

Spousal Rape in Nigeria: An Aberration

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Abstract

Spousal rape, which is non-consensual sexual intercourse between a husband and wife, is an issue of growing concern in contemporary human society. It has become such a menace and abhorred around the world that many countries have enacted laws making it a crime. In these countries including every state in the United States of America where it has been illegal since 1993, perpetrators are prosecuted and sentenced to prison terms. But in countries like Nigeria, spousal rape is unknown to the law, and as such, under the constitutional principle of the legality theory, no one can be prosecuted for a crime which is unknown to the law. This paper examines the legal position of spousal rape in Nigeria in comparison to other jurisdictions. This is with a view to exposing the dire need for a quick review of existing legislation on sexual offences to include spousal rape as a crime. This will not only put Nigeria on the road map to best practices, but will also assure and protect the weaklings in marital relationships who are not disposed to sexual intercourse all the time.

1. Introduction

Spousal rape, also known as marital rape, is the non-consensual sexual intercourse in which the perpetrator is the victim's spouse. In most cases, it would be the husband having sexual intercourse with his wife without her consent. As such, it is a form of partner rape, of domestic violence, and of sexual abuse.¹ As presently conceived, it is a serious form of violence that can have life-shattering effects for its victims.² Spousal rape occurs when one spouse forces the other to take part in certain sexual acts without the other's consent. It is a form of intimate partner violence by which one spouse attempts to establish dominance and control over the other.

Rape, from which is derived spousal rape, has been associated with "violence", "force", "speed" and the "lack of consent". It has been rooted as the act of taking something by force especially the seizure of property by violent means.³ The sense of violence associated with rape in medieval time is captured in the works of Daniel Defoe in 1706 wherein he was quoted as saying "when kings their crowns without consent obtain, 'Tis a mighty Rape, and not a Reign".⁴ Before the 19th century, the idea of spousal rape was not contemplated. At that time, women were still regarded as part of the man's material possession. Married women were regarded as property belonging to their husbands. Marriage was therefore understood as an institution where a husband had full and complete control over his wife's life; and control over her sexuality was a part of the greater control that he had over her in all spheres of life. That women were regarded as part of their husband's property was never in doubt. In 1707, Lord Chief Justice John Holt of England described the act of a man having sexual intercourse with another man's wife as "the highest invasion of property."⁵ Thus, non-consensual sexual intercourse between a man and his wife was a way to protect his property. Also, at the slightest provocation, a man would met out all sorts of brutality on his wife including non-consensual sexual intercourse as a way of exercising and maintaining dominance and control over her. Those were the early beginnings of what is today known as spousal or marital rape.⁶ Furthermore, many cultures have had the concept of spouses' conjugal rights to sexual intercourse with each other. Under this conception, the idea of marital or spousal rape was treated as an impossibility as a married man can never be guilty of rape on his wife, for according to Sir Mathew Hale in 1736, such a rape could not be recognized since the wife, by going through the ceremony of marriage, "hath given up herself in this kind unto her husband, which she cannot retract".⁷ Unlike non-spousal rape, the peculiar feature in spousal rape is that the

¹ "Marital Rape" available at: http://en.wikipedia.org/wiki/Marital_rape (accessed on 4/12/2013)

² "Marital Rape" available at: <http://www.rainn.org/public-policy/sexual-assault-issues/marital-rape> (accessed on 6/6/2015).

³ Mark Peters, "The History of the Word Rape" available at www.magazine.good.is/articles/the-history-of-the-word-rape (accessed on 28/5/2015).

⁴ Randy Thomhill and Craig T. Palmer, "A Natural History of Rape: Biological Bases of Sexual of Coercion" available at <https://books.google.com.ng/books?isbn+=0262700832> (accessed on 28/5/2015)

⁵ S H Pillsbury, Judging Evil: Rethinking the Law of Murder and Maris laughter, available at [http://books.google.com/?id=OPLYXR2xOnOC&printsec=frontcover#v=onepage\\$4f=false,ISBN](http://books.google.com/?id=OPLYXR2xOnOC&printsec=frontcover#v=onepage$4f=false,ISBN) 9780814766804. (accessed on 6/6/2015)

⁶ DEH Russell, *Rape in Marriage*, New York Macmillan Publishing Company, 1990, P.11

⁷ W Blackstone, Commentaries on the Laws of England", available at <http://www.mdx.ac.uk/WWW/STUDY?xBlack.htm> (accessed on 4/12/2013)

victims have to live with their assailant and are often too scared to voice their pain. In most cases, victims of spousal rape may hesitate to report for a number of reasons including family loyalty, fear of their assailant's retribution, inability to leave the relationship, lack of a cause of action in law (as in Nigeria where spousal rape is not yet criminalized) or they may not know that rape in marriage is against the law (in jurisdictions where spousal rape is criminalized).¹ Many countries including England and Wales, Liberia, Ghana, Canada, Bolivia, Rwanda, Spain etc.²

