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THE NEED TO CRIMINALIZE MARITAL / SPOUSAL RAPE IN NIGERIA

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ABSTRACT

Marital/Spousal rape in marriage is non- consensual sex in which the perpetrator is the victim's spouse. It is a form of domestic violence which has been condoned or ignored by law and the society at large. The reasons for the reluctance by many countries (especially Nigeria), not to criminalize and prosecute marital rape can be attributed to the failure of a precise definition in our laws, the traditional perception of the issue of marital rape, and the lack of public knowledge that forced sexual intercourse in marriage is illegal. There is thus, an urgent need for the amendment of Sections 6, 282, and 357 of Nigerian Criminal and Penal Codes to include spousal rape in its definition of rape. The essence for proposing that the laws on sexual offences in marriages should be implemented is not because other countries are doing so, but because the issue of marital rape has become a trending and overwhelming issue in Nigeria and victims are very reluctant to report such cases for a number of reasons which include fear of their perpetrator's vengeance or retribution, no cause of action in law as in Nigeria where spousal rape is not yet criminalized. There is the urgent need

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for Nigeria to review its sexual offences laws to include marital rape, as this will gradually reduce the issue of rape in marriages and also protect the right of a wife to retain and control her body's integrity and rights. It is also recommended that the strengthening of our legal and institutional framework to meet up with modern acceptable definition of rape to include spousal rape in the definition of rape in Nigerian Criminal and Penal Codes so as to aid its criminalization.

Keywords: Rape, Marital Rape, Sexual intercourse, Penetration, Consent

1. INTRODUCTION

The offence of rape constitutes one of the most serious crimes in Nigeria and it can be said to be one of the most under-reported. Women, both young and old, are always at the receiving end of this form of sexual violence. Forceful and non-consenting intercourse from spouses, relatives, friends, strangers, etc. has become the topic of discourse on the internet and in newspapers all over the world and in Nigeria. The offence of rape has been in existence from time immemorial. There have been reported cases of rape in the Bible in the case of Dinah, the daughter of Jacob by Shechem[1] and Tamar, the daughter of King David of Israel by her brother Amnon[2]. The act of rape, which virtually all societies in the world regard as criminal, is an aggravated form of sexual assault that involves the non-consensual sexual intercourse, traditionally by a man with a girl or a woman.

Many traditions and customs round the world do not recognize marital rape as an offence, especially in cultures that viewed women as little more than property, thus by marriage her husband had unrestricted consent to sexual intercourse whenever he deemed fit. It is the general belief, in most Nigerian cultures, where the collection bride price or dowry for marriage suggests a transactional nature and an unspoken consent giving the husband proprietary rights over the wife including free access to sex, whether she likes it or not. The concept of marital rape itself initially came to serve as an exception to the offence of rape, because it has been a widely accepted notion that a wife cannot be raped by her husband. Contrary to this conservative belief, statistics have shown that over 40% of

[1] Genesis 34:2
[2] 2 Samuel 13:14

married women in the world are victims of marital rape[3]. As a result of this, there have been calls by concerned individuals, bold victims of this ordeal and human rights activists alike for the criminalization of marital rape especially in Nigeria. There have been moves by several countries in the world to criminalize this offence and this is design is fast spreading to other jurisdictions as well including some African countries such as South Africa[4] where that law provides that a man can be found guilty of raping his wife. This work examined the current position of law on marital rape in Nigeria, the impediments to its criminalization and the need to make this cancer a criminal and prosecutorial offence.

2. CONCEPTUAL CLARIFICATIONS

2.1 Rape

Rape is an act committed by a man against a woman by way of sexual intercourse by force or without her consent or against her will[5]. Rape can also be easily be defined as having sexual intercourse with a non-consenting female with the knowledge by the accused that his victim was not consenting[6]. There are also definitions of rape as given by the Penal Code, the Criminal Code and the Violence Against Persons Prohibition Act. Section 357 of the Criminal Code provides:

> 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 misrepresentation as to the nature of the act, or in the case of a married woman, by impersonating her husband, is guilty of an offence which is called rape.

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[3] Adeniyi I.Adekunle, 'Marital Rape: An Examination of the current position of the law in Nigeria' (2021) http://www.ThisDaylive.com. Accessed 6 March 2023

[4] According to the 1993 Prevention of Family Violence Act

[5] Alubo, A.O, *Modern Nigerian Criminal Law (Materials, Cases and Comparative Studies)* 3rd Edition(University of Jos Press 2018). p 343

[6] Chukkol,K.S, *The Law of Crimes in Nigeria* (Zaria: ABU Press 1998) p.186

The Criminal Code also provides that any person who commits the offence of rape is liable to imprisonment for life, with or without canning[7].Section 282 of the Penal Code provides:

> A man is said to commit rape, where he had sexual intercourse with his wife, 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 hurts
>
> (d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
>
> (e) with or without her consent, when she is under fourteen years of age or of unsound mind
>
> (f) sexual intercourse by a man with his own wife is not rape, if she has attained puberty.

