

The Need for The Entrenchment of Marital Rape in Nigeria's Criminal Jurisprudence

Esther Joseph Umoren,

LLB, BL, LLM (inview) Assistant Chief State Counsel,
Ministry of Justice, Uyo, AkwaIbom State, Nigeria

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ABSTRACT: *The need for the entrenchment of marital rape in Nigeria's criminal jurisprudence is a pressing issue that requires urgent attention. Marital rape refers to any non-consensual sexual activity perpetrated by a spouse against their partner within the institution of marriage. Despite being a prevalent form of gender-based violence, marital rape is not explicitly recognized as a crime under Nigeria's legal framework. This paper examines the need for the entrenchment of marital rape in Nigeria's Criminal jurisprudence. Marital rape is rampant in Nigeria, just like any form of rape. Marital rape victims have experienced a lot of psychological trauma, depression, emotional imbalance; the experience has resulted in divorce, medical, physical and mental health to its victims. Unfortunately, marital rape victim is unable to report their victimization to the appropriate authorities, this is because there is no law criminalizing marital rape in Nigeria. This paper further looks at the historical review of marital rape exemption, the theories about the exemption and need to criminalize marital rape in harmony with other jurisdiction. The paper therefore recommended the imperatives steps towards protecting the rights and well-being of individuals within the institution of marriage and legal support for victims of gender-based violence.*

KEYWORDS: Rape, sexual intercourse, women, Nigeria, Jurisdiction.

INTRODUCTION

There is a growing trend that marital rape exemption is unjust and has no place in a civilized society. For centuries, husbands around the world have been granted marital exemption to the crime of rape¹, this is because the manner of crime in marital rape embodies some of the major tensions and complications arising from legally recognized fundamental rights in Nigeria. The Nigerian society has largely and rightly invested in ensuring that the justice system is fair to all, in this process, the voices of victims of marital rape are sometimes muffled under the weight of intersecting factors such as the laborious evidential procedures required for criminal

¹ T. Fus Criminalizing marital rape: "A comparison of Judicial and legislative Approach", available at <http://www.accessmylibrary.com>, accessed 8th November, 2023.

prosecution, stereotypical and prejudicial assumptions about women's experience of sexual assault, and neglect of the complex nature of what constitutes choice and want².

The person who takes a decision relating to sex is an important factor in the occurrence of marital rape³. This work examines whether a man can be raped by a woman, various laws that relates to marital rape exemption and the need to amend the laws, to ensure criminalization of marital rape in Nigeria.

The Concept of Marital Rape

Marital rape is the non-consensual sexual intercourse in which the perpetrator is the victim's spouse. It is the husband or the wife having sexual intercourse with another, without his or her consent. As such, it is a form of partner rape of domestic violence, and of sexual abuse⁴. Marital rape occurs when one spouse forces the other to take part in certain sexual acts without the others consent. It is a form of intimate partner violence by which one spouse attempts to establish dominance and control over the other. It is important to note that this form of crime is not centered on men alone, though marital prevalence is a rape between a husband to the wife and not vice versa. Men can also be victims of rape, this will be discussed in the course of this work.

Historical Review of Marital Rape Exemption

Historically, under the English common law, sexual activity was viewed as immoral, if it occurred outside the confines of marriage, thus, marriage was the rightful way to morally engage in sexual activity without societal condemnation⁵, central to the definition of marriage under the English common law, was the procreation of children which evident in the approach to the concept of consummation. Lack of consummation of sexual relationship between spouses are enough to legally declare a marriage voidable⁶. It means that sexual action is expected in marriage and in an era where women had little or no independence, the husband had control over, when sexual activity occurred in marriage. Therefore the husbands did not need the wife's consent for sexual activity. Marriage was an honourable way to fulfill sexual desires and reproduce. Families used marriage to cement relationship with other families and forge alliance. Often times, women were used as wagers for such alliances and relationship⁷.

² A. O. Ogunwale and R. F Afolabi, "Prevalence, determinants and coercive strategies relating to marital rape among women in Oyo State, Nigeria, available at <http://www-ncbi.nlm.nih.gov> accessed 8th November, 2023.

³ Ibid.

⁴ M. Peters, "The History of the word rape" available at <http://www.magazinegood, is article.org>. Accessed 8th November, 2023.

⁵ N. Bala, "The History and Future of marriage in Canada", available at <http://www.heinonline.org>, accessed 8th November, 2023.

⁶ N. Bala. Ibid.

⁷ S. Coontz, Marriage, a History: How love conquered marriage. 1stedn. (New York: Penguin book, 2006) P. 125.

The view of women as objects for men's sexual, economic, families and social gratification informed the marital rape exemption. Sir Mathew Hale has been credited with the first formal pronouncement of the tyrannical injustice to married women that significantly denied them the protection of the law from the offence of rape by their husbands. In his 1736 legal treatise published as history of the pleas of the crown, Hale is credited to have said that the husband cannot be guilty of the rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract, the wife hath given up in his kind into her husbands, which she cannot retract⁸.

Although Hale's proposition was not supported by Judicial authorities and sources of its time, one logical conclusion to draw from his book was that the understanding of marriage as an institution that enforced conjugal rights at the time, exempted any charges of rape against a husband⁹. In the sixteenth and seventeenth centuries when History of the plea of crown was established, the only means through which marriage could be revoked was by Act of parliament. This meant that without such a formal revocation of marriage by divorce, a women could not refuse their husbands access to their own bodies nor could they bring a case of rape against their husbands, since consent to sex was already matrimonially authorized.

THEORIES ABOUT EXEMPTION OF MARITAL RAPE

Implied Consent Theory

The implied consent theory, or irrefutable consent theory, was the most endorsed justification for the spousal rape exemption. A marriage was embodied in a contract, and the terms of this contract included a wife's irrevocable consent to have sexual intercourse with her husband whenever he wishes¹⁰. Any sexual intercourse between husband and wife after the wife provided initial consent in their marriage contract, was deemed consensual and thus could not constitute rape.

Property Theory

Another common law origin which was a building – block in the foundation for the marital rape was the idea that a husband owed his wife as chattel. Since a husband could not take what he already own, a husband was no more capable of raping his wife, than an owner was of stealing his own property¹¹. Since women were regarded as property, the common law treated rape not as a crime against women, rather, as a violation of man's property interest. The rape laws were concerned with protecting a husband's property interest in his wife fidelity, and

⁸ M. Hale, "History of the pleas of the crown". Available at <https://www.britannica.com>topic>History-of-the-pleas-of-the-croen> accessed 8th November, 2023

⁹ K, Faseyi, "Spousal rape in a Globalized world; available at <https://www.ajol.infor166810articletext-434192-1-10-2180328pdf> accessed 8th November, 2023.

¹⁰ S. Elvy, "A Post Colonial theory of Spousal Rape: the Caribbean and beyond". (2015) 22 Michigan Journal of Gender and Law P. 150

¹¹ C. Mitra, "For she has no right or power to refuse her consent". Available at <https://www.ojp.gov>virtuathbrary/abastracts/she-has-no-right-or-power-refuse-her-consen> accessed 8th November, 2023

father's interest in his daughter's virginity¹². To allege criminal charge against a man for raping his wife would tantamount to suing a man for stealing his own property¹³.

Unity Theory

Unity Theory emphasizes that, upon marriage, the wife's identity merged onto the existence of her husband. In 1765, Blackstone stated, "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 everything¹⁴. This doctrine made rape to a woman by her husband a legal impossibility, since a man could not rape himself¹⁵.

The Privacy and Reconciliation Theory

The right to marital privacy and the goal of marital reconciliation have been used to justify the spousal rape exemption under the privacy theory, failing to prosecute a husband for raping his wife prevented governmental intrusion, protected marital privacy and promoted reconciliation between spouses. Upon marriage, the curtain is drawn, the public stays out and spouse's stays in. if a husband were prosecuted for raping his wife, the public could review the intimate act of marital couple, which would violate the couple's right to marital privacy¹⁶. Under the reconciliation theory, the ability of married couples to reconcile would greatly decreased, if spouses were permitted to access the criminal justice system to resolve all of their marital disputes¹⁷.

Other Reasons for Marital Rape Exemption

Apart from the Theories listed above, the offence of marital rape was said to be impracticable to establish, especially with evidential procedures and the establishment of consent. For offence of rape to be established, the woman has to prove that she did not give her consent to the sexual intercourse, and if given, it was by force. How will the wife establish this fact, when she has been constantly having sexual intercourse with her husband for years and even produced children for him. Also who will corroborate the crime, calling an eye witness to an event that happened in the inner room? Or medical evidences showing injury on the vagina (where unfortunately, there is none).