The main thrust of this paper is to critically discuss the legality of spousal rape under Nigerian Law. In doing so, the paper examines the meaning of rape not only under Nigerian Law but as well in other jurisdictions. The paper then discusses the legality of spousal rape in Nigeria and compares it with the practice in other jurisdictions and concludes that the concept of spousal rape in Nigeria is an aberration until the laws are amended to accommodate it in the jurisprudence of Nigeria's criminal law. Recommendations are made for marital rape to be criminalized in Nigeria to bring it abreast of the rest of the world.

2. Meaning of Rape under Nigerian Law

Rape which in medical parlance is defined as penile penetration of vulva³ is the most serious kind of sexual assault and is punishable with imprisonment for life with or without whipping.⁴ Rape simply means sexual intercourse with a girl or woman without the consent of the girl or woman.⁵ In Nigeria, a man commits rape if he has unlawful sexual intercourse with a woman who is not his wife and who, at the time of the intercourse, does not consent to it. These features of the offence of rape are encapsulated in two major statutes in Nigeria; the Criminal Code⁶ and the Penal code.⁷ It is pertinent to state here that while the Criminal Code is applicable to the southern states of Nigeria, the Penal Code is applicable to the northern states. It is important to state also, as will be shown in this paper, that though the two statutes define the offence in different terms, the definitions are of the same effect. They mean the same thing.

It is perhaps appropriate to note that the two major statutes prescribing offences in Nigeria do not directly define the offence of rape. They merely describe the ingredients of the offence, facts which the prosecution must prove beyond reasonable doubt in order to secure conviction. In this vein, section 357 of the Criminal Code⁸ 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 threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.

Similarly, section 282 of the Penal Code,⁹ on the offence of rape, provides that:

A man is said to commit rape who, save 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 14(fourteen) years of age of unsound mind.

¹ "Marital Rape will push cause of victims" available at <http://www.leadership.ng/news/388170/marital-rape-will-push-cause-of-victims> (accessed on 28/5/2015)

² "Marital rape", available at http://en.wikipedia.org/wiki/marital_rape (accessed on 4/12/2013)

³ JK Mason and A M Smith, *Law and Medical Ethics*, (London: Butterworths, 1987) 22.

⁴ C O Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria*, 2nd edn; Ibadan: Spectrum Books, 1980, 271.

⁵ *Ogunbayo v The State* (2007)8 NWLR (Pt. 1035)157 at 178. see also *Posu v The State* (2011)2 NWLR (Pt 1234)393 at 414 and the heart-rending case of *Okoh v Nigerian Army* (2013)1 NWLR (Pt. 1334)16 at 30 in which a military officer who was HIV Positive forcefully had sexual intercourse with the complainant

⁶ Cap C 38, Laws of the Federation of Nigeria, 2004 sections 357 and 358

⁷ Cap 89, Laws of Northern Nigeria, 1963, sections 282 and 283.

⁸ *Ibid.*

⁹ *Ibid.*

These two statutes are virtually the same in their provisions on rape. The only difference between them is in the choice of words. It is therefore a difference without distinction. For the purpose of this paper, both provisions are discussed as if they are one.

The first point to be noted from the above provisions is that in Nigeria, a woman cannot commit the offence of rape upon a man.¹ This is so because the statutes provide that the offence can only be committed upon a woman or girl.² In other words, only a woman can be a victim of rape. This is the result achieved if the principle of interpretation of statute; *expressio unius est exclusio alterius* is applied.³ This aspect of the offence in Nigeria is not in consonance with the trend in other jurisdictions wherein it is possible for a woman to be guilty of rape under the definition of that offence. This is discussed in detail in a subsequent section of this paper.

The second point to be noted from the definition of the offence in Nigeria is that a man cannot be guilty of rape upon his wife. This is the main thrust of this paper and it is discussed later. This is the purport of the statutes in Nigeria.⁴ Section 6 of the Criminal Code defines "unlawful carnal knowledge" as "carnal connection which takes place otherwise than between husband and wife." That is to say, that a man cannot have an unlawful sexual intercourse with his wife. He cannot rape his wife.

Another point that should be noted is that under the Nigerian definition, rape is committed upon penetration of the female genital organ (vagina) by the male penis. Thus, it is not rape if the vagina is penetrated with any other object or any other part of the male body. Furthermore, it is not rape if any other part of the female body (e.g. the mouth or the anus) other than the vagina is penetrated.