The Violence Against Persons Act provides as follows:

A person commits the offence of rape if:

a. He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;
b. The other person does not consent to the penetration; or
c. The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse[8].

[7] Section 338 of the Criminal Code
[8] Section 1(1) of the Violence Against Persons Prohibition Act 2015

With this beautiful expansion of the definition of the offence of rape by the VAPP [9], it has then simplified the means of proving rape whereby there need not be full penetration by only the penis of a male person but penetration also by any object constitutes the offence of rape. What is commendable though is that the draftsman has created another offence known as 'sexual assault by penetration' which has by implication widened the definition of the offence or rape by the extension of rape to non-vaginal and penile intercourse.[10]It is also worthy of note to point out that in Nigeria, going by the definitions of rape in both the Penal and Criminal Codes, a woman cannot commit rape on a man. This is so because the statutes provide that the offence can only be committed upon a woman or girl. But the expansive definition given by the VAPP can be said to provide that a man can also be raped by a woman. This is clearly seen in subsection (a) wherein the pronouns 'he' or 'she' is used. The question now is whether or not a man can successfully institute and secure conviction against a woman for the offence of rape.

Section 126 of the Sharia Penal Code Law of Kano State provides:

1. A man is said to commit rape if he 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 her consent is given because she believes herself to be lawfully married;
   v. With or without her consent when she is under fifteen years of age or unsound mind.

2.2 Who can Commit Rape?

According to Section 30 of the Criminal Code, a male person under the age of twelve (12) years is incapable of committing the offence of rape, that is, he is presumed to be incapable of having carnal knowledge. This

[9] Violence Against Persons Prohibition Act

[10] Tanimu, A.I, Hassan, G.D, 'The Law on Sexual Violence in Nigeria: Perspective on Violence Against Persons (Prohibition) Act 2015' [2019] (5)(1)*Journal of International Law and Jurisprudence* p.117

presumption of the law is an irrebuttable one and cannot even be rebutted by showing that the boy has reached puberty despite his age[11]. It follows that from this, he cannot be guilty of the offence of rape. By implication, only a male that is above the age of twelve can commit rape according to the laws in Nigeria.

2.3 Can a Man be Raped by a Woman?

As the law stands today in Nigeria, a woman cannot rape a man or another woman because a woman is not physically capable of having penile penetration of a man or another woman. This is deducible from the provisions of Section 357 of the Criminal Code, Section 282 of the Criminal and Penal Code, Section 126 of the Sharia Penal Code and Section 258 of the Criminal Law of Lagos State respectively. However, a woman may be convicted of rape as an accessory under Section 7 of the Criminal Code. For example, a woman who aids, counsels or procures a man to rape another woman will be regarded as the actual perpetrator of the crime and can be convicted of the same offence as the principal offender. However, as opined by the researcher of this work, the expansive definition of rape by the VAPP might just be the window that is needed to also prosecute a woman for rape.

2.4 Elements of Rape

i. **Penetration/Sexual Intercourse**: It must be proved beyond reasonable doubt that the penis of a male person penetrated the vagina of a female. With the expansive definition given by VAPP, penetration is not only limited to the penile organ or the vagina alone. Penetration can be with an object to either the vagina or anus of the victim. There needs to be no ejaculation or emission of sperm.[12]The penetration also needs not be comprehensive or substantial. It is sufficient if it is slight or minimal. The absence of penetration will render inane any charge of rape. While ejaculation is not necessary, ejaculation and the deposit of semen is concrete proof or indication of penetration[13]. In *Jegede v The State[14],* it was

[11] Ochem, C.E, C.T.Emejuru, 'An Appraisal of the Jurisprudence of Spousal Rape in Nigeria' [2015] (1) (1)*Donnish Journal of Law and Conflict Resolution*p.3

[12] Tanimu n.11

[13] Alubo n.6 p.347

held that whether the prosecutrix was a minor or an adult, there must be a link with the accused. The court held that there exists a difference between rape and attempted rape. In the case of *Ibo v Zaria N.A,*[15] the court held that though the offence of rape is completed upon penetration, ejaculation and / or the rupture of the victim's hymen are important by way of evidence.

ii. **Lack of consent**: To secure a conviction for rape, the prosecution must show that the victim did not give her consent to the sexual intercourse. Where the accused alleges that there was consent, he must prove that such consent was not given under threat or deceit, fraud, misrepresentation or intimidation of any sort. Having carnal knowledge of a woman who is sleeping is rape. It is also rape to have carnal knowledge of a person of weak intellect, or one who is too young to understand the nature of the act[16]. Section 254 of the Criminal Code of Lagos State provides as follows: "for the purpose of this chapter, a person consents if he agrees by choice and has freedom and capacity to make and communicate that choice"
In Section 264 (2) of the same law, the law stated that in determining whether a person had reasonable grounds for believing that another person consented, the court shall have regard to all the circumstances, including any steps taken by the defendant to ascertain whether or not the woman consented. Thus, consent must be total and holistic. If there was a conviction, it would be reversed where the victim testified that as she was getting out of the accused person's car where forcible rape took place, she kissed him goodbye[17].