There are myths that established the rationale for marital rape exemptions. For example, a myth that says that women enjoy being raped, also that woman most often lied about being raped. We also have the myth about vengeful women who conjured rape as a retaliatory way to get

¹² L. Siegel, "The Marital Rape Exemption: Evolution to Extinction", available at <https://www.semanticscholar.org/paper/the-marital-rape-exemption%3A-evolution-to-extinction-siegel/ef7dc600docasff44...accessed> 8th November, 2023.

¹³ Ibid.

¹⁴ W. Blackstone, "Commentaries on the laws of England", available at <https://jackmullercenter.org/ed-resources/blackstone-commentaries/accessed> 8th November, 2023.

¹⁵ Ibid.

¹⁶ E. Elvy, OP. cit.

¹⁷ E. Elvy. Op cit

back to a man who wronged them or fails to meet their demands¹⁸. There was also the myth about consent, which suggested that women are coy creatures, and that when they say no, they often times meant yes or try again¹⁹. Other myth includes a jealous wife who would easily raise the issue of rape on his unfaithful husband, who intends to leave her for another woman just to get back at him.

Marital Rape Exemption: The case of Nigeria

In Nigeria, a man commits the crime of 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. By rape, we mean penile penetration of the vulva²⁰, without the consent of a girl/woman.

There are two major statutes proscribing the offence of rape in Nigeria, though they merely describe the ingredients of the offence, and not define the offence of rape. Section 357 of the criminal code²¹ provides that:

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats, or intimidation or 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 cases of a married man, by impersonating her husband, is guilty of an offence which is called Rape”.

Similarly, section 282 of the penal code Act²² provides that:

“A man is said to commit rape 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 or whom she is or believes to herself to be lawfully marriage (e) with or without her consent, when she is under 14 (fourteen) years of age or of unsound mind.

These two statutes are same in their provisions on rape. Points to be noted from the two statutes are that in Nigeria, a woman cannot commit the offence of rape upon a man, only a woman can be a victim of rape. Also a man cannot be guilty of rape upon his wife. Section 6 of the criminal code Act²³ defines unlawful carnal knowledge as “carnal connection which takes place otherwise than between husband and wife”. Under the Nigerian laws in both section 357 of the

¹⁸ The story of Joseph and Potiphar’s wife in the Bible (Gen. 39:5-20) was a strong reference to warn judges, juries and men alike, about the danger of falling prey to the lies of a bitter woman.

¹⁹ K. Busby, “every Breath you take: Erotic Asphyxiation, vengeful wives and other Enduring myths in spousal sexual Assault prosecutions”, available at <https://www.utjournals-press/doi/abs/10.3188/cjwl.24....accessed> 8th November, 2023.

²⁰ Y. Mason and A. Smith, Law and Medical Ethics (London: Butterworth’s Press, 1987) at 22.

²¹ Cap. C. 38, Laws of the Federation of Nigeria, 2004.

²² Cap. C. 53, Laws of the Northern Nigeria, 1960.

²³ Cap. C. 38, Laws of the Federation of Nigeria, 2004.

criminal code and section 282 of the penal code, a husband cannot be charged with marital rape. Once the marriage is subsisting, then any sexual intercourse with her is never rape²⁴.

Can a Man be raped?

For our society to acknowledge that men are raped, it must first recognize and acknowledge that men can be vulnerable. Both men and women are socialized to see a man as powerful, assertive and in control of their bodies. It may be challenging for some to think of men as being the victims of sexual crimes because it is challenging to recognize men as ‘victims’ and to think of them as men²⁵.

It is a common misconception that due to the mechanics of sex, it is impossible for a man to be raped by a woman, the thought is that if a man and a woman have sex, the man must be sexually aroused and so must be consenting. Men can display physiological signs of arousal, including erection and ejaculation, when they do not want to have sex, just as women can lubricate and orgasm during rape²⁶.

Given that rape is ‘causing a person to engage in sexual activity without consent’, a man can be tied to a bed for a teasing oral sex, only to be forcefully penetrated by a woman despite his protestation. Erection can be induced by fear and it is not necessarily indicative of pleasure or consent. Women use verbal pressure, persuasion, intoxication, physical violence and physical harms as aggressive strategies to compel men to penetrate them²⁷. A woman having sexual intercourse with a man without his consent ought to be considered rape. Rape should be made gender neutral, a bill to amend the criminal code Act should be initiated, until that is done, Nigerian men cannot be raped. The amendment, will provide recourse for many men in homes, offices, domestic male staff, who are sexually exploited by their female employers.