The notion that a husband cannot be guilty of rape upon his wife is predicated on the then generally accepted view of the common law. It was based on a theory articulated by Mathew Hale, Chief Justice in England in the 18th century who wrote in 1736 that:

...the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract.⁵

In a long line of judicial authorities, the courts in Nigeria have applied the law on rape as contained in the statutes referred to above and have held that rape is the act of sexual intercourse committed by a man with a woman who is not his wife and without the woman's consent.⁶

In *Posu v The State*⁷ the Supreme Court enumerated the ingredients of the offence of rape when it held that in a charge of rape or unlawful carnal knowledge of a woman without her consent, it is the duty of the prosecution to prove the following ingredients beyond reasonable doubt:

- (a) that the accused had sexual intercourse with the prosecutrix;
- (b) that the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation;
- (c) that the prosecutrix was not the wife of the accused;
- (d) that the accused had the *mens rea*, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not;
- (e) that there was penetration.

On when the offence of rape is complete, the Court of Appeal, adopting the decision of the Supreme Court in *Ogunbayo v. The State*¹ and other cases, held that:

¹ It should be noted however that pursuant to section of 7 of the Criminal Code in Nigeria, where a woman is incapable of committing rape, she can be found guilty of the same offence for aiding, counseling or procuring the commission of the offence as in *R v Cogan and Leak* (1975) Crim. L.R. 584

² C O Okonkwo, op.cit.

³ "Rape Under Nigerian Law: Time for a Review", available at <http://saymalcolm.wordpress.com/2012/07/25/rape-under-nigerian-law-time-for-a-review/> (accessed on 8/6/2015).

⁴ Both the Criminal Code and the Penal Code.

⁵ D Finkelhor and K Yilo, *License to Rape: Sexual Abuse of Wives*; New York, The Free Press, 1985, 24. See also J E Hasday, "Contest and Consent", *California Law Review* Vol. 88(5) October 2000 available at: http://chicagounbound.uchicago.edu/journal_articles (accessed on 6/6/2015) and the views of J C Smith B Hogan, *Smith and Hogan Criminal Law*, 5th edn, London: Butterworth, 1983, 405-407.

⁶ See the cases of *Okoyomon v The State* (1973)1 Sc 21; *Upahar v The State* (2003)6 NWLR (Pt. 816)230 and *Ogunbayo v The State* (2007)8 NWLR (Pt. 1035)157.

⁷ (2011)2 NWLR (Pt. 1234)393 at 416-417.

The essential ingredients of the offence of rape are penetration and lack of consent. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape.²

The foregoing is, in a nutshell, the crux of the offence of rape under Nigerian Law. Under the said law, it is crystal clear that only a man can commit the offence of rape just as it is also clear that a husband cannot be guilty of rape upon his own wife. What is left now is to examine the meaning of rape in other jurisdictions to see if the Nigerian position is in consonance with the rest of the world.

3. Meaning of Rape in other Jurisdictions

Recent legislation on rape around the world demonstrates a continued departure from the common law definition whereby the victim must be a woman. The meaning of rape in Ghana is similar to that in Nigeria. The only difference is that it is rather simplified. Under Ghanaian law, rape is defined as “the carnal knowledge of a female of sixteen years or above without her consent”.³ In some jurisdictions, the element of consent has even been removed from the definition. As will be seen, some of these definitions are very exhaustive, gender-neutral and devoid of the marital rape exemption syndrome in contrast to the Nigerian legislation.

In England and Wales, rape is defined as follows:

- (1) A person (A) Commits an offence if –
 - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis;
 - (b) B does not consent to the penetration, and
 - (c) A does not reasonably believe that B consents.⁴

Under this law, as in Nigeria, rape requires a penis to be inserted into a woman’s vagina, anus or mouth without her consent. As such, physically, a woman cannot rape a man. Only men can commit the offence of rape as a principal. A woman can legally rape a man if she acts as an accomplice in assisting a man to put his penis into another woman’s vagina, anus or mouth without her consent.⁵ The major difference between this definition and that under Nigerian law is that it includes the penetration of the anus and mouth of the victim. Otherwise, they are the same.

Similarly, in 2012, the United States Department of Justice announced a change in the definition of rape from “the carnal knowledge of a female forcibly and against her will”, to “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim”.⁶ This definition which is more broad-based, has jettisoned the notion of gender – restriction. The definition takes into consideration the dynamics of sexual assaults taking place in the modern world. Under this definition, it is possible for rape to be committed by inserting a finger or any other part of the body other than the penis into the vagina, anus or mouth of the victim. It is also possible under this definition for a woman to be guilty of rape upon a man if she inserts her finger or any other object into the anus of the victim without his consent.

Many jurisdictions such as Canada, and several US and Australian states, have abandoned the term rape” in favour of other terms such as “Sexual assault”, “sexual intercourse without consent”, “criminal sexual conduct”

¹ supra

² *Okoh v Nigerian Army* supra at 30-31. See also *Jegade v The State* (2001)14 NWLR (Pt. 733)264 and C Arinze-Umoni and O Ikpeze, “Rape in Matrimony. Entrenched Global Disaster and Underdevelopment of Women: Nigeria in Focus” available at www.csus.edu/hhs/capcr/docs/.../papers/c%20arinze-umobi.doc (accessed on 26/5/2015) wherein the authors emphasized that the hallmark of the offence of rape is the absence of consent by the victim to the sexual intercourse.

³ Section 98, Criminal Code (Amendment) Act 2003 (Act 646) Ghana.

⁴ Section 1, Sexual Offences Act 2003 (England).

⁵ Bastian Lloyd Morris, “Is the Law on Rape Sexist?” available at www.blmsolicitors.co.uk/2014/03/is-the-law-on-rape-sexist/ (accessed on 10/6/2015)

⁶ New R ape Definition”, available at <http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/new-rape-definition-frequently-asked-questions> (accessed on 27/5/2015)

etc. The Canadian Criminal Code criminalizes “sexual assault”. Sexual assault is defined as sexual contact with another person without that other person’s consent. Section 273(1) of the Code defines consent as “the voluntary agreement of the complainant to engage in the sexual activity in question.”¹ In South Africa, the new legislation on rape repealed the common law offence of rape and replaced it with a new expanded statutory offence of rape applicable to all forms of sexual penetration without consent, irrespective of gender.²

The statute defines rape as follows:

Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.³

“Sexual Penetration” is defined as:

Any act which causes penetration to any extent whatsoever by –

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person.⁴

It must be stated, and credit to South Africa, that this law which came into effect on December 16, 2007 after being signed into law by the then president, Thabo Mbeki, is one of the world’s most modern in its comprehensive description of what sexual offences are. It is also vital to note that the purport of the law simply means that a woman, a man (or a child) can be raped by another woman or man.⁵ This cures the gender bias and other limitations of the definition of rape in several jurisdictions.

4. The Spousal Rape Exemption under Nigerian Law

The pertinent issue to be determined under this section is; whether the Nigerian criminal jurisprudence recognizes spousal rape? In other words, can a man be guilty of a rape upon his lawful wife? It seems obvious that given the meaning of rape under Nigerian law, that the resolution of this issue must be in the negative. This must be so because the combined effect of sections 6 and 357 of the Criminal Code⁶ is to the effect that a man cannot rape his wife. Unlawful carnal knowledge is defined to mean carnal connection which takes place otherwise than between husband and wife.⁷ Statutory therefore, the carnal connection that takes place between husband and wife is lawful, and therefore cannot satisfy the element of “unlawful carnal knowledge” that must be proved in order to establish rape.

Again, section 282(2)⁸ expressly provides that sexual intercourse between a man and his own wife is not rape provided that she has attained the age of puberty.

The *actus reus* of the offence of rape under Nigerian Law which is “Unlawful sexual intercourse” otherwise known as intercourse outside the bonds of marriage, tends to confirm the generally accepted elaborate legal regime that has continued to explicitly subordinate wives to their husbands. Under customary law, the incident of rape of a wife by her husband is unknown as the wife is regarded as the property of the husband. As such, he is free to have her at will notwithstanding her disposition. This altitude is predicated on the notion that on the payment of bride price, the husband becomes the “owner” of the wife just as he owns other items of property including goats, sheep and chicken and reserves the right to discipline her, including having sexual intercourse with her any time he desires. This perpetuate the idea held under customary law, that a woman is a piece of property owned by the husband.⁹ 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.

¹ Sexual Assault Criminal Law, Rape Shield, Evidence . . . available at [ww.sexassault.ca/criminal process.htm](http://ww.sexassault.ca/criminal%20process.htm) (accessed on 11/6/2015)

² “Laws regarding rape” available at <http://en.m.wikipedia.org/wiki> (accessed on 11/6/2015)

³ Section 3, Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)

⁴ Ibid. see also “Judge extends definition of rape” available at <http://mobi.iol.co.za#!/article/> wherein a Pretoria High Court Judge ruled that the common law definition of rape was “archaic” and resulted in inadequate protection for victims of sodomy and discriminatory sentence holding that the common law imitation to vaginal penetration had become anachronistic and offensive. His ruling also brought “male rape” into ambit of rape. It should be noted that this ruling was made in 2006, a year before the amendment in 2007 which broadened the scope of the definition of rape in South Africa.