iii. **Mens Rea:** *Mens rea,* in law, simply means criminal intent; the thoughts and intentions behind a wrongful act including the knowledge that such an act is wrong. The intention of an accused person to have forced sexual intercourse with a woman or girl

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[14] (2011) 7 SCNJ 135
[15] (1962) NWLR 30
[16] Asada, D. Lecture Notes on Criminal Law (Jos, unpublished students manual, 2005) p59
[17] Alubo, A.O 'Rape under Nigerian Criminal Law: Review of Prescriptions for 21st Century Nigeria' [2008] (2) *Frontiers of Nigerian Law Journal (FNLJ*) p.9-38

without her consent is the *mens rea* of rape. This *mens rea* must concur with the *actus reus* (activity that transgresses moral or civil law) to give rise to the crime[18].

3. THE POSITION OF THE LAW ON MARITAL/ SPOUSAL RAPE IN NIGERIA

Marital/spousal rape is the common version of rape which has never attracted much attention. There is a serious controversy over the matter whether it is rape at all in the strict sense of the term. An act of a husband having sex with his wife without her consent and will is spousal rape, even though it is not a crime in Nigeria, the position is different in some western countries where it is a crime. In Nigeria, where women are still treated as an economical burden, it is presumed that a woman surrenders her consent upon entering into marriage forever[19].

The fulcrum of this article is more focused on the physical and mental pain which is associated with the trauma of marital/spousal rape as well as the cases of domestic violence which in most instances is a direct result of the act. Whether husbands have right to have sex with their wives without their consent is a major question of this research study. It has been described as one of the most serious violations of a woman's bodily integrity. Therefore, any unwanted sexual act committed by a spouse without the consent or express permission of the other spouse is a crime which needs to be prosecuted. The Declaration on the Elimination of Violence Against Women (DEVAW) has long acknowledged that marital rape is a form of violence against the rights of women[20]. The Beijing Declaration and Platform for Action defines violence against women as physical, sexual and psychological violence that occurs in the family including marital rape.[21]

The rights of either spouse of a marriage, which include the right to the other's consortium, cohabitation, sexual intercourse and maintenance during marriage is one of the concepts of a valid marriage. If after solemnization of the marriage, either of the spouses without reasonable

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[18]Alubo, A.O. *Modern Nigerian Criminal Law (Materials, Cases and Comparative Studies)* 3rd Edition (University of Jos Press 2018) p.349

[19] Umobi, A, Nwoke, I.J 'A case for the Criminalization of Spousal Rape in Nigeria' [2021] (2)(1)*Law and Sciences Justice Review (LASJURE)* p.156

[20] Declaration on the Elimination of Violence Against Women (A/RES/48/10485th plenary meeting 20 December 1993) Article 2(a)

[21] Beijing Declaration and Platform for Action (Adopted at the 16th plenary meeting on 15 September 1995) Section D 113(a)

reason withdraws from the sexual presence of the other, then the aggrieved party has a right to file petition for restitution of conjugal right in the law court. The existence of conjugal right to have sex is attached to all recognized forms of marriage. This right is not disputed. The controversy arises in deciding the extent of this right[22]. Conjugal right to have sex between spouses is not exclusive. Rather, it is dependent upon mutual consent. Again, as there is right, there is remedy to restore the conjugal right, however, the use of force was never permitted for its exercise.

According to the extant laws in Nigeria, the concept of marital rape, which is also known as spousal rape, is one that is alien in Nigeria. The Nigerian criminal justice has clearly banished the concept of marital rape.

Section 6 of the Criminal Code goes further to depict 'unlawful carnal knowledge' as carnal connection which takes place otherwise than between husband and wife. In other words, spousal rape is not an offence in Nigeria. A husband cannot rape his wife as the marriage contract is deemed to imply consent to sexual intercourse which can only be revocable by a separation agreement or order of the court. Under this Section of the Criminal Code, marital rape has been clearly made lawful, and as such, a man cannot be said to have raped his wife under any circumstance.

Similarly, the Nigerian Penal Code does not proscribe marital rape. The provisions of Section 282(2) of the Penal Code clearly provide that: "Sexual intercourse by a man with his own wife is not rape, if she has attained puberty". The Penal Code, by virtue of this provision, has explicitly and conditionally created the marital exemption to the offence of rape. By implication, as a general rule, a man cannot be said to have raped his wife under the Penal Code. However, a qualifying clause has been attached to this volatile subsection which states that: only "if she has not attained puberty". This lucidly implies that a husband will be guilty of raping his wife, only if he has nonconsensual intercourse with such wife who has not attained puberty. By implication, the Penal Code has recognized the concept of marital rape, although marital rape enjoys the entertainment of the force of law only if the victim of such marital rape is a wife who has not attained puberty[23].

