant risk of contracting HIV and there was conflicting evidence in relation to whether they used protection.

In examining what constitutes consent in other cases where consent was contested, the decisions of the courts varied, showing both encouraging and damaging understanding of what constitutes consent. The defence of consent was raised in forty-two cases. This is not surprising since sexual assault often involves a she-said / he-said debate. In some cases, courts positively recognised that silence and passivity,[168] non-resistance,[169] attempting to rekindle romance,[170] fraudulently portraying oneself as a professional to obtain consent for an examination of a sexual nature,[171] or submission out of fear,[172] do not constitute consent. The court also accepted as evidence of non-consent a complainant who did not scream or yell out after saying no because the sexual assault took place with her son on the bed.[173]

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[165] *Ibid*.
[166] *R v Kinney*, 2013 YKCA 5.
[167] *DC*, *supra* note 107.
[168] *KM*, *supra* note 110 at paras 22,50.
[169] *MG*, *supra* note 115 at para 262.
[170] *BDN*, s*upra* note124 (the fact that the parties were separated seem to be a factor that also played a role in the decision. The court noted that they had a giving the growing conflict between the parties and the fact that they were separated, it was unlikely she would have consented voluntarily)
[171] *Mastronardi, supra* note 125.
[172] *RNA*, *supra* note 147 (kidnapping and assault preceded the alleged sexual assault).
[173] *KM, supra* note 110 at para 42.

While the above treatment of consent is positive, the problem, however, remains what several scholars have observed in some of these judgements: Some judges seem to implicitly or otherwise view consent in marital relationship as existing until withdrawn or non-consent communicated by some level of resistance.[174] In the *EKM* case, the trial judge noted that the accused who presumed that the complainant who was walking naked in her own home was inviting the accused to touch her might have been confused about lack of consent or mistaken the touching as playful until she expressly told him not to touch her.[175] In the *Labelle* case, a mentally-challenged complainant who "went along' during an otherwise consensual sexual relationship in which the accused allegedly became aggressive was presumed to be consenting because she did not communicate non-consent.[176] The court also rejected her evidence that on a separate occasion the accused pushed for sex to prove fidelity which she eventually gave in to though she was uninterested. In the *NR* case, it was noted on trial that when the police examined the room where the assault allegedly took place, there was no evidence of struggle or injury on the complainant. In the *WCH* case, the court noted with respect to most of the sexual assault charges that while the complainant indicated she was not consenting, she "did not verbalise her disagreement or communicate non-consent".[177]

The issue of revocation of consent was rarely brought up in the cases examined even though the definition of consent is often confused with revocation of consent. For example,

[174] See Randal, *supra* note 6; Lazar, *supra* note 6; Craig, *supra* note 5.

[175] *R v EKM*, 2012 NBCA 64 at para 17 (Note he was found guilty of the sexual assault which occurred after she had the conversation with him not to touch her and they were separated. The separation seems to help the court in reaching this decision).

[176] *Labelle*, *supra* note 110 (Note the accused was also mentally challenged and the court focused on the fact that the complainant acquiesced that she did not communicate consent).

[177] *R v WCH*, [2015] OJ 6579, 2015 ONSC 7729 at para 57[*WCH*] (Note accused was convicted of another sexual assault that occurred after she had hysterectomy and testified she yelled and cried in pain and also sustained injury to corroborate it)

expressions such as "verbalise" non-consent,[178] "protested physically and verbally,"[179] "did not resist physically,"[180] "did not indicate non-consent"[181] featured in some of the defence and Crown questioning and even judicial analysis of consent in the cases examined. I believe that questions regarding resistance and communicating non-consent are not at par with the definition of consent as voluntary agreement. Questions that go to communication of non-consent by lack of resistance may arise when the court is examining the *mens rea* of sexual assault which is consent in respect of the accused's state of mind as at the time of the sexual assault not when the state of mind of the complainant is being examined. To accept that a wife, or any woman, is in a perpetual state of consent till revoked is to reinforce the belief that a man can see "a pair of hips and help himself" to it.[182] This requirement also overrides the accused's responsibility to ensure that he takes reasonable step to ensure consent.

Revocation of consent is legally supposed to arise when a complainant who has voluntarily given consent to the sexual act in question withdraws such consent. In the cases examined, revocation of consent was addressed in three cases.[183] In these cases, one of the accused persons pled guilty, one was found guilty, while the last was found not guilty. In the *JJW* case, the accused who anal-fisted the complainant after she objected to him digitally penetrating her vagina during a consensual sexual relation was found guilty of sexual assault. In contrast, in the *ES* case, the complainant testified that on two occasions during a consensual oral

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[178] *Ibid*.

[179] *R v LI*, 2014 BCSC 2595 at para 96 [*LI*].

[180] *Tobac, supra* note 148 (The reasoning of the court in this case was positive. The court explicitly condemned spousal sexual violence and rightly identified the role of battered women syndrome. However, what I question is why the court thought it was necessary to note that although the complainant did not resist physically and it was understandable she didn't she rather kept begging him to stop especially since the accused agreed with the facts and pled guilty to the sexual assault).

[181] *WCH*, *supra* note 177 at para 57.

[182] Comments of Territorial Court Judge Michel Bourassa as quoted in Margo Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23:1 Ottawa L Rev 71 at 73.

[183] *R v ES*, 2015 ABPC 227; *R v JJW*, 2012 NSCA 96[*JJW*]; *Arloo*, *supra* note 125.

sex, the accused held her head so tightly and would not let her come up for air despite her struggles. The court noted that she did not communicate verbally or by conduct that she was withdrawing consent. In fact, the trial judge giving insight into his opinion of the state of mind of the complainant noted that he had reasonable doubt to believe that the complainant in her subjective mind got to the point where she withdrew consent.[184] What the court never made reference to was how the complainant would have withdrawn consent if she was incapable of doing so because her head was held down by the accused and she was unable to speak.

In the cases examined, nineteen of the accused persons introduced a blanket defence that the alleged sexual assault never occurred and was just a fabrication. Irrespective of the defence introduced, especially when the defence is consent or that the assault never happened, the important issue becomes assessing credibility and reliability of both parties. Assessing credibility in criminal cases is not a matter of whose narration is more believable as the accused is presumed innocent until proven guilty and the Crown has to establish guilt beyond reasonable doubt which means that any iota of reasonable doubt is to be resolved in favour of the accused. In spousal sexual assault cases and sexual assault cases generally, the issue of credibility is sometimes tied to the complainant's demeanor,[185] alcohol or drug use,[186] post-assault conduct (not leaving or staying in touch with the accused),[187] inability to explain delay in reporting,[188]

[184] *ES*, *ibid* at para 59.
[185] See e.g. *R v RL*, 2013 ONSC 1247.
[186] *Kearn*, *supra* note 149*; CDH*, *supra* note 128 at para 42.
[187] See e.g. *R v DS*, 2013, ONCA 244 [*DS*]; *BJW*, *supra* note 155.
[188] See e.g *R v MJ*, 2011 ONCJ 412 [*MJ*]; *NR*, *supra* note 116 at 109.

timing of report which is often tied to custody battle or wanting out of the marriage,[189] as well as post-conviction conduct.[190]

In the ninety cases examined, the credibility of the complainant was questioned in sixty-three cases by the defence and addressed by the court.[191] There were decisions of the court that assessed credibility favourably for the complainant. In the *WCH* case, the court rejected the fact that the complainant's credibility was tainted because she might have entered into a new relationship while the accused was on trial. In the *BS* case, the complainant was described as a credible and reliable person who accepted her shortcomings and expressed regrets for her past bad choices.[192] In the *MQ* case, the complainant was described as having "no sense of agenda or vengeance" and also the court noted that she did not exaggerate. The accused was found guilty.[193]

However, there were cases where the court expressed discriminatory comments about complainant's credibility. In the *JSS* case, the court noted that the complainant kept in touch with the accused shortly after the alleged sexual assault.[194] In *MJ,* the court noted that it was not in its place to speculate on the reason for the delay in reporting the sexual assault. However, the court further stated that such omission could be presumed to mean that the complainant was more preoccupied with not being ejected from the house by him than the sexual assault, thus inferring

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[189] See e.g *R v TS*, 2012 ONCA 289 [*TS*] (the trial court rejected the inference to credibility and custody battle).

[190] *Ibid* at paras 133-37 (the accused appealed the conviction because his wife after his conviction began to seek custody and use his conviction as a weapon. Also because the charge of assault she made against him about his child was unproven). But See *KM,* 2013 ONSC 1271 at paras 68,77 (the complainant credibility was bolstered by her demeanor which revealed someone who was not vengeful and wish to reconcile with the accused).

[191] This is with the exception of cases where the accused pled guilty, the three cases where the complainants were asleep and saw videos and woke up during the assault and cases where I could not find trial records or the trial was by a jury.

[192] *BS, supra* note 124 at para 169.

[193] *MQ, supra* note 116 at para 124.

[194] *R v JSS,* 2015 BCSC 1369 at para 31.

that this fear of ejection might be the motive for the charge. The accused was acquitted.[195] In the *NR* case, the court noted that one would expect a complainant to remember the sequence of the sexual assault, that is, whether the alleged non-consensual oral sex preceded the vaginal or otherwise.[196] The accused's evidence of consent was accepted and he was acquitted. In the *Labelle* case, the court stated that the complainant, a person with mental disability, "was not a stranger to deceit"[197] because she had allegedly lied in respect of her living arrangement with the accused to get a welfare cheque. The accused was acquitted. In the *CDH* case, the trial court examining the credibility of the complainant stated that "she did not certainly give [him] the impression that she was in any way an abused woman or was insecure."[198] The complainant in question was allegedly assaulted by an estranged spouse against whom she had a no contact order. The trial judge noted that her job as a personal trainer involved going to people's homes which meant that she must be independent. The judge described her attitude on trial as "border[ing] on being rude".[199] The accused was acquitted of the sexual assault but found guilty of assault, little discussion was recorded regarding the complainant's evidence of the sexual assault itself.

In the *DS* case, the court echoed the reasoning of the defence when it noted that the complainant "knew that if [the accused] was convicted of the serious charges before the Court…he would be deported back to India, noting that "[s]he knew how to do this because she did it before with respect to her first husband".[200] Notably, this same line of reasoning was rejected by the trial court in the *EKM* case where the accused alleged that the complainant

[195] *MJ*, *supra* note 188 at paras 31-36.
[196] *NR*, *supra* note 116 at para 105.
[197] *Labelle*, *supra* note 110 at para 7.
[198] *CDH*, *supra* note 128 at para 33.
[199] *Ibid* at para 33.
[200] *DS*, *supra* note 119 at para 66.

fabricated the allegation in order to get him deported. The court noted that given the allegation against the accused, it was understandable, if the family wanted him to leave. The accused in the case had been charged with sexual assault of his wife and his children.[201]

The general undertone evident in the court's assessment of consent shows that while some judges focus on the legal requirement of consent as voluntary agreement, there are judges who implicitly require and do not curtail questioning with respect to the level of resistance put up by the complainant in order to establish non-consent, sometimes requiring an explanation for lack of resistance.

Honest but Mistaken Belief in Consent

In the cases examined, it is difficult to determine the role the defence of honest but mistaken belief played in most cases, especially in jury trials where judgment was delivered orally or with minimal reasoning. However, I found eleven cases where the court addressed this defence.[202] Out of the eleven cases, the defence of honest belief was rejected by the trial court in nine cases, while it was accepted in one case.[203] At the appeal level, one of the decisions was overturned because the trial court wrongfully rejected this defence.[204] One recurring theme in ten out of the eleven cases was the presence of assault preceding the sexual assault in question and the presence of separation or conflict between the spouses. The circumstances identified in these cases indicate that the defence is not available for an accused who does the following: kidnaps and tortures the complainant prior to the sexual act or proceeds after the expression of non-

[201] *EKM*, *supra* note 175 at para 17.
[202] See *JRS*, *supra* note 142; *R v DGS*, 2013 SKCA 6 [*DGS*]; *JSY*, *supra* note 110; *WCH*, *supra* note 177; *BDN*, *supra* note 124; *JH*, *supra* note 124; *R v AP*, 2011 ONSC 2716 [*AP*]; *RL*, *supra* note 185 [*RL*]; *JRS*, *supra* note 142; *Marvos*, *supra* note 129; *Ahmadzai*, *supra* note 140.
[203] See *RL*, *supra* note 185.
[204] *R v AP*, 2013 ONCA 344 [*AP CA*].

consent,[205]assaults and confines the complainant,[206] proceeds with the assault in the face of pain, screaming and yelling,[207] or did not discuss sex but proceeds in the face of growing conflict and accompanies such sexual assault with physical assault.[208]

However, in the *RL* case, although the defence of honest belief is not fully addressed, the trial court accepted that the accused was honestly oblivious to lack of consent. The court stated that it accepted the accused initiated sex to show affection and accepted his narration that the room was dark during the sexual act and he did not know the complainant was crying till he heard her sniffing. There was no discussion as to whether the accused took reasonable steps to confirm consent. The wife's testimony was inconsistent as to how the sexual assault occurred. Accepting the accused's version of event, the court found that the accused had no knowledge the complainant was crying.

In the *AP* case,[209] the trial judge rejected the defence of honest but mistaken belief in consent but the appellate court reversed the decision and ordered a new trial. The accused and the complainant agreed that they had practiced bondage sex, with the wife usually the submissive, but they varied in their testimony on the limitations of the practice. The complainant testified that due to her traumatic sexual assault experience as a pre-teen she explicitly told the accused that she would not feign unwillingness or allow the use of force. She claimed that she had been sexually assaulted by the accused on other occasions. The accused testified that he sometimes imagined their sex life was role play and sometimes not.[210] As to the sexual assault in question, the accused testified that on the day in question the complainant was engaging in a

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[205] *JRS, supra* note 142; *DGS, supra* note 202, *JH, supra* note 124.
[206] *Marvos, supra* note 129.
[207] *WCH, supra* note 177.
[208] *BDN, supra* note 124.
[209] *AP, supra* note 202 at para 45.
[210] *Ibid* at para 45.

wrestling with a neighbour and he got aroused by it. He claimed that she walked into the room and laid beside him with her back to the wall. He stated that he grabbed her saying "you want it don't you" and she said "no". [211] He claimed the no was in a submissive voice and he took it to mean yes.[212] He further stated that she was receptive and active during the act. He told her the next morning that he enjoyed it and she said she did not. When asked to clarify why he thought no meant yes, he noted at trial that it was possible she did not want the sexual act but she never used the safe word which he claimed was "cabbage".[213] The complainant testified that to the contrary that she came into the room, he grabbed her, choked her and said he was going to "fuck her and take what was his."[214] She said she cried and fought, he told her that she "knew this was coming." When he finally ejaculated, she went into the washroom and kept running the shower. She said they had no safe word because they never practiced forced sex. She claimed that she woke up the next morning and the accused told her that last night was awesome to which she replied that "it was rape".[215]

The trial judge in the *AP* case noted that the accused could not reference any instances of victim/assailant role between the parties except a student/teacher role and a failed attempt at assailant/victim role during their honey moon. The trial judge also noted that the accused's narration of the victim/assailant role did not mirror the aggressor/submissive role but seemed like an attempt to deceive the court.[216] He found the accused guilty. On appeal, the conviction was vacated for different reasons but the one that stood out was the discussion of the trial judge's failure to determine if in the relationship between the complainant and the accused "no" could be

[211] *Ibid* at para 52.
[212] *Ibid* at para 46.
[213] Ibid at para 91.
[214] *Ibid* at para 15.
[215] *Ibid* at para 17.
[216] *Ibid* at para 29.

said to mean "yes".[217] The court of appeal noted that the trial judge focused on the assumption that victim/assailant role meant being physically aggressive while the accused said being aggressive did not mean force but rather in the use of aggressive language. This reasoning ignored the decisions of the Supreme Court in several cases that consent is either present or absent,[218] that is, it is active, requires a conscious mind and should be contemporaneous to the sexual act in question.[219] More importantly, it ignored the fact that the accused had the onus of taking reasonable step to ensure that the complainant was consenting to that particular sexual act. An approach that precludes express agreement to the sexual act in question violates the provisions of the *Criminal Code* and the very tenets of equal protection of the law.

A review of the cases on honest belief shows a slightly positive trend. However, the appellate court decision in the *AP* case leaves one with questions about honest belief in consent where there is a viable marriage. As will be shown in the next cases, the presence of previous rough sex or role play seems to be a ticket for the introduction of evidence of past sexual history.

Evidentiary Procedures: Judicial Requirement of Corroboration and Recent Complaint

The *Criminal Code* expressly prohibits the requirement of corroboration and recent complaint. This means that references to the fact that the complainant did not make an immediate complaint or that her evidence needs independent support should not be a requirement nor have adverse effect on the case. In the ninety cases reviewed, the issue of timely disclosure and timing of disclosure was found relevant to motive and credibility. The court noted in the *MJ* case, the trial court acknowledges that victims of sexual assault may not disclose in a timely manner and

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[217] *AP CA*, *supra* note 204.

[218] *Ewanchuk*, supra note 39 at para 31 Major J (as he then was).

[219] *Park*, *supra* note 41. *See also*, *Esau*, *supra* note 41 at paras 34,49-51,64-68 Mclachlin & L'Heureux-Dube dissenting; *JA SC*, *supra* note 2 at para 65 McLachlin J (The affirmative, contemporaneous and requirement of conscious mind approach to consent applies to spouses).

noted that there was no legal requirement for timely disclosure. The court however went further to state that this does not alleviate the burden of explaining why there was delay in disclosing and what eventually prompted disclosure. In cases where the complainant did not make a timely disclosure, the court usually demands an explanation to confirm what prompted disclosure in order to rule out a motive to fabricate allegation.

The court accepts different explanation for delay in reporting, mostly based on the full facts of the case. In the *RL* case, the court accepted fear of estrangement and cultural implication for extended family,[220] fear that family would break up and difficulty in telling family of sexual assault was accepted in the *MG* case.[221] The complainant's ignorance on the fact that spousal sexual assault was a crime was rejected in the *AC* case, because according to the court, the complainant was no longer the naïve girl that immigrated to Canada. She had acclimatised to the Canadian way. However, the same explanation was accepted in the *HE* case because the complainant did not make the report and she presumably had no motive to fabricate allegation and expressed shock at the legal implication of the accused's action. In *WCH* case, the court accepted that the complainant felt demeaned and was afraid of the accused to whom she was still married.[222] In *the LW* case, the court rejected the complainant's excuse that she reported when the accused, her ex-spouse, showed up years later and threatened her daughter.[223] In the *NR* case, the court also rejected the argument that the complainant was more concerned about her safety which accounted for why she did not mention the sexual assault but only the husband's

[220] *RH*, *supra* note 110 at para 76 (the court noted she was still estranged from her father for reporting the sexual assault).
[221] *MG*, *supra* note 115 at paras 258, 264.
[222] *WCH*, *supra* note 177 at para 50.
[223] *R v LW*, 2012 ONCJ 270 [*LW*].

aggressive behaviour the night when she spoke with a 911 operator and first responding officers.[224]

The negative implication of relying on recent complaint is well exemplified by the *Collins* case.[225] The complainant and the accused started a relationship when she was fourteen and he was fifteen. She became pregnant at fifteen and they moved in together. The accused was charged with multiple counts of assault and sexual assault. In relation to the first to third sexual assaults, the trial judge rejected the complainant's explanation that her untimely disclosure was due to the fear of the accused. The judge reasoned that since she had the wherewithal to report an assault charge sometime in June 2006 and developed courage to break up with the accused, being afraid was not an excuse that "rang true".[226] In respect to the last sexual assault which allegedly happened in November 2006, the court noted that even though the assault occurred while she was seventeen, she had developed courage after the break up and report of sexual assault and the threat of the accused who was at the time in breach of a no contact order and his threat to harm her might have been responsible for untimely disclosure. The accused was found guilty of the last count of sexual assault. On appeal, fresh evidence was introduced as the error in the date of the phone charger assault as occurring in June 2007 as opposed to April 2006. The appellate court noting the important role the timing of disclosure and its relationship to the assault played in the trial court's finding of guilt and drawing of distinction between the four alleged sexual assault, quashed the conviction and ordered a new trial.[227] The entire case turned on the trial judge's pre-occupation with a reasonable explanation for untimely disclosure.