The Need for the Entrenchment of Marital Rape in Nigeria

Marital rape is a serious public health problem affecting spouses in Nigeria. Marital rape is a common practice in Nigeria, many men, especially women are constantly being raped by their spouses. Marital rape has played significant role in the poor state of health of spouses in our society. Girls are consistently being forced into marriages. These girls are forced into marriages

²⁴ F, Branda “Gender-based violence Laws in sub-Saharan Africa” available at <https://www.evav-global-setabase.unomen.org> Accessed 8th November, 2023.

²⁵ Male victims-National Alliance to End Sexual violence-available at <https://endsexualviolence.org>.accessed 8th November, 2023.

²⁶ N. McKeever, “Can a Woman Rape a man and why does it matter?” available at <https://link.springer.com>. Accessed 8th Nov. 2023.

²⁷ S. Weare, “oh you are a guy, how could you be rape by a woman, that makes no sense”. Towards a case for legally recognizing and labeling ‘forced-to penetrate’ eases of rape available at <https://www.cambridge.org>journalis>article>. Accessed 10th November, 2023.

before they have the full rights of adulthood and being forced into sexual relationships without their consent, as long as their perpetrator is legally married to them, amounts to marital rape²⁸. The case of the Sudanese girl who was sentenced to death for killing her husband who attempted to rape her, after raping her a night before, brought the issue of marital rape to the global stage. The 19 year old Noura Hussein in Sudan was sentenced to death by the court for murdering her husband. According to Noura Hussein, her father made her contractually marry her cousin when she was 16yrs, but she refused to accept the union and sought refuge in a relative for three years. She returned to her family home after the father said the marriage was canceled, but found out that she had been duped and preparations for her wedding ceremony were under way. Hussein said, she refused to have sex with her husband after the ceremony, but on the sixth day, he raped her, as three of his male relatives held her down to restrain her. The following day, he attempted to rape her again, as she struggled to stop him, she stabbed and killed him. Her sentence was eventually set aside by a superior court and she was given a lesser sentence²⁹.

The violence against persons (Prohibition) Act 2015 has not made a provision exempting a spouse from being charged with the offence of rape, where a crime is committed against their spouse. Section 1(1) of the VAPP Act provides:

“a person commits the offence of rape if

- (a) he or she intentionally penetrates the vagina, anus or mouth of another person with any part of his or her body or anything else.
- (b) The other does not consent to penetration or
- (c) 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 misrepresentation as to the nature of act or the use of any substance or addictive capable of taking away the will of such person or in the case of a married person, by impersonating his or her spouse.

Section 45(2) of the VAPP Act has given priority to the VAPP Act concerning the matters it covers. It provides that where other laws make provisions for areas that the VAPP Act has covered, the VAPP Act will supercede. Therefore, where proved beyond reasonable doubt by the prosecution, the offence of spousal rape is punishable under the VAPP Act³⁰, provided the victims come forward. Unfortunately VAPP Act is not applicable to all jurisdictions within Nigeria, it applies to FCT and few other states. It is not a binding law in a state unless it is adopted and domesticated by the state. Also the VAPP Act has not expressly defined who a ‘person’ is³¹, it made reference to the definition of a person in accordance to the interpretation Act under section 18 caps 192, laws of the federation of Nigeria 2004, which defines a person

²⁸ N. Jaham and Z Islam, “Marital rape, child marriage: Issues that are now even more pressing”, available at <https://www.daily-star.net/2023/11/10/editorial-news-child-marriage-marital-rape-must-be-criminalized/> – accessed 10th November, 2023.

²⁹ J. Gathright, “Sudanese Teen Bride Sentenced to Death for killing Husband during Alleged raped”. Available at <https://www.npr.org/2023/11/10/1221111111> accessed 10th November, 2023.

³⁰ M. Monday, “is spousal rape a crime in Nigeria?” available at <https://www.blog.gavel.ng/>. Accessed 10th November, 2023.

³¹ See Section 46 of the VAPP Act 2015.

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to include anybody of persons, cooperate and an unincorporated. The question now is, by this definition, is a spouse included in this definition?

Spousal rape has been slated as a crime in many countries such as United States of America, United Kingdom, Ghana, Malawi, South Africa, Rwanda, sierra Leone, Zimbabwe etc. there is therefore need for Nigeria to follow suit

CONCLUSION AND RECOMMENDATIONS

Nigeria is yet to criminalize marital rape in harmony with other parts of the world. I look forward to the development of Nigerian Jurisprudence on marital rape. VAPP Act should be domesticated in states where it is unavailable. VAPP laws of various states should be tested on marital rape.