[22] Umobi n.20
[23] Adeniyi n.4

Under the Sharia Penal Code, which is more of a regional legislation that has been domesticated by some Islam-dominated States such as Bauchi, Kebbi, Jigawa, Yobe, Borno, Sokoto, Zamfara and Kano, the concept of marital rape has been undoubtedly exiled into oblivion. For instance, by virtue of Section 128(2) of the Sharia Penal Code Law, "Sexual intercourse by a man with his wife is not rape". This provision has clearly snubbed the concept of marital rape, and has also strongly created a marital exception to the offence of rape under that law[24].

Under customary law, the issue of rape of a wife by her husband is unknown as the wife is seen as the legitimate property of her husband, like all other inanimate properties. The husband is invested with powers to deal with her as he deems fit. This is not different from the property theory explained earlier which connotes that after marriage, the wife becomes a chattel of her husband. This means the husband can never rape his wife because he is only making judicious use of his property. In the event that the wife refuses to give consent to the act and the husband proceeds to have his way forcefully, her lack of consent will elicit no consequence. That being the case, any sex within marriage is lawful and so a husband cannot rape his wife. This is called the marital rape exemption[25].

The marital rape exemption did not just start in Nigeria. In the nineteenth century, William Blackstone, whose treatise on the laws of England was extremely influential throughout the United States of America and the Commonwealth, offered a classic definition which illustrates the subjugation of women. According to him, by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover she performs everything. Upon this principle, of a union of person in husband and wife, depends almost all the legal rights, duties, and disabilities that either of them acquires by the marriage[26].

The principle of a united husband and wife by subsuming a married woman's civil identity and rights thereby promoting a husband wide-ranging control over his wife. These male privileges which were enshrined in

[24] Ibid
[25] Aderenle ,A.,'The Concept of Marital Rape in Nigeria: Lessons from other Jurisdictions'(Lagos, 23 July2020) http://www.LinkedIn.com accessed 8 March 2023
[26] Ibid

English common law evolved around the conviction that a wife became her husband's physical and sexual property as part and parcel of the marriage contract. So, consent of the wife to sexual connection having been given by the act of marrying, he is not guilty of an assault in having such connection. Therefore, it is lawful for a husband to have carnal knowledge of his wife, and the fact that he uses force does not make him guilty of rape. The "Hale fiction" propounded by Sir Matthew Hale in his 1736 legal treatise states that a husband cannot be held liable for raping his wife since she cannot withhold consent by virtue of marriage [27] and this belief held sway until 1991. It is contended that the legal position of marital rape in Nigeria presently is the same with pre 1991 England. That is to say, that any sexual intercourse within marriage is lawful and so a husband cannot rape his wife. That has been the state of the law in Nigeria since her independence in 1960[28]. This position is a very sad one indeed seeing as the times have changed, circumstances bordering on consent have changed and other jurisdictions around the world have evolved with the times and reviewed their laws especially as it relates to the issue of marital/spousal rape and have begun to criminalize it especially when it comes with assault, violence, life threatening illnesses and the ultimate death of the victim.

The call for the need to criminalize marital/spousal rape in Nigeria is predicated on the grounds that most times, domestic violence, assault, physical and mental abuse as well as psychological abuse takes place in the course of the act. A lot of women have lost their lives as a result of forced sexual intercourse from their husbands. Others have found themselves with serious health challenges after the act. There was the story of a woman who just gave birth through caesarean section (CS) and was advised by her doctor to give her body rest from any form of sexual activity for 6 weeks to avoid complications after the surgery. Her husband demanded for sex after some days of her discharge but she was not willing to because of the doctor's orders. He eventually forced his way and she started bleeding afterwards. She was rushed to the hospital but she eventually died because she lost a lot of blood[29]. Another case was reported on the internet of a woman who was severely beaten by her husband in Ogun State because she

[27] Sir M. Hale, 'History of the Crown' (1736) cited in Spousal Rape: Nigerian and English Laws in Perspective (1) *EBSU Journal of International Law and Judicial Review*
[28] Ibid
[29] This story happened sometime in 2012 in Langtang North L.G.A of Plateau State

refused his sexual advances. Her reason was that he wanted a male child after several females but they were advised by the doctor to refrain from childbearing because of the likelihood of the woman dying if she tries to give birth again. They were advised to go for family planning so they can enjoy their conjugal rights but the husband was adamant on her having more children.

Another story is told of Carol, a surgical theatre nurse, narrated that she had come back home, tired and fatigued after standing for almost six hours because of three emergency surgeries at the Accident and Emergency (A&E) Unit of the hospital where she worked. Instead of closing at 2:00 p.m. as she was scheduled to, she supported the afternoon team of nurses given that she is a more experienced and qualified nurse at the A & E Unit. The extra time she put in made her get home late and very tired. In all honesty, she desperately needed a rest. But being a woman who must balance her home and career, she managed to supervise and made sure the home front was completely in order before she retired to the bedroom. Carol finally moved to stretch out on the bed, where her husband was already lying down, not knowing the man was anxiously waiting for her. As she tried to adjust the duvet, her husband reached out for her. Carol was very cold and unresponsive. He was not deterred and moved closer to her. She knew the signs when her man wanted her, skin to skin. The signals intensified and Carol complained she was worn out and fatigued. Oga was not interested in that story. Carol was still dragging the duvet to cover herself when a stronger force tore it away and then had his way forcefully. She did not feel so good after he rolled off; rather she felt low like an orange violently sucked and cast aside. She felt that her husband had no respect for her feelings. She was withdrawn and kept interactions with her husband at a very minimal level henceforth. After two days, Carol professionally tried to address the situation, but her husband said:

> In the first place, that injection was what you needed to bounce back to a complete circle. You had a beautiful night rest; in fact, you should have seen yourself sleeping like a baby. If you had taken note, you woke up like a giant in the morning, and your blood system circulated very well. That is the blessing that comes from a forceful oil rig exploration. Don’t also forget that I am legally qualified for

> my action because I have all the necessary NAFDAC numbers to carry out the exploration when I want[30].

There are several other stories of the abuse that women have had to endure from their husbands when they say no to sex. This is not in any way encouraging or advocating for women to deny their husbands their conjugal rights but it is a call to the husbands to also be considerate and understand why the woman is saying no at that moment and respect her wishes.

It should be noted, however, that even where husband is shielded by virtue of the marital rape exemption, where he uses violence on the wife during intercourse, he can be guilty of assaulting or wounding his wife. However, be that as it may, to protect the integrity of the woman and her human right, she must be protected against forced rape, notwithstanding that it is not recognized by the law in Nigeria, and this is the fulcrum of this article. This could be achieved by the amendment of the existing Criminal Code and Penal Code that exclude the definition of spousal rape as a crime in Nigeria.

However, there are some exceptions to the general rule that a husband cannot rape his wife. His guilt may be determined in the following circumstances[31]:

a) Decree of judicial separation: in a decided case,[32] it was held that where a competent court has given an order of judicial separation, the wife is no longer bound by law to have any form of cohabitation with the husband and he will be held liable where he forces himself on her.
b) Where there is a nisi order for divorce: It has been held that a decree nisi of divorce ends a marriage and where the man sleeps with his wife without her consent, it is rape[33].
c) Where there is an existing injunction barring the husband from molesting his wife or where he has given an undertaking in a competent court of jurisdiction not to do so.

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[30]http:///www.sunnewsonline.com 'Yes, Marital Rape is Holy' Published 12th January 2020. accessed 6 March 2023

[31] Blackstone: To have and to hold: The Marital Rape Exception and the fourteenth Amendment. 99 Harvard Law **re**port 1986 p 1255

[32]Clarke (1949) 2 ALL E.R 443. Also the case of Miller (1954) 2 Q.B 282

[33]R v O'Brien (1974) 3 ALL E 663

4. MARITAL RAPE IN OTHER JURISDICTIONS

On the 23rd day of October 1991, the marital rape exemption was dispatched when the House of Lords, in a unanimous judgment in *R v R*[34] declared that a husband's immunity from a charge of rape on his wife formed no part of English Law. In the foregoing case, the defendant had married his wife in 1984. As a result of matrimonial differences, the wife left the matrimonial home in 1989 and returned to live with her parents, informing the defendant of her intention to petition for divorce. While the wife was staying at her parents' house, and before she could file any petition for divorce, the defendant forced his way into the apartment and attempted to have sexual intercourse with the wife in the course of which he inflicted actual bodily harm on her. He was charged for rape and assault to which he pleaded not guilty. He was convicted and he appealed his conviction contending that his intercourse with his wife was necessarily lawful and therefore outside the statutory definition of rape. The defence argued that there was no such offence because of the marriage exemption. The case was appealed until it reached the House of Lords. The landmark judgment was given by Lord Keith of Kinkel with whom all the other law Lords on the Panel agreed. He held that the contortions being performed in the lower courts in order to evade the marital rights exemption demonstrated how absurd the rule was. He said that the marital rights exemption was "common law fiction" which had never been a true rule of English law. Kinkel concluded that the fiction of implied consent has no useful purpose to serve today in the law of rape. The defendant's appeal was accordingly dismissed and he was convicted of the rape of his wife. This judgment had a positive effect not only in England but also in the entire Commonwealth including the United States of America and other jurisdictions, which has culminated in the present position of the law in many such jurisdictions excepting Nigeria amongst others.

Even before the decision in 1991, in the cases of *H M Advocate v Duffy*[35] and *H.M. Advocate v. Paxton,*[36] the court held that the fiction of implied consent has no useful purpose to serve today in the law of rape and convicted the defendant for rape on his wife on the ground of an existing separation order which indicated revocation of the implied consent. In a

[34] (1991) 1 ALL ER 747, (1992) 1 A C 599
[35] (1983) SLT 7
[36] (1985) SLT 96

nutshell, the law established in the case of *R v R* (supra), is that it is rape for a husband to have sexual intercourse with his wife without her consent whether or not they are living together or separated.

In December, 1993, the United Nations High Commission for Human Rights published the Declaration on the Elimination of Violence Against Women. This established marital rape as a human right violation. This is, however, not fully recognized by all UN member states. In 1997, United Nations Children Emergency Fund reported that just 17 states criminalized marital rape. In 2006, the UN Secretary General found that marital rape may be prosecuted in at least 104 states[37]. Of these, 32 states have made marital rape a specific criminal offence, while the remaining 74 states do not exempt marital rape from general rape provisions. Four states criminalize marital rape only when the spouses are judicially separated. The different rape statutes in the various states of the United States used to preclude spousal prosecution, including estranged or even legally separated couples. Some countries that have criminalized marital rape recently include: Turkey in 2005, Mauritius in 2007 and Thailand in 2007[38].

In 1993, South Africa passed the Prevention of Family Violence Act, which among other things criminalized marital rape. The law stated as follows: "Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of rape of his wife". South Africa became one of the first countries within Africa and one of the few members of the 15 members of the Southern Africa Development Community (SADC) to criminalize marital rape. In the United States, it wasn't until the late 20th Century that the laws began to change to recognize rape by a spouse as criminal, partly as a result of feminist activism which promoted the idea of bodily autonomy of a woman whether married or not leading to changes in rape laws that criminalized marital rape[39]. The first case to charge a man for marital rape was *Oregon v Whiteout*[40] where the accused forcefully engaged in sexual intercourse with his wife after they had a fight. The case was made possible by a recent amendment to the Oregon Criminal Code that removed the "marital rape exemption" that

[37] Aderenle n.26
[38] Ibid
[39]Tardoo Ayua, 'Marital Rape:The Case for its Criminalization in Nigeria' (October 2019)http://www.medium.com. accessed 8 March 2023
[40] (1978) 108 866 Circuit Court County of Marion, Oregon

existed in most rape laws at the time. The accused was eventually acquitted but the case drew national attention and brought to the fore the need for marital rape to be made criminal.

In 1984, the Court of Appeal held that marital rape exemption was unconstitutional in *People v Liberta*[41]**.** By 1993, all states had expunged marital rape exemptions from their rape laws, however there still exist loopholes or exceptions to the marital rape laws in some states in the U.S.A, for instance in South Carolina where a spouse cannot be prosecuted unless force or threat of force was used.

Other countries that criminalized marital rape include Canada in 1983, France in 1990 by a pronouncement by the Court of Cassation and subsequently by legislation, and South Korea in 2013 to name a few[42].Africa equally has not been left out as a number of countries have made marital rape a crime in their laws such as South Africa in 1993[43], Zimbabwe in 2001, Rwanda in 2009[44], Sierra Leone in 2012[45]and Malawi in 2016[46]. In totality, only about fourteen (14) African countries have made marital rape a crime.

From the foregoing, the marital rape exception is gradually becoming unpopular due to the interference of human rights activists, women's rights protection organizations in order to prevent all anti-social behaviours, perceived human rights violation and flagrant abuse of women. However, what may be perceived as human rights violation and an abuse of the right of women in developed countries may, on the other hand, be a way of life for some people based on their customs which is a product of their sociological, cultural or religious affiliations.

5. IMPEDIMENTS TO CRIMINALIZATION OF MARITAL RAPE IN NIGERIA

(a) Failure of the victims to speak out: It has been ingrained culturally in the minds of both men and women in Nigeria that forceful intercourse in marriage is not an issue. Thus, the woman will be reluctant to speak to anyone about the abuses she goes through at the hands of her husband. The society will scorn her, some of her fellow women will mock her, her family might feel embarrassed that

[41] (1984) 64 N.Y 2d 152
[42] Tardoo n.40
[43]Section 5 South Africa Family Violence Act
[44] Rwanda Law No. 59/2008 on Prevention and Punishment of Gender Based Violence
[45] Section 5 Sierra Leone Sexual Offences Act
[46] Malawi Marriage, Divorce and Family Relations Act 2015

she is 'washing her dirty linen' in public not minding the pains she goes through. Because of this, most victims do not speak out. They prefer to suffer in silence or complain in the background when issues of marital rape are brought up. They would rather cover up the problems they face in their homes after all, 'every home has its challenges' and they do not want to be seen as bad or evil or saying their husbands force them against their will to take what is 'rightfully' theirs. Women should be encouraged to speak up against marital rape and take up the matter in the courts of law as without their testimonies on how they have been taken against their consent, how can the courts move to criminalize such an act? Thus, speaking out and instituting actions in court is the way forward.

(b) Stockholm's syndrome: This can be defined as feelings of trust or affection felt by the victims towards their captors or abusers. This is a coping mechanism to a captive or abusive situation which is developed over time. It applies to situations including child abuse, relationship abuse, etc. The victims of marital rape become so used to the cycle of abuse they have been put through that they do not see anything wrong in their husbands or spouses raping them even when it involves domestic abuse or violence. Because they have already seen the act as normal, they will not be inclined to report to the authorities or even speak against it to their abusers. Stories abound of women saying they do not enjoy sex if they are not forced or beaten before the act. Victims are encouraged to seek mental help so they get to realize the errors of their thoughts and speak up against it.

(c) Religious/cultural beliefs or teachings: Under the Islamic religion, it is generally construed that a wife cannot refuse to have sexual intercourse with her husband. In fact, it is supported in one of the Hadith, that a woman who refuses to have sexual intercourse with her husband upon request by her husband is deemed to be cursed by all the angels of Allah during the period of such refusal. Apparently, Islam does not recognize the concept of marital rape[47].

[47] Adeniyi n.4

Similarly, in Christianity, it is predominantly believed, even as contained in the Holy Scripture, that the wife does not have authority over her own body, as her body belongs to her husband[48]. This biblical injunction, insinuates that a wife is not expected to deny her husband the pleasure of her own body. By necessary implication, the concept of marital rape is neither recognized nor reproved, in the Christian religious injunctions as well as Islam. When women complain to their pastors about this form of abuse against them, they are advised to comply and not deny their husbands their bodies or better still, they are advised to pray to God to make their husbands stop forcing them against their will. This is the stark reality that women have found themselves in and no respite seems to be on the way for them.

Being married means that each party has a duty to fulfil the other's sexual desires. This is a fact; but it is also true that many things can make men and women not be in the mood for sex. A man who beats his wife and abuses her should not expect that sex will be the foremost thing on her mind. In fact, some of such women give in for fear than anything else because they know he will abuse them some more. Some men cheat on their wives and despite being discovered, still expect their wives to give in to their sexual pleasures. They are advised by their spiritual fathers to forgive and forget after all the Bible encourages us to forgive. These pastors do not take into consideration the pains these women go through as a result of the actions of their husbands, the most important thing is the Holy Books say giver your bodies and that is how it should remain.

There is an urgent need for our spiritual leaders to speak about marital rape and caution erring husbands that are reported to them and if need be, encourage the abused women to take up the matter with the law authorities for legal redress.

(d) Fear of retribution by the perpetrators of the act: Some victims have been prevented from reporting cases of marital rape because they are afraid that their husbands will not take it lightly with them

[48] 1 corinthians 7:4-5

when news of the abuses they have been forced to endure comes to light. The impression their immediate community will have of women who dare to speak up against marital rape is even enough to keep them quiet. They will be judged by family, friends and the society for "exposing what is the man's right" in marriage. There is a popular saying that goes "only he who wears the shoes knows where it pinches". It is very easy for people standing outside without knowing the horrors the victims of marital rape have been forced to endure to criticize those who decide to make a case out of their predicaments. There have been instances where the victims after reporting to the authorities went back home to even more horrific abuses which have led to deaths, life threatening health conditions and even maiming.

(e) Lack of laws criminalizing marital rape: It is a common saying that *Ubi jus ibi remedium* meaning where there is a law, there is a remedy. In this instance, there is no law prohibiting marital rape and as such, there is no remedy for the victims. Even if victims desperately want to get justice from their abusers, the lack of requisite laws criminalizing this offence makes it very difficult for them to get the justice they so desire. The closest they can get it probably a conviction for sexual assault or domestic violence which even though offers some of respite, it is a far cry from the rape their bodies are forced to go through.

6. IS THERE ANY HOPE FOR ABUSED WOMEN?

This issue of marital rape is disheartening for many reasons. To begin with, the promises to love, be faithful and trust each other get broken hence the reluctance of some women to give in to their husbands' demands. For a man who has broken the marital vows to love, protect and be faithful to his wife and still expect her to willingly and joyfully sleep with him is beyond comprehension. This is not even putting into consideration the issue of STDs[49] which many of these men then bring into their homes. Such men do not even care if they give their wives incurable sexually transmitted

[49] Sexually Transmitted Diseases

diseases like Herpes or even AIDS[50]. The main concern is on the fact that the man has paid the woman's bride price and so she must give him what he wants whenever he wants or demands of it. Husbands should be able to discuss with their wives and convince them. Sometimes, women are just being coy and want the man to show some affection and pet them a little before sex. Women are highly emotional beings who value the right kind of attention from their men. In such instances, the men can become very impatient and think the woman is being inordinately stubborn and might decide to literally become forceful and rough, if the woman gets injured or badly bruised in the process, they do not care. After all, they have gotten what is 'rightfully and lawfully' theirs. It is disheartening that while Nigerian men and women think marital rape is something normal and proper, the international community recognizes it for what it is- a heinous and traumatizing experience for its victims.

Some form of reprieve seems to be provided for in the Protection Against Domestic Violence Law (2007), Lagos State. Lagos State has a domestic violence law that takes sexual offences beyond unlawful carnal knowledge and this prepares the ground for future prosecution of marital rape in Lagos State[51]. This Law was enacted to provide protection against domestic violence and for connected purposes. Section 18 of the Protection Against Domestic Violence Law (2007) defines domestic violence as any of the following acts: "physical abuse; sexual abuse exploitation including but not limited to rape, incest and sexual assault; starvation; emotional, verbal and psychological abuse. "The law goes further to define sexual abuse as, "any conduct that abuses, humiliates, degrades, or otherwise violates the sexual integrity, or dignity of the victim."