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[224] *NR, supra* note 116 at para 109.
[225] *R v Collins*, 2012 ONSC 6571.
[226] *Ibid* at para 20.
[227] *R v Collins*, 2015 ONCA 561.

The requirement of corroboration is another way judges assess the credibility of complainants. In the *LW* case, the judge referred to corroboration as a matter of "common sense".[228] He described it as independent testimony that makes the trial fact-plausible. The accused was acquitted because among other things there was no evidence of injury or fact that the complainant sought medical attention. In *R v SW*, the judge described the evidence by the complainant's sister as unreliable witness whose evidence required corroboration by the complainant while also stating that the complainant's evidence was not corroborated by the sister. The accused was acquitted despite the judge acknowledging that it was unlikely the complainant would consent to sex after a confrontation.[229] In *R v AM*, the court noted that there was no medical evidence and phone records to corroborate the complainant's testimony, although he was quick to point out that corroboration was not a legal requirement but an inference to how difficult it could get to assess credibility without such corroborating evidence. The accused was acquitted.[230] In *R v BJW*, the court stated that while it is inconceivable that a person would consent to twelve-inch-wine bottle and fist being inserted into her vagina, he did not see any corroborating evidence such as medical report or injuries.[231]

The cases examined above exposes the limitations inherent in some judicial understanding of the dynamic of power relations in spousal sexual assault cases. First, corroboration and recent complaint are jettisoned legal requirement under the Canadian *Criminal Code*. However, the question that remains is why they play such significant role in judicial assessment of spousal sexual assault cases. These requirements come from a patriarchal

[228] *LW*, *supra* note 223 at para 54.
[229] *R v SW*, 2016 ONSC 287 at paras 19, 28,29.
[230] *R v AM*, 2014 ONSC 5328 at paras 88-89.
[231] *BJW*, *supra* note 155 at para 61(a).

assumption that women have tendencies to fabricate a sexual assault charge. They ignore the social context within which sexual assault occurs in spousal relationship.

The requirement of recent complaint in the form of giving satisfactory answer for delay in reporting is problematic and ignores the nuanced relationship between spouses. For example, in the *BDN* case, the complainant is noted to have pled for the accused to be released because his incarceration would result in financial difficulty to her. The parties had a joint business, shared responsibilities of child care, and she could not afford to hire a babysitter or a co-worker.[232] This woman had been subjected to humiliating encounters, being tied to the bed, flogged, her pubic hair shaved and being vaginally penetrated without her consent. She also had to go through the court process to narrate this ordeal in details. In *Arloo* case, the complainant also asked the court to forgive the accused and have him return home to her.[233] The accused in question had been arrested on several occasion for assaults that led to the complainant being hospitalised. These assaults included inserting his whole hand into her vagina, tearing a part of the inner portion of her mouth, forcing her to attempt suicide while threatening to insert a knife in her vagina. In *HE*, the complainants (ex-wife and children) wanted the accused to seek help for his anger issues and hoped he would not be sent to jail. The accused in this case had not only sexually assaulted his wife repeatedly but had locked the children outside barefooted in a 40-degree winter. These three cases serve as pointers to the importance of nuanced examination of the power play in spousal relationships, which demands expert evidence, may be necessary when examining spousal sexual assault.

[232] *BDN, supra* note 124 at paras 5,6.
[233] *Arloo, supra* note 125 at paras 41. See also *HE, supra* note 115 at para 14.

Past Sexual History and Production of Personal Records

Evidence of past sexual history was used for different purposes in the cases examined. Some of these reasons included the following: to support a defence of honest but mistaken belief in consent, to show that another person other than the accused may have committed the offence, or to challenge credibility. The most prominent appearance of the use of past sexual history was in cases where the parties allegedly engaged in prior rough or kinky sex. The reasoning of the court for allowing such application may be inferred from the *JSS* case where the trial judge noted that anal intercourse and presumably bondage sex between spouses in heterosexual union might sometimes fall on the spectrum of aberrant sexual behavior, one to which a woman would most likely not consent.[234] Thus, evidence of past sexual history may be necessary to provide context so that juries do not assess the credibility of the accused too harshly in the absence of such context.[235]

Part of the 1992 amendments to the *Criminal Code* requires that the defence bring a motion before the court which will determine if there is a reasonable ground for the application of past sexual history before conducting an evidentiary hearing on such an application.[236] This study found fourteen cases where evidence of past sexual history between the parties was referenced and one case where the court stated that the application was made but later dropped.[237] However, only ten out of the fourteen applications could be located. In the ten cases,

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[234] *JSS, supra* note 120 at para 39.

[235] *Ibid.*

[236] Note, application for past sexual history only applies to evidence to be adduced by the defence. There is no requirement for application where the Crown is leading evidence of the sexual relationship between the parties either to create a context or debunk a defence of honest belief in consent. See e.g. *R v ENG* 2015 MBQB 95 at para 10.

[237] See *Ibid; JSS, supra* note 194; *TS,* 2012 ONSC 6244 [*TS*]; *DGS, supra* note 202; *AP, supra* note 202; *R v AC*, 2014 ONSC 1512; *R v SB*, 2014 NLTD(G) 61[*SB*]; *BRE, supra* note 129; *JW, supra* note 110. See *HE, supra* note 115 (application was dropped). See *R v WCD*,2012 MBQB 128 [*WCD*]; *JH, supra* note 124 (rejected in part); *BDN, supra* note 124; *EKM, supra* note 175 (no record of application but prior sexual history was referenced without noting if the Crown introduced it on direct examination).

the application was granted in nine cases, at least in part, and rejected in one.[238] A review of the applications shows that judges often err on the side of the accused while noting that they could review the application during the trial process based on the evidence of the Crown.

Aside from the cases where I found applications for the introduction of past sexual history, there were cases where past sexual history was referenced at trial. In the *BDN* case, past sexual history between the parties was used to support a defence of belief in consent though there was no record of an application and the trail judge did not make reference to an application.[239] The accused testified that his honest belief arose from the fact that the complainant went to shower before coming to look at the financial document. He stated that she often took a shower before sex as a routine in their normal sexual activity and also that tying and flogging was part of their sexual role-playing and bondage sex.[240] The court noted that the complainant also agreed that they had engaged in prior bondage sex. It was not clear if this acknowledgment came during cross-examination or direct examination.[241] In the *EKM* case, the appellate court noted that trial judge's comments on the defence's belief in consent showed that he accepted the argument that the accused may have been initially confused as to consent to his playful touching because "[t]hey had always done this while they were together".[242] In the absence of a full trial record, it is unclear how this evidence was introduced on trial.

In the *WCD* case, the trial court rejected the application for past sexual history on the ground that it would lend little information to the fact in trial. The accused alleged that the complainant lied at the preliminary inquiry when she stated that the accused was the father of her

[238] *WCD, supra* note 237.
[239] *BDN, supra* note 124.
[240] *Ibid* at para 14.
[241] *Ibid* at para 21.
[242] *EKM, supra* note 175 at para 17.

unborn child and also that he transmitted an STI to her. The Crown's argument was that the defence application failed to meet the requirement of sections 276(2)(a) and 276.1(2)(b) of the *Criminal Code* and was a fishing expedition as it did not set out the particular sexual activity and its relevance to the case. The court agreed with the Crown stating the defence application was not only speculative but may likely proffer no relevant evidence to facts in issue.[243] In the *JH* case, the court while allowing the accused to question the complainant's past sexual history between them disallowed him from adducing evidence of past sexual history between the complainant and her ex-husband to show that she once made an unproven allegation of sexual assault against him.[244]

One case where the court rejected the myth that the complainant is more likely to have consented due to previous sexual interaction during an application for the use of past sexual history evidence is the *DGS* case.[245] The accused appealed his conviction on the ground that the trial judge did not properly inform the jury on the use of past sexual history evidence. He argued that it was necessary for the judge to inform jury on post-separation conduct that might support the defence of honest belief. The appellate court upheld the conviction on the ground that the trial judge was right in telling jury that the evidence could not be used to support the myth that the complainant was likely to consent. There is no record of an application, so it is difficult to determine why the evidence was allowed in the first place. The accused in this case was separated from the complainant, went to her place unannounced and they talked about their children's schedule. He initiated sex, and she refused, pushed him off a little and told him "you know me, I can't do this, just to do it."[246] He claimed he stopped but later they had consensual

[243] *WCD, supra* note 237 at paras 20-28.
[244] *JH, supra* note 124.
[245] *DGS, supra* note 202.
[246] *Ibid* at para 4.

sex. He stated that she did not stop him when he pulled her shorts. He later heard her crying in the bathroom and subsequently sent her series of messages apologising and asking if she was going to report to the police. His argument was that her conduct was synonymous to that which she usually showed when she wanted sex during their marriage.

Also in the *ENG* case, the defence proffered different reasons for wanting to adduce evidence of past sexual history including questioning the complainant, who was a sex worker at the commencement of their relationship, as to whether she continued in the occupation during the relationship in order to explain the injuries she alleged arose from the sexual assault. The record on trial showed that the complainant had an arrest record for prostitution for an offence that presumably occurred after the commencement of their relationship. The court noted that the defence could not state with certainty that the complainant was engaging in sex work or sexually with anyone immediately prior to the alleged sexual assault. The court nonetheless allowed the evidence on the ground that it was of a specific sexual activity because it "relates to sexual activity that the complainant **engaged** in with others in the few days' prior" to the alleged assault.[247][emphasis added] Ironically, the court noted that while this would allow the defence to make full answer and defence, the protection of the dignity and privacy of the complainant requires the defence to limit the question to a three-day period preceding the alleged sexual assault.[248]

In reference to the cases examined, evidence of past sexual history is allowed to attack credibility when the complainant testified that she would never consent to anal sex.[249] Electronic evidence of complainant conversation with the accused about engaging in anal sex was

[247] *ENG, supra* note 236 at para 37.
[248] *Ibid* at para 38.
[249] *JSS, supra* note 120; *SB, supra* note 237.

allowed[250] in order to establish a date range for the beginning and/or end of sexual relationship,[251] in order to attack credibility to a complainant who claimed she never cheated on the accused,[252] to establish that rough sex had been part of the parties' normal sexual relationship,[253] to show that a person other than the accused may have been responsible for the injury arising from the alleged sexual assault,[254] to show whether the complainant was, at the time of the alleged sexual assault, engaging in sex work,[255] to create a context for the defence of belief in consent as to whether the parties had a safe word or played submissive/dominant role in order to explain the "modulated role playing submissive voice" with which the complainant said "no" to the sexual act being subject matter of the charge and to explain the behaviour of the complainant that might lead to inference of consent,[256] and to show evidence of post-offence conduct that the parties engaged in numerous consensual sex after the alleged sexual assault.[257] It was allowed in the *JW* case to show evidence of pre-allegation conduct that might speak to motive of fabrication.[258]

While the introduction of past sexual history evidence may not necessarily mean that the accused will be acquitted of the charges, it does not detract from the potential prejudice and the likely violation of the complainant's privacy and sexual integrity when the evidence is bared in Court. Also, using past conduct to give reasonableness to belief in consent may preclude any legal protection or benefit arising from the notion of affirmative, contemporaneous and revocable

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[250] *JSS, supra* note 120, *SB, supra* note 237 (this was allowed to question credibility because she put forward to the police that she did not like anal sex).
[251] *JJW, supra* note 183 at paras 23 – 31.
[252] *SB, supra* note 237.
[253] *ENG, supra* note 236 at para 24 (note court stated that it may not allows this evidence at trial depending on the evidence of the complainant).
[254] *TS, supra* note 237.
[255] *ENG, supra* note 236.
[256] *Ibid* at para 14-15.
[257] *Ibid* (court note that it will not be an open ended questioning).
[258] *JW, supra* note 110 at paras 18-22.

consent. If the decision of the appellate court in the *AP* case is anything to go by, then a complainant who had previously engaged in bondage sex is at the mercy of the accused and may have to employ extreme violence to indicate non-consent.

In relation to the production of complainant's personal record, accused persons facing spousal sexual assault charges hardly make a formal application for these records. In the cases examined, there were only three cases where the defence made a formal application for the use of complainant's private record.[259] Two of the applications were in relation to the complainant[260] while one related to the children who the accused also allegedly assaulted.[261] This is not remarkable since the accused is likely to have knowledge of most of the intimate details about the complainant and likely know if such private records exist. For example, in the *WCD* case, the accused applied for counselling record where the complainant alleged she told her counsellor about the sexual assault. The counselling session in question was attended by both parties. The court granted the application limiting the records to any reference to the alleged sexual assault. One case that may have benefitted from the introduction of third party record was the *AP* case where the complainant testified that the accused admitted to the sexual assault during a counselling session. However, there was no record of such document during trial.[262]

An examination of the cases above reveals varying decisions in judicial assessment of spousal sexual assault cases. While it appears that some judges are catching up to the decision of the court in *JA* and also applying the ruling in *Ewanchuk*, there are still judges who infuse

[259] There was one case where the court hearing an application to stay prosecution pending the appointment of a counsel noted that there was the likelihood that the accused will made an application to introduce third party record and past sexual history but there is no record of the trial. See *R v Furster*, [2016] OJ 1443

[260] *WCD, supra* note 237; *AC, supra* note 237 (this related to the Children's Aid Society's interview with the wife and kids. The accused was also charged with sexually assault his children, the application was allowed in part).

[261] *R v SYD,* 2014 ONSC 1416 (the record was counseling records for the kids and the court rejected the application upon review of document).

[262] *AP, supra* note 202 at para 48.

damaging myths and stereotypes about women into their analysis of spousal sexual assault cases, especially when assessing consent and credibility.

Spousal Sexual Assault and Substantive Equality

The Supreme Court in *Ewanchuk* noted that sexual violence is as much an equality issue as it is a violation of women's rights and dignity.[263] The aim of the equality provision of the *Charter* is to even up the position of historically disadvantaged group in society. This vision of equality means that laws and policies should not place additional burden or deny benefit to such disadvantaged group. Inequality can arise from prejudice and stereotyping or the intersection of factors such as race, gender, and class, which is why substantive equality requires a contextualised and purposive interpretations of laws and policies in order to ensure that myths and stereotypes did not motivate reasoning.[264] Justice McLachlin writing for the majority in *R v Mills* affirmed that the "Parliament may also be understood to be recognizing 'horizontal' equality concerns, where women's inequality results from the acts of other individuals and groups rather than the state, but which nonetheless may have consequences for the criminal justice system".[265]

While section 15 of the *Charter* does not bind individuals to this vision of equality, it does however bind government and state actors to these equality principles.[266] One of the most prominent cases that exemplifies the importance of applying these equality principles to relationships across all levels of society is the Jane Doe's case where the Police was found in breach of the equality rights of women for its failure to inform potential victims of rape about a

[263] *Ewanchuk, supra* note 39 at 362 L'Heureux- Dube J.

[264] *Quebec v A, supra* note 103 at para 319. See Taypotat, *supra* note 103 at para 20; *Ewanchuk, supra* note 39 at para 90. See also *R v B(W),* [2000] OJ 2184, 145 CCC (3d) 449 at para 146 (Ont. CA) [*B(W)*]

[265] *B(W), ibid* at 59, 90.

[266] Note this does not preclude a complainant from instituting a civil action in respect of sexual assault and claim damages for the spousal sexual assault. See e.g. *DG v RM*, 2012 SKQB 296; *Pilon v Nahri*, [2006] OJ 2640, 149 ACWS (3d) 717 (Ont. SCJ).

serial rapist in their neighbourhood. The police was also found in violation of the right of the complainant to security of person under section 7 of the *Charter*. The action of the police was found to be based on myths and stereotypes about rape victims.[267] By extension, the Supreme Court noted that prosecutorial discretion and judicial review of sexual assault cases should be motivated by the principles of substantive equality.[268] This means an identification and rejection of myths and stereotypes that implicitly propel evidentiary procedures and assumptions in adjudication of spousal sexual assault cases. This view is not a creation of a contest of rights between the accused and the complainant, or a "battle between feminist and defence lawyers". Rather, it is a focus on "promoting convictions of guilty persons and not clouding the issue with evidence of collateral issues which may tend to prejudice the trier of fact".[269]

In the cases examined, substantive equality plays no significant role in judicial examination of cases and when it does, the attention paid to it is very minimal. For example, on the issue of culture and response to the criminal justice system, some judges seem to have an understanding of the impact of culture and sexual violence on a victim and how such violence may play out in responses to the accused and the justice system. However, most judges, even where the verdict is positive, seem to place little attention on the principle of equality when assessing female visible minorities, especially new comers' response to the criminal law. There are areas of spousal sexual assault trial that will benefit tremendously from a substantive-equality interpretation: the use of past sexual history evidence, the requirement of recent complaint, the defence of honest but mistaken belief in consent, and the understanding of consent and its fluidity even in spousal union. Rules that fail to protect victims of spousal "…sexual assault

[267] *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] OJ 2681 (Div Ct), [1991] OJ 3673 (CA).

[268] *Mills, supra* note 101.

[269] Christine Boyle, "Section 142 of the Criminal Code: A Trojan Horse?" (1981) 23 Crim LQ 253 at 265.

[perpetuate] the disadvantage felt by victims of sexual assault, often women.… The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong".[270]

Conclusion

This chapter examined the developments of sexual assault laws in Canada and how these laws apply to spousal sexual assault cases. It examined how the Parliament made efforts to ensure that there is legal protection for women. It also examined judicial application of these laws to spousal sexual assault cases. The chapter highlighted some shortcomings and relative strengths in the evidentiary procedures applied to spousal sexual assault cases. It exposed how judicial reasoning with respect to spousal sexual assault is both negative and positive by showing that even in the event of criminalising spousal sexual assault, there is still need for a corresponding substantive-equality interpretation which recognises and rejects the infusion of myths and prejudices into the adjudication of spousal sexual assault.

The cases revealed mixed understanding of the required elements and evidentiary procedures when assessing spousal sexual assaults. Some judges positively promote affirmative consent; however, most judges seem to promote the belief that proof of the *mens rea* of consent requires some level of resistance by the complainant. Also, in the absence of growing conflicts between the couples, the requirement of reasonable steps to ascertain consent is sometimes ignored especially when the parties have a history of role-playing or bondage sex. More outrageous is the finding that corroboration and recent complainant, contrary to their abolition in Canadian *Criminal Code* seem to play a very pivotal role in adjudicating spousal sexual assault cases and are often responsible for the outcome of a case. Moreover, judges almost always

[270] *Ibid* at para 30

neglect the role of equality when assessing application to introduced evidence of for past sexual history. All these observations threaten the positive impact the law on sexual assault cases can have as a deterrent or an avenue for justice for victims of spousal sexual assault.

The next chapter reiterates some of the broader implications of spousal sexual assault legislation that adopts an essentially formal-equality approach as obtained in Nigeria. It also highlights the pitfalls for a half-hearted application of substantive-equality approach to spousal sexual assault adjudication, particularly as observed in some cases in Canada. Following summaries of these broader implications of not consciously and committedly approaching spousal sexual assault from an attitude of substantive equality are recommendations on how to undermine some of the shortcomings discussed in this study regarding spousal sexual assault adjudication.

Table of Cases

R v BSS, 2015 ONSC 3330. See also *R v Bates*, 134 OAC 156, 2000 CanLII 5759 [Appeal of sentence by Crown-same case].

R v Burke, [2014] BCJ No. 2667 [trial]. See also 2014 BCSC 2082 [sentencing].