⁵ Anoeschka Von Meck, “Rape the new Legal definition “ available at <http://www.knysnaplettherald.com/news/News/General/14052/Rape-t> (accessed on 11/6/2015)

⁶ Ibid.

⁷ Ibid. section 6

⁸ Of the Penal Code

⁹ C Arinze-Umobi & O Ikpeze op.cit. See also O Olopade, Law and Medical Practice in Nigeria (Ibadan: College Press &

Spousal rape exemption did not just start in Nigeria. It is rooted in the eighteenth and nineteenth centuries' conception of marriage and the obligations of the husband and the wife under that relationship. This conception operated along the common law principles of coverture, which explicitly subordinated wives to husbands.¹ 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 an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.²

The principles of coverture united husband and wife by subsuming a married woman's civil identity and according husbands wide-ranging control over their wives. As elaborated by scholars, "the laws of nature and divine revelation" jointly designed the husband as the head of the family.³ As such, "it (was) for the wife to love, honour, and obey; it (was) for the husband to love, cherish, and protect"⁴. Coverture principles were also acclaimed to reflect "the law of nature, which gave strength to the man and feebleness and dependence to the woman."⁵

The implications of this understanding of the relationship between husband and wife can be found throughout nineteenth – century jurisprudence. Under that regime, a husband enjoyed substantial rights to his wife's person.⁶ The common law gave husbands the authority to chastise, or correct, their wives, as long as the corporal punishment did not cause permanent injury.⁷ As an indubitable conviction that a man cannot be guilty of a rape upon his own wife, especially up to the nineteenth century, rape laws stated what a "male person" could not do to "any woman, other than his wife."⁸ Legal writers took pains to emphasize that "a man cannot be guilty of a rape upon his own wife",⁹ that "a husband does not become guilty of rape by forcing his wife to his own embraces."¹⁰ Indeed, as one legal writer put it; "the 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."¹¹ By the same token, "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."¹²

These male prerogatives which were enshrined in 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.¹³ The reasons usually cited to explain and justify the wife rape exemption in nineteenth century authoritative legal sources originated in the work of Sir Mathew Hale, a former Chief Justice of the Court of King's Bench in England.¹⁴ Hales seminal treatise, the History of the Pleas of the Crown¹⁵ was first published in 1736 and became extraordinarily influential in America and the Commonwealth. Therein, he stated:

Publishers Ltd, 2008) 153.

¹ J E Hasday op. cit.

² W Blackstone op. cit.

³ J Schouler, A Treatise on the Law of the Domestic Relations 16-21 (Boston: little, Brown, & Co. 1870), 16-21

⁴ J E Hasday op. cit. see also Bradley, J., concurring in the judgment of the court in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) wherein the Learned Law Lord stated: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"

⁵ J P Bishop, Commentaries on the Law of Married Women, (Philadelphia: Kay & Brother, 1871) 27

⁶ Schouler op. cit.

⁷ W Blackstone, op. cit.

⁸ Thomas W Waterman, A complete Practical Treatise on Criminal Procedure 6th ed (New York: Banks, Gould & Co. 1853) 6-7

⁹ Oliver L Barbour, The Magistrate's Criminal Law, (Albany: Wm. & A. Gould & Co; 1841) 66

¹⁰ J P Bishop op.cit, 623-624

¹¹ Emlin McClain, A Treatise on the Criminal Law, (Chicago: Callaghan & co. 1897) 207.

¹² Wm L Clark, Jr, Hand-Book of Criminal Law, (St. Paul: West Publishing Co., 1894) 190

¹³ Kate Painter, "Wife Rape in the United Kingdom" available at www.crim.cam.ac.uk/people/academic_research/kate.../wiferape.pdf (accessed on 6/6/2015).

¹⁴ J E Hasday, op.cit.

¹⁵ (Philadelphia: Robert H Small, 1847) (1736)

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract.¹

The “Hale fiction” held sway in England, America and other commonwealth jurisdictions until 1991. But before 1991, unsuccessful attempts had been made at demystifying the Hale Fiction of wife rape exemption. The first attempted prosecution of a husband for the rape of his wife was in *R v Clarke*² but rather than try to argue directly against Hale’s logic, the court held that consent to sexual intercourse in the instant case had been revoked by an order of the court for non-cohabitation. Similarly, in *R v O’Brien*,³ Park J held that a decree nisi divorce effectively terminated a marriage and it was possible thereafter for the husband to rape his wife. The same result was achieved in *R v Steele*⁴ where an injunction had been granted to restrain a husband from molesting his wife or where he has given an undertaking to the court not to do so.⁵