Hopefully, other states will adopt this Protection Against Domestic Violence Law that Lagos state has enacted. Lagos has been at the forefront of championing new laws that have changed the face of advocacy and keeping up with international communities. Since most cases of marital rape usually go hand in hand with domestic violence and assault, the victims can go to court and get some form of justice for the abuses they endure at the hands of the perpetrators of these acts while we earnestly hope that this menace of marital rape is eventually criminalized. What

[50] Acquired Immuno Deficiency Syndrome
[51] Ibrahim R. Olalekan, 'Marital Rape under the Nigerian Law' (Kivayoni, 23 March 2019) http://www.streetlawyernaija.com accessed 6 March 2023

would be of interest to all is how the courts will utilize the law and whether other states will follow suit in unsettling the barbarism and misapprehension that a wife gives an irrevocable consent to sexual intercourse once she enters into a marriage contract [52].

7. CONCLUSION

From a legal perspective, marital rape is not an offence in Nigeria. It is assumed that the wife gives implied consent to sexual intercourse with her husband upon getting married. It is thereby widely believed and accepted in Nigeria that a husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial agreement; she has submitted herself to the husband and cannot retract. There is no doubt that marital/spousal rape has generated a serious controversy especially in the wake of radical human rights activists, women's rights protection organizations, advocating on the right of a wife to control her sexuality and retain her body's rights to give or withhold consent. Thus, sexual intercourse between a husband and his wife without the consent of either spouse is an offence in several jurisdictions. Even though marital rape is fast becoming a crime in a lot of countries, Nigeria and some African countries do not still recognize marital rape as a crime, because the laws with regard to sexual offences especially, the definition of rape in those laws, do not contemplate a situation when a husband can be guilty of a rape upon his own wife.

Rape is a horrible crime that can cause lasting physical, psychological and emotional damage to the victim and marital rape is no exception. A person does not stop being vulnerable to pain or bodily violation from another just because they have been married. The lack of laws criminalizing marital rape means the victims have no recourse and are therefore trapped in a hopeless situation. It also further emboldens those who are inclined to commit such crimes because they have no fear of legal retribution. Marital rape has been recognized by the United Nations as a form of violence against women, but the absence of marital rape laws in Nigeria throws a clog in the global struggle against violence against women. The rules of interpretation of our extant laws on rape can be used to argue that the absence of a specific law on marital rape means that it is not the

[52] Ibid

contemplation of the legislators for it to be an offence. It is against this backdrop that the following recommendations are made:

1. The act of marital rape should be criminalized. In order to achieve this, laws specifically proscribing the act should be passed. The extant Criminal and Penal Codes of the states, Sharia Penal Code as well as other laws dealing with sexual assault and rape amended to include marital rape specifically as a crime and the marital rape.
2. The process of criminalizing marital rape must pass the litmus test for its application to be optimal and equitable. For starters, marital rape must be unequivocally prohibited, that is to mean there must be no exceptions to marital rape. Since the most important ingredient of rape is the lack of consent, any sexual intercourse without consent by one of the spouses must render the other spouse liable so long as depriving the victim of consent was done intentionally and maliciously knowing fully well that the non-consenting partner had genuine reasons for withholding consent.
3. There must also be provisions for dedicated and sustainable mediums for reporting marital rape as well as other forms of domestic abuse which stems from marital rape. A framework needs to be created to cater for victims of marital rape due to the intimate nature of the crime and the psychological and social issues that may arise such as an order of protection of the victim against further sexual abuse, well-equipped institutions for recovery and therapy, well trained personnel in those institutions that can help the victims heal from the trauma brought on by the act, etc.
4. There should be sensitization campaigns to inform and educate the public about the fact that forced sexual intercourse against a spouse is wrong and illegal (once marital rape is criminalized), this will help to bring an end to the act as well as inform victims that they can get justice through the criminal justice system if they are raped by their spouse. This is especially important if we are to rid our society of the entrenched beliefs that the wife owes her husband sex anytime he expects it as her role as a wife, which perpetuates a system of victimhood.
5. It is of utmost importance that laws are passed to put an end to other practices which create or promote the circumstances that lead to marital rape in marriages such as child marriage, trafficking, forced

marriage, etc. These practices contribute to subjugate women in marriages where their free will and right to their bodily autonomy are absent leading to marital rape. The most important step should be the amendment of the 1999 Constitution to remove some of the provisions which support these practices, such as the provisions of Section 29(4)(b) which provides that a married woman shall be considered a person of full age, tacitly encouraging child marriage.

6. There should be measures put in place to protect the victims of marital rape who would be bold enough to report their abusers. This is important because they are open to reprisal attacks from the perpetrators and even from members of their immediate community who see their act of taking up the matter as wrong and as such will want to silence them.