R v CAG, 2014 ABQB 119 [application by crown to review bail].

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R c DC, 2008 QCCQ 629 (CanLII) rev'd *DC v R*, 2010 QCCA 2289 [appeal from the judgment of the Quebec court of appeal] aff'd *R v DC*, 2012 SCC 48, [2012] 2SCR 626. [2011] SCCA no 137 [2011] C.S.C.R. no 137. See also [2011] SCCA. No. 137 [2011] CSCR no 137 [application for leave to appeal and other motions] 2010 QCCA 276 [court of appeal, oral judgement in French] 2009 QCCA 1687. See also 2008 QCCA 1568. See also 2008 QCCA 504.

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R v DMC, 2015 ONSC 1726.

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R v Field, 2015 BCSC 2282 [sentencing] 2014 BCSC 2040 [application to declare a dangerous offender].

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R v HE, 2015 ONCA 531.

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R v JH, 2012 NLTD(G) 122 [trial] 2012 NLTD(G) 174 [sentencing] Aff'd 2014 NLCA 25[appeal of conviction dismissed]. See also 2012 NLTD(G) 32 [application for past sexual history] See also 2012 NLCA 77 [application for release pending appeal].

R v JH, 2013 ONCA 693 [appeal of conviction].

R v JJW, 2012 NSCA 96 [appeal against sentence by Crown].

R v JMH, [2012] PEIJ 10, 2012 PECA 6 [appeal of conviction allowed and new trial ordered]. See also *R v Hanlon*, 2011 PECA 8 [application for interim release pending appeal dismissed].

R v JRS, 2013 BCSC 1363 [original reasoning] see also [2013] BCJ 2881, 2013 BCSC 2413[sentencing].

R v JSS, [2014] BCJ 3375. See also 2015 BCSC 1369 [sentencing].

R v JSY, 2013 BCCA 451 aff'g 2011 BCSC 1280.

R v JTM, 2014 ABPC 125.

R v JW, 2009 ABQB 332 [application for past sexual history] 2011 ABCA 285 [appeal of conviction].

R v Kearn, 2012 SKQB 531 aff'd 2014 SKCA 15 [sentence and conviction appeal].

R v KM, 2015 ONCJ 680.

R v KM, 2013 ONSC 1271 [trial] aff'd 2015 ONCA 582.

R v Labelle, [2015] 2015 ONSC 696.

R v LAM, 2010 ONCJ 742, 2011 ONCJ 387 [sentencing] aff'd 2013 ONCA 113 [appeal of conviction dismissed].

R v LI, 2014 BCSC 2595 [trial] 2014 BCSC 2550 [sentencing] 2015 BCCA 446 [application for counsel for appeal].

R v LS, 2014 ONSC 5456 [application to edit criminal record]

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R v Mahal, 2012 ONSC 2314 [appeal of conviction].

R v Mantla, 2012 YKTC 52. [application to cross examine complainant at preliminary inquiry]. See also 2012 YKSC 73 [application for review of detention].

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R v MG, 2012 ONSC 5722 [appeal of conviction and sentence dismissed].

R v MJ, 2011 ONCJ 412.

R v MQ, 2010 ONSC 61 aff'd *R v Q(M)*, 2012 ONCA 224, 110 OR (3d) 276 [appeal of conviction and sentencing].

R v NJD, 2013 NBQB 184.

R v NR, 2012 ONSC 6611.

R v NW, 2013 ABCA 393 [appeal allowed].

R v OEC, 2013 MBCA 60 [appeal by accused of a dangerous offender designation].

R v Onyaditswe, 2015 ONSC 4995 [appeal from conviction and sentencing].

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CONCLUSION

> Substantive equality is grounded in the understanding that true equality requires a critical examination of unspoken assumptions, traditions, and myths; instead of a simple formalistic like-treated-alike, substantive equality can require substantive change that will ensure the accommodation of differences.[1]

One of the most complicated subjects in the history of sexual assault in Canada and Nigeria is legislation involving sexual assault in the marital context. From early argument about whether a husband could sexually assault his wife to more recent argument about evidentiary procedures, spousal sexual assault laws and the adjudication of spousal sexual assault cases in general remain heavily contested. Notwithstanding the redefinition of marriage from a formal traditional heterogamous union to include a broader range of unions of partners formally and/or informally involved, spousal sexual assault cases are still being legislated and adjudicated based on certain stereotypical assumptions that hamper justice, especially for women who are over-represented as victims of this kind of crime.

As a gendered crime, the reality of spousal sexual assault brings to light the precarious situation many married women encounter in their own homes. The peculiarity of the crime and the complexities it easily incites demands that society not only give extra attention to the nature and impact of this crime on victims, but also that society approach each instance of this crime with every seriousness and with acute sense of understanding. A person's home is expected to be the safest space and the choice to marry should not mean that a woman has given up her rights to decide not to participate in sexual intercourse and/or how she engages in a sexual relationship.

Women have been historically subject to degradation and denied protection of the law from spousal sexual assault. The English common law, by codifying the marital rape exemption, employed the law as an avenue to foster the perspective that married women are inferior and

[1] Hon Claire L'Heureux, "Foreword" in Fay Faraday,Margaret Denike& m. Kate Stephernson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter*, (Ontario: Toronto Irwin Law Inc, 2009) at 4.

dependents in marriage. All the theories used to support the marital rape exemption such as the privacy, unity, property, reconciliation theories, as well as the arguments surrounding the difficulty in prosecution, all goes to reveal a society historically invested in keeping married women subject to the whims of their husbands. The marital rape exemption ignores that any interaction of a sexual nature that occurs outside a wife's consent given freely without encumbrances is sexual assault. And any law that insists otherwise violates the tenets of equal protection and benefits of the law for all. This understanding demands recognition that spousal sexual assault is a violation of human dignity, sexual integrity and equality.

Formal equality demands that likes be treated alike and unlikes differently. Under this regime, the treatment of all married women the same may be justifiable based on marital status. However, formal equality may create inequality as in the case of the marital rape exemption where all married women are exempted form the protection of the law based on marital status. Moving beyond formal equality, substantive equality requires more than the removal of legal or institutional barriers that deny married women the opportunity to report spousal sexual assault. It focuses on the impact and benefit of the spousal sexual assault law on married women as a historically disadvantaged group. It seeks to ensure that state actors in the legislation and application of laws and policies on spousal sexual assault are aware of myths and stereotypes that may implicitly inform their perspective when examining problem of spousal sexual assault.

This study has attempted, among other things, to discuss the diverse and complex legal histories of spousal sexual assault legislation in Nigeria and Canada. Both countries historically derived their legal systems from the British common law. The study shows that the marital rape exemption inherited by the national laws from Nigeria and Canada informed the immunity granted husbands from rape prosecutions on their wives. It was not until 1983 in Canada that the

marital rape exemption was abrogated. In the case of Nigeria, even with the recent 2015 law that abolished the marital rape exemption, husbands still maintain immunity from prosecution of rape on their wives, so long as they do not reside in the capital territory–Abuja–where arguably the new law has jurisdiction.

The exemption of married women in other states in Nigeria from legal protection against spousal sexual assault violates the tenets of equality before and under the law. The principle of non-discrimination is deeply embedded in the Constitution of Nigeria which is the supreme law of the land and every other law inconsistent with it is null and void to the extent of its inconsistencies. Following from this, it is incumbent on state actors to ensure that married women across all states in Nigeria are protected from the heinous crime of spousal sexual assault by criminalising the act.

The marital rape exemption has been abrogated from Canadian criminal law since 1983 and the Parliament has introduced a series of amendments to protect the equality rights of women, especially ensuring equal protection and benefit of the law by making sure that evidentiary procedures and elements of sexual assault are defined in terms that respect women's sexual integrity. However, this study notes that the application of these laws to spousal sexual assault remains fraught with inconsistencies. These inconsistencies can result either from an essentially formalist definition of equality or a half-hearted approach to substantive equality expectations in which spousal sexual assault adjudication is undergirded with prejudicial myths and stereotypes about married women and sexual assault victims generally.

Consequently, the central argument of this study is that legislations, judicial decisions, and evidentiary procedures on spousal sexual assault should be infused with substantive equality. As the results from my analysis of cases of spousal sexual assault in Canada reveals, when laws

on spousal sexual assault have not been conceptualised through a substantive equality approach that takes into consideration the contexts, history and infrastructures that motivate spousal sexual assault crimes, then such laws invariably remain flawed and ineffective. Nigeria's recent legislation on spousal sexual assault calls into question the usefulness and purpose of laws if they are essentially put to the service of injustice by not ensuring that elements of sexual assault and consequent evidentiary procedures in definition and application take into consideration the equality rights of married women.

This study argues that the confusions inherent in the complex and plural bodies of criminal laws in Nigeria results from the displacement of the role of the Constitution as the supreme law of the land. The provisions of the Nigerian Constitution supersede other laws irrespective of the pluralistic nature of the country. The Constitution embodies equality provision and if this provision is reviewed to clearly define equality from a substantive equality viewpoint, other inconsistent laws including marital rape exemption will be null and void. Also, judicial interpretation of the laws on marital rape will be guided by the principle of substantive equality rather than myths and stereotypes on rape and the roles of women.

In the case of Canada where equality has been substantively defined and largely approached as such, more education of lawyers and judges is required to ensure that misinterpretations and misconceptions of the spirit of substantive equality do not derail spousal sexual assault trials, and that evidentiary procedures in this kind of case take into serious consideration some of the peculiarities of spousal sexual assault cases in ways that would check the perpetuation of gender stereotypes and myths about women.

While there are judges who focus on fostering equality and ensuring the myths and stereotypes do not influence their approach to spousal sexual assault, this study shows that many

judges still have their perception coloured by myths and stereotypes and do not understand the dynamic of relations and negotiation of consent in marital situations. The view that sexual assault is a sexual act when it is not accompanied by extraneous physical violence, the requirement of timely report, and the perception of how sexual assault victims should behave reflect a system that is infused implicitly or otherwise, with myths and stereotypes about spousal sexual violence.

Following from this attitude in Canada, despite the fact that the marital rape exemption was legally removed in 1983, one is left with no choice but to question the place and impact of criminal law in dealing with spousal sexual assault. The criminalisation of spousal sexual assault may not necessarily change social attitudes towards sex in marriage. It is still, however, an important symbolic step in endorsing the rights of women to equal protection and benefit of the law. The law may sometimes serve as a deterrent to those who may want to engage in criminal acts. However, tackling spousal sexual assault requires more than legal sanctions. Given a long history of gender inequality and discrimination, certain institutionalised conditions often unite to render women vulnerable to spousal sexual assault. Some of these conditions include socio-economic factors and the intersecting circumstances of race, class, and such other axes of discrimination.

Therefore, there is a need to recognise that spousal sexual assault is not an individual and isolated act but a systemic problem. The symbolic impact of criminalising spousal sexual assault only goes so far to show that married women are worthy of protection. However, if they cannot enjoy the benefits of such protection, then it is a fruitless effort. This thesis makes the following recommendation for reassessing spousal sexual assault legislation and adjudication where necessary as the case may be:

- First, Nigeria needs to take a cue from Canada and expressly and unequivocally criminalise spousal sexual assault in all sates of the federation in Nigeria.
- As discussed in the chapter on Nigeria, the Legislature has to do more than just criminalise spousal sexual assault, they have to amend evidentiary procedures that potentially work against successful prosecution of such crimes.
- There is need for investment in the training of lawyers and judges on the dynamic of spousal sexual assault. As examination of cases in Canada reveals that criminalisation and removal of laborious evidentiary procedures is not enough if judges are still motivated by myths and stereotypes about women.
- There is need for the introduction of expert evidence when dealing with spousal sexual assault cases in order to explain and understand why victims of spousal sexual assault may respond differently to the same act of violence.
- More importantly, judges need to undertake a contextualised and purposive interpretation of laws that take into consideration the equality rights of complainants when assessing evidence.
- The state, especially in Nigeria, needs to invest in hotlines, shelters, trainings, and counselling for married women, especially victims of spousal sexual assault.

In all, the prevalence and impact of spousal sexual assault has to be widely understood. This study has shown that spousal sexual assault crimes thrive when society maintains an unethical disposition of silence towards such crimes and therefore permits their not being known and acknowledged as crimes, even by victims. The muffled state of this crime also results in a lack of understanding about how it operates, and discourages victims from voicing out their experiences. Thus, there has to be more concerted social education on the nature and dangers of

spousal sexual assault. Such massive social education, when effectively put into operation, could help educate members of society on proper ethical conduct in sexual relationships and help smother the myths and stereotypes that make these crimes possible. Since spousal sexual assault is a crime that is systemic and very old, a system-wide approach is necessary to check the actualisation of the crime and not just try to punish the act after it has happened. This study is premised on the notion that a genuine substantive equality principle should not be one that is simply oriented towards punishment for crime, but one that is oriented towards ending crime. To put an end to such a crime as spousal sexual assault demands more than making laws. Justice is in protecting everyone equally. And the right and proper education coupled with the right laws will do much more than is presently obtainable. Also, the power of the media should be exploited further by ensuring dedicated and committed representations and awareness of the dangers of spousal sexual assault. In this media orientation and education, victims' perspectives and humanity must be emphasised in order to correct some of the erroneous narratives associated with sexual assault by one's own partner.

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