In the foregoing cases, the courts found reasons not to apply the wife rape exemption without contradicting the logic in Hale’s proposition. However, there are recorded instances of a husband successfully relying on the exemption in England and Wales.⁶ It is contended that the legal position of wife 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. The reason for this is not far-fetched. When Britain colonized Nigeria, she made her part of the British Empire, now known as the Commonwealth. The British brought and left behind not only the English language and their way of life, but also the English law which was received into Nigeria by virtue of local statutes that permitted the application of English law in Nigeria. Part of that English law that remained valid in Nigeria included decisions of courts in England which till today, has persuasive effect in the jurisprudence of Nigeria.⁷ Part of the reason for this state of the law on the subject matter of discourse, is the reluctance of the Nigerian legislature to review the law on rape and other sexual offences in consonance with the currency of the global trend towards the criminalization of wife rape.⁸ But as it is, that is the law in Nigeria. A husband cannot be guilty of rape upon his wife. It will be an aberration and a travesty of justice to apply the law other than it is. Nigeria is not alone in this. In India, even though the government strengthened its rape laws and increased the sentences for rape amid a public outcry over the gang rape and murder of a student in a Delhi bus in 2013, a man cannot be convicted of raping his wife because the laws on rape do not apply to married couples. This principle of law was applied in the recent acquittal of a man who allegedly drugged and raped his wife. In his ruling on the case, Judge Virender Bhat said:

The prosecutrix (the wife) and the accused (Vikash) being legally wedded husband and wife, and the prosecutrix being major, the sexual intercourse between the two, even if forcible, is not rape and no culpability can be fastened upon the accused.⁹

5. The Practice in other Jurisdictions

For many years after the publication of Hale’s work in England, there was no substantive challenge to his statement until *R v Clarke*¹⁰ in 1949. The principle established by Hale in 1736, that women agree to sexual intercourse on marriage and cannot retract that consent, had been laid to rest. On the 23rd day of October 1991, wife rape exemption was consigned to history in England when the House of Lords, in a unanimous judgment in *R v R*,¹¹ declared that a husband’s immunity from a charge of rape on his wife formed no part of English Law.¹

¹ Ibid, 629

² (1949)2 ALL ER 448

³ (1974)3 ALL ER 663.

⁴ (1977)65 Cr App Rep 22

⁵ See also the case of *R v Roberts* (1986) Crim L R 188 where the existence of a formal separation agreement achieved the same result.

⁶ “Marital Rape” available at: http://en.wikipedia.org/wiki/matrital_Rape (accessed on 12/14/2013). See also *R v Miller* (1954)2 Q B 282, where it was held that the wife had not legally revoked her consent despite having presented a divorce petition, *R v Kowalski* (1988)86 Cr App R339 which was followed by *R v Sharples* (1990) Crim L R 198 and *R v J* (1991) In the above cases, the husbands were instead convicted of assault or indecent assault.

⁷ Ese Malemi, *The Nigerian Legal System: Text and Cases*, (3rd edn, Lagos: Princeton Publishing Co., 2012) 46. See also A O Obilade, *The Nigersian Legal System*, (Ibadan: Spectrum Books Ltd, 1977)17.

⁸ C Arinze – Umobi & O Ikpeze, op.cit.

⁹ Dean Nelson, “Rape in Marriage not a Crime, Indian Court rules”, available at <http://www.telegraph.co.uk/news/worldnews/asia/india/10824964/Rap> (accessed on 4/6/2015)

¹⁰ Supra

¹¹ (1992)1 A C 599, (1991)1 ALL ER 747 (1991)3 W.L.R. 767

In the 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.² This judgment had a rippling effect not only in England but also in the entire commonwealth including the United States of America and other jurisdictions³ which has culminated in the present position of the law in many such jurisdictions excepting Nigeria amongst others.

The practice in many other jurisdictions on the issue of wife rape is that wife rape has been criminalized. This followed the landmark decision of the House of Lords in *R v R*⁴ in England. But even before that decision in 1991, two decisions in Scotland had held that "the fiction of implied consent has no useful purpose to serve today in the law of rape"⁵ and had each, convicted the defendant for rape on his wife on the ground of an existing separation order which indicated revocation of the implied consent. The significance of the decision in *R v R*⁶ lies in its reliance on the absence of consent simpliciter and not on the existence of a separation from which absence of consent could be implied. Therefore, the law as established in this case, in England and many commonwealth nations, 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.⁷

In the United States of America, the legal history of wife rape is long and complex one spanning over several decades. Prior to the mid 1970s, the concept of "marital rape exemption" made it impossible for wife rape to be a crime. Many statutes then precluded the prosecution of spouses, including estranged or even legally separated couples.⁸ But the tide changed in the 1970s and 1980s when numerous states adopted laws criminalizing marital rape. This was before the decision in *R v R*⁹ in England. But by July 1993, marital rape was made a crime in all states in America including the District of Columbia and it became illegal to rape your spouse.¹⁰ This wind of change which has blown around the world has been accentuated in its gravitation in the 20th and 21st centuries by a frenzy of human rights agitations championed by feminist advocates.¹¹ The contemporary feminist argument against the marital rape exemption is an effort to establish that marriage is a potentially antagonistic and dangerous relation in which women need and deserve legal rights to protect themselves from the serious harms caused by unwanted sex in marriage. In this regard, modern feminists oppose marital rape on the ground that it deprives women of control over their reproductive capacity.¹² They also argue that marital rape denies women

¹ K Painter op.cit., see also Rob Jerrard, "Marital Rape" available at: <http://www.rjerrard.co.uk/law/articles/rape.htm> (accessed on 13/6/2015)

² "Famous Cases: *Regina v. R*" available at: www.brightknowledge.org/knowledge-bank/.../famous-cases-regina-v-r (accessed on 16/6/2015)

³ Ibid.

⁴ Supra

⁵ *H M Advocate v Duffy* (1983) S.L.T. 7 and *H.M. Advocate v. Paxton* (1985) S L T 96, two decisions to which the House of Lords referred in *R v R*. See also the dictum of Lord Keith at page 617 of the report.

⁶ Supra

⁷ Ibid.

⁸ In *Frazier v State* 86 S.W. 754 (Tex.crim.App.1950), Mr Frazier was found guilty of assault with attempt to rape and he appealed his conviction. The Texas Court of Criminal Appeals which reversed his conviction, relied on a long line of judicial precedent in finding that Mr. Frazier's conduct did not constitute "a violation of the Law"

⁹ supra

¹⁰ "Marital Rape" available at: <http://www.rainn.org/public-policy/sexual-assault-issues/marital-rape> (accessed on 12/4/2013). See also "Marital Rape" available at: <http://en.wikipedia.org/wiki/marital/rape> (accessed on 12/4/2013)

¹¹ Ibid.

¹² Thomas R Bearrows, "Abolishing the Marital Exemption for Rape: A statutory Proposal" (1983) U./LL.L Rev., 201 at 218 wherein the author argues that rape statutes which include the marital exemption impermissibly burden a woman's decision to

the right to control their sexuality and their chances for sexual pleasure. They posit that a marital rape victim loses the ability to determine her sexual actions, pleasures, and desires free from external influence.¹ From this perspective, feminist advocates argue that the damage occasioned by marital rape exemptions is the subordination, and in many cases, the annihilation, of the psychic, physical, emotional, and erotic female self, and a violation of women's bodily integrity. It also destroys the woman's autonomy, to decide what happens to her body in the marriage relation. Rape laws, it is argued, protect a woman's sexual integrity and freedom of choice in an area of utmost intimacy and the fact that the rape occurs in a marital context does not affect the interests which are violated.² As the concept of human rights has developed and crept into the constitutions of many nations of the world, the belief of a marital right to sexual intercourse has become less widely held. This has resulted in increased criminalization of marital rape by many nations.³ And in December 1993, the United Nations High Commissioner for Human Rights published the *Declaration on the Elimination of Violence Against Women* which establishes marital rape as a human rights violation.⁴ Many countries of the world including Namibia, Swaziland, South Africa,⁵ Ghana⁶ and Thailand⁷ have made spousal rape a criminal offence. But there still remain many others who have not done so. And Nigeria belongs to this group.

6. Conclusion

There can be no doubt that spousal rape has generated a serious controversy especially in the wake of a renewed feminist advocacy on the right of a woman to control her sexuality and retain her bodily integrity. This is against the background of an old and customarily held view of the presumed consent to sexual intercourse between spouses. The agitation for the abolition of what has been referred to as "the marital rape exemption" was given great momentum by the landmark judgment of the House of Lords in 1991 which opened the floodgate of a worldwide reclassification of sexual offences to include spousal rape. Thus, sexual intercourse between a husband and his wife without the consent of either spouse is an offence in several jurisdictions. This is not so in Nigeria, principally, 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 seen in terms of "unlawful sexual intercourse" which is defined as sexual intercourse which takes place otherwise than between husband and wife. Consequently, a man cannot be guilty of rape upon his wife under Nigerian law.

But should Nigeria continue to live in this state when the rest of the civilized and civilizing world leave her behind? The patent and compelling temptation is to recommend an amendment to the laws to remedy the "lapse". The difficulty in suggesting an exhaustive review of the law in consonance with the current global trend on the issue stems from the reality that even in jurisdictions where spousal rape has been criminalized, there are many who are of the opinion that the criminalization involved post facto criminalization in so far as the law prescribed imprisonment for spouses for engaging in act which was at once, according to the law, their right.

Secondly, and related to the first problem, is the issue of burden of proof which will arise at the trial. While the law in theory may hold no distinction between a spouse and any other person on the issue of rape, in practice, when the case comes to court, there will be difficulties in proving that rape in fact took place. This is so because in marriage, sexual relations including sexual intercourse are to be expected. And if the defence relies on consent, then it places a very heavy and difficult evidential burden on the prosecution to discharge.⁸ This obstacle was acknowledged by Lord Keith in the 1991 landmark case of *R v R*⁹ "when there is no separation, this may be harder to prove".

use sexual abstinence as a method of contraception.

¹ J E Hasday, op.cit. See also Robin West "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment (1990)42 FLA. L. Rev., 45 at 69.

² ibid

³ D J Frank, JC Bayliss & A B Steven, "Worldwide Trends in the Criminal Regulations of Sex, 1945 to 2005", in *American Sociological Review*, 75(6):871 available at <http://dx.doi.org/10.1177%2F003122410388493> (accessed on 12/4/2013)

⁴ "Marital Rape" available at: http://en.wikipedia.org/wiki/marital_rape (accessed on 12/4/2013)

⁵ Karen Stefiszyn, "A Brief Overview of Recent Developments in Sexual Offences Legislation in Southern Africa" UN. Expert Group Meeting on Good Practices in Legislation on Violence against Women..., 4.

⁶ Yakin Erturk, "Report of the Social Rapporteur on Violence against Women, its Causes and Consequences" available at: <http://www.unher.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47ce68652> (accessed on 12/4/2013)

⁷ "Thailand outlaws marital rape" available at <http://www.chnapost.comtw/asia/2007/06/22/113083/Thailand-outlaws.htm> (accessed on 12/4/2013)

⁸ Wendy McElroy, "Spousal Rape Case Sparks Old Debate" Fox News 16/2/2005 available at <http://www.foxnews.com/story/2005/02/16/spousal-rape-case-sparks-old-debate.html> (accessed on 17/6/2015). See also Gary H Strauss, "Wife Rape: Personal Realities and Hope for the Future" available at: <http://books.google.com/books?isbn=1621893278> (accessed on 17/6/2015)

⁹ supra

Another problem which arises in some of the jurisdictions where spousal rape has been criminalized stems from the prevailing social norms that exist in certain cultures. As a result, these laws are either ignored or rarely prosecuted and many jurisdictions including states in America still retain vestiges of the marital exemption. For example, the punishment prescribed for spousal rape is often lighter than for other types of rape, and as has been stated, the standard of evidence required is often higher.¹ Notwithstanding the enactments, these laws are ignored as the act is not socially considered a crime. The general consensus then is that a man raping his wife is an alien concept which goes against cultural norms because it is perceived as the wife's duty to provide sex on demand by the husband.² This is in consonance with the jurisprudence of marriage which entails the bond of intimacy between the husband and the wife. This intimate bond is evidenced in the primacy of sexual intercourse between a man and his wife. To curtail this sexual intimacy by the requirement of consent before the act of sexual intercourse between a husband and his wife would certainly destroy the very essence marriage.

Are we suggesting that Nigeria should not take any steps to align her laws on sexual offences with the rest of the world? By no means. As it is, Nigerian statutes are still silent on spousal rape. Law is dynamic and ought to be used to address the needs of the society. Our opinion is that should the Nigerian society really need a change in the sexual offences laws to prescribe marital rape, then that should be it. It will not be an exercise in wisdom to amend the law just because other countries are doing so. Nigeria should take into account the sensibilities of peculiar social and cultural norms and the real intent of the marital relation. Sex is the reason most men marry. To outlaw sex in marriage on grounds of lack of consent would require a superior persuasion. But until that is done, marital rape remains an aberration under the Nigerian jurisprudence.

¹ Wendy McElroy *ibid*.

² Christine W. Wanjala, "Marital Rape: Is it a Crime or a Conjugal Right?" available at www.monitor.co.ug/SpecialReports/Marital-rape-is-it-a-crime-or-a-conjugal-right/-/688342/1720960/-/as,fvsz/-/index.html (accessed on 12/4/2013). See also "Marital Rape" available at: http://www.hiddenhurt.co.uk/mariatal_rape.html (accessed on 12/4/2013) wherein the author stated the point:

"A wife being raped will often question her right to refuse intercourse with her husband, and while she may realize that legally it now constitutes rape, there are many reasons which may prevent her from perceiving it in such a light"

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