

MARITAL RAPE EXEMPTION IN NIGERIA: TIME FOR A DEPARTURE?

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ABSTRACT

Of all crimes that could possibly be committed against a woman, rape is arguably the most brutal, more brutal than murder itself because in the latter, she is not alive to relive the horror. Rape leaves on the victim a perpetual dent; it is like an act of terrorism on a female. It skins the victim of her dignity as a human, leaving her sorrowful to nurse the remnants of her violated self. That dignity, that wholeness of the female cannot be propitiated by apologies, monetary compensation, not even by the imprisonment or death of the perpetrator. The heinousness of the crime is so extreme that some have advocated for the penalty of death for rapists and as the crime continues to be on the increase, it will be such a candidate for long. Sexual exploitation of females within the African continent is rife. But the failure to effectively address the problem may have something to do with the deep-rooted condescending view of women in traditional African society, not even civilisation can come to the rescue. One aspect of sexual exploitation that men by all means tend to always escape is the one perpetrated against women under the umbrella of marriage. Nigeria as the most populous African country comes to the fore in this discussion.

Keywords: Marriage, Rape, Marital Rape Exemption, Nigeria

INTRODUCTION

Judicial commentaries on rape reflect the magnitude of damage caused by the offence on a victim. In *Popoola v State*, Ngwuta JSC opined that **‘I think that the severity of punishment for rape, with particular reference to statutory variety, should rank next to capital punishment’**.ⁱ The Supreme Court of India was apt in its description of the offence in *State of Karnataka v Krishnappa* when it stated that ‘Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female’.ⁱⁱ The offence has earned every definition and description accorded it. Rape is as destructive as the offence of murder. This gives insight into why some find the humiliation so unbearable that they may resort to suicide and those that lack the courage to end it all scoop endlessly from the fountains of depression. It is quite easy to come out in full force and insist on the strict letters of the law when a manⁱⁱⁱ forces himself on just any woman. The big questions however are, what if the complainant in question is the man’s own wife? By forcing himself on his own wife when she has not given consent, has the man committed the offence of rape? Does the wife need to give consent? Is there anything like absolute and continuing consent in a matrimonial setting?

THE SUBJECT MATTER OF RAPE

Rape is carnal knowledge of a female person without her consent. Statutorily, the definition of rape revolves around consent. Thus, the Criminal Code has it that:

Any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false or fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.^{iv}

The meaning of the offence can be gleaned from its very elements; penetration and absence of consent. In *Iko v State*, rape was defined ‘a forcible sexual intercourse with a girl or a woman

without her giving consent to it'.^v The crime of rape is one riddled with too many technicalities that the best way to comprehensively define it is to define it descriptively. So, whenever a person has been charged with the offence of rape, the core requirements to ground conviction and which the court must satisfy itself is that the supposed victim did not give her consent. This consent could be given in any manner whether verbally or non-verbally^{vi} and that there was penetration, the insertion of the male sex organ (penis) in the female sex organ (vagina) of the victim. Once those two requirements are present, the offence of rape is constituted. The most important and 'essential ingredient of the offence is penetration and consent of the victim is a complete defence to the offence' says the court.^{vii} There are numerous intricacies and technicalities surrounding the offence of rape that there will be a departure from the substance of this article if they are delved into too much. Here, attention shall be focused essentially on the issue of consent within matrimony. Having obtained some insight into the concept, one's consciousness must then awaken with regard to how this can arise between a legally married couple and the issues surrounding same.

RAPE WITHIN MATRIMONY: A BOURGEONING ISSUE

Is a man capable of raping his wife? From the general meaning of rape as sexual intercourse with a woman or girl without her consent, the answer to that question simply is, yes! The implication is that once a female has said no, her relationship with the person to whom the refusal is addressed becomes irrelevant. All that matters is that the man intends to engage in sexual intercourse with her and she has denied him consent.

Considering the above view of rape, whether or not a wife has a right to say no has been a subject of perennial debate among scholars. Some people find it absurd to reason that the offence of rape can come within the contemplation of a legally constituted marriage and though its validity is arguable, the view is not unfounded. The marital union is assumed to have occasioned a surrender of one's right over his or her body. In the days when the common law view of ethics and morality was paramount, reference was usually made to the Bible and its provisions on matrimonial issues.^{viii} Attempts have always been made to defend the marital rape exemption. Tallest among the defences is anchored on marital privacy. The belief that the law and society in general should not pry into what couples do with themselves along sexual lines. In this view, it is stated that there is something inherent in the nature of the relationship

between husband and wife that makes legal intervention inappropriate, misguided, and ultimately self-defeating.^{ix} The basis is that marital relation depends on intimacy protected from external scrutiny, intimacy that could not survive if the law intervened to investigate and prosecute marital rape charges.^x

The premise on which the argument is built sounds logical. After all, marriage presupposes the union of a man and woman to the exclusion of all others.^{xi} This exclusion to a very large extent binds even the State. To further complicate the argument, the privacy being advocated for between a husband and a wife falls under the department of sexual intercourse which is conveniently the most intimate aspect of their relationship, and which ought to be kept away from public eyes and by all means. Indeed, it may be difficult for a woman to relay to the public that her intimate moment with her husband had no slight resemblance of intimacy but brute force. In many societies, any woman doing so invites her sanity to be questioned and Nigeria is one of such societies. On another hand, it is taken to be an insult to the man to demand that he give account of a close door encounter with his lawfully wedded wife. These notwithstanding, the argument in favour of that near-absolute approach to privacy is replete with deficiencies.

The right to privacy does not imply that the law should shut its eyes completely as to warrant abuse whether psychological or physical. Sexual intercourse with a female person without her consent whether in the absence or presence of an intimate relationship is most times but not exclusively accomplished by force. The law peering into the presence of violence in intimate relationships therefore is not a violation or abrogation of privacy but a derogation of it for the safety of other persons.^{xii} Thus on privacy alone, the exemption does not stand. One would expect an argument to be made in favour of privacy where the law begins to prescribe the number of times, where and how a couple should engage in sexual intercourse. In *Liberta* it was stated that:

While protecting marital privacy and encouraging reconciliation are legitimate State interests, there is no rational relation between allowing a husband to forcibly rape his wife and these interests. The marital rape exemption simply does not further marital privacy because this right of privacy protects consensual acts, not violent assaults.^{xiii}

It has been stated that ‘once a marital relationship is at the point where a husband rapes his wife, state intervention is needed for the wife's protection’.^{xiv} Overall, there have been a recognition of the right to privacy of the individual as ranking above the right to privacy of a married couple in their unified capacity. This has been judicially affirmed in the US. According to the court in *Eisenstadt v Baird*, ‘The . . . couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup’.^{xv} In this regard, having a separate intellectual and emotional makeup envisages that sometimes, their moods, desires and wishes may differ. One area such difference may arise is with respect to sexual intercourse. Denial of consent is an expression of one spouse’s intellectual and emotional make up which sometimes may have been influenced by external factors like stress or anger, which in turn robs the spouse of the mood necessary to indulge in sexual intercourse but at other times it may be for no reason at all, they are all valid.

Deliberate attempt is made here to avoid appraising the reasons why the wife may deny her husband consent. The reason is simple, they are immaterial. In reality, she may have no reason at all and there is nothing the husband can do about it. Even though conjugal right is a right, it is a soft right, one that not even the law and State elements can enforce within the narrowest meaning and the law does not grant the man the right of self-help. Sexual intercourse is a right to the extent that throughout the subsistence of that marriage, the man or the woman as the case may be, is the sole beneficiary of and the only one entitled to bring an action for its denial. Even a judicial order of restoration of conjugal right can be ignored by the man or woman. The highest legally guaranteed right of the aggrieved spouse is to institute dissolution proceedings based on the very fact that the stipulated time has elapsed, and the denial has subsisted.^{xvi}

On the other hand, some may argue that the exemption ought to continue. The basis for this argument is that if the parties are allowed to have conflicts and reconcile on their own terms, the marriage is less likely to end. This argument sounds plausible as trial of the man for rape by the State at the instance of the wife all but ends the marriage. It is hardly the case that a woman would file such a report hoping for the State to through penal methods, remodel the husband to be a loving and caring person after which the marriage will continue to flourish. The fact remains that women will be less likely to report their husbands on allegation of rape if it was just one incident after which the man embarked on acts of love and care, and a recognition of and respect of her choices. Women are more likely to forgive and hope that their

abusive husbands would change. Before a woman would summon the courage to bring her marriage to the fore of public scrutiny, being fully aware of the stigmatisation from the public and the consequence on her marriage, she must have exhausted all other available options. In *Weishaupt*, it was stated that:

It is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence, we doubt that there is anything left to reconcile.^{xvii}

Ryder and Kuzmenka further add that ‘If the marriage has deteriorated to the point that intercourse is accomplished by forcible, violent assault, what is left to save, especially if the wife is willing to criminally charge her husband, knowing that a lengthy jail sentence could ensue?’^{xviii} The authors capture it with the statement that ‘In summary, it is the husband's violent act of rape, not the wife's subsequent attempts to seek protection through the criminal justice system that disrupt a marriage’.^{xix} Thus, the fear that trial of a husband for rape of his wife will occasion irreconcilability may be erroneous because it may have already become irreconcilable. Therefore, ignoring her report on the basis that she will reconcile amicably with her husband may simply amount to sanctioning of further abuses by the man.

On a second thought, the law provides that ‘Any person who commits the offence of rape is liable to imprisonment for life with or without canning’.^{xx} Already, the wife could initiate assault charge against her husband for the forced intercourse. So, there is already punishment in existence. It trickles down to this question, what would amount to justice for violated wives? On the one hand, it could be an open but indirect call for greater respect of their choices by their husbands. On the other hand, it could be a campaign for adoption of a whole different approach to marriage. In the latter sense, couples may have to go into marital union with lesser rights over issues concerning the other spouse. And incidences like sex thought before now to be a right will whittle down to a mere privilege. If marital rape exemption is anything to go by, will sexual intercourse not amount to merely a grant of privilege from either party? The fact that State apparatus cannot be used to enforce conjugal right to the core reduces its status as a right and this is totally fine.

MARITAL RAPE AND THE COMMON LAW

There was a time when the answer to the question whether a man could rape his wife was an absolute no. The reasoning was based on the fact that sexual intercourse is necessarily incidental to marriage; that a person going into marriage does that with the acknowledgement that she cannot have sole autonomy of her body, that she is sacrificing her preferences, that her personal comfort and bodily autonomy is subject to the overriding desire of her husband. And so, having subscribed to marriage, she also subscribed to the fact that her husband could demand as of right, his conjugal right at all times and under all circumstances.

Under the common law, the issue over the years has been a thorny one. The first known pronouncement on marital rape exemption was made by Matthew Hale who stated 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 herself up in this kind unto her husband which she cannot retract’.^{xxi} The statement portrays continued consent as an incident of marriage. Indeed, if there were any personal rights the woman had, they were now suspended in the husband. The view was not left on a solitary lane. In *Regina v. Clarence*^{xxii} the court reversed conviction of a man for assault and infliction of grievous bodily harm on his wife after he had had sexual intercourse with her when he had a venereal disease. And in doing so, Hale’s statement was quoted. Most common law dispositions on issues were ecclesiastically persuaded because of the closeness between the State and the Church. So, the Bible was a major recourse in ascertaining what could be the law. One such biblical provision that may have influenced earlier stance on rape could be found in Deuteronomy 22:28 and 29 which has it that if a man happens to meet a virgin girl who is not engaged and abducts her and rapes her, upon their discovery, the man would pay the girl’s father 50 silver shekels and the girl would become his wife. It further states that the man would not be allowed to divorce her all through his life by the reason that he humiliated her.

The payment of money arguably is a form of punishment. However, the verse could be interpreted to mean that every girl who is not a virgin and who had not been engaged does not enjoy much protection. It may be interpreted to mean that a price has been placed on virginity which is fifty shekels of silver. The most notable point is the provision for the violated woman to become the man’s wife. Having the man marry the female he defiled tends to have a blurring effect on the difference between who is actually punished and who is being compensated. If a

literal interpretation is given to the stated verses, it may amount to reward for the man and subjugation of the female to further violence and abuse in the hands of her violator. If the man without any valid ticket could have carnal knowledge of her against her wish, if he raped her when he had no iota of right to do so, if he raped her when they did not live together, when he did not see her every day and had to seize her first, will the girl be anymore spared when she has become the man's wife? Whether or not that is the true interpretation and rendering of those verses is a case for another day.

To further analyse the scripture above, scholars have delved into why the engagement clause is inserted in it. The prohibition of an offence as rape from inception has been argued to be championed by the men. Before basking into any euphoria, it is noteworthy that they may have drawn basis from the above verses which makes reference to engagement. According to Brownmiller, 'Men designed laws to prevent abduction of propertied virgins, a crime they viewed as akin to damaging another man's property'.^{xxiii} The argument is that men enacted the law of rape not because they were vexed by the abuse of the women but the potential abuse of their women and subsequent reduction of their worth or market value. And as Freeman puts it, prosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property.^{xxiv}

According to Williams Blackstone, 'by marriage, the husband and wife are one person in law 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'.^{xxv} This disposition is quite often referred to as '*unity of parties*'. Upon marriage, the man became the owner of the wife. So, the wife's position was that of a chattel, she was the man's property. The implication was that wives for a fact were more like dignified slaves. Now that is where the backdrop reaches a low because even slaves were protected from forced intercourse from anyone including their masters.

John Stuart Mill decried the policy of decriminalising marital rape, stating that:

A female slave has an admitted right, and is considered under a moral obligation, to refuse to her master the last familiarity. Not so the wife: however brutal a tyrant she may unfortunately be chained to. Though she may know that he hates her, though may be his daily pleasure to torture her, and though she may feel it impossible not to loathe him, he

can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations . . . marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house.^{xxvi}

As already noted, the common law demonstrated a strong leaning towards Christian beliefs.^{xxvii} So becoming one flesh was interpreted by some to imply that a man having intercourse with his wife was as good as having same with his wife. Therefore, since he would ordinarily not seek permission from anyone to engage in self-sexual gratification, he did not require that of his wife. The earliest rape laws drew from the deuteronomical interpretation of capture, rape and marriage.^{xxviii} Under the then English law, the practice was adopted. There was however a proscription of abduction if the woman had goods or lands, or was an heiress.^{xxix} Thus, it suffices to say that ancient English laws to the extent that they tried to protect the rights of women against abduction and rape, limited its application to those of noble birth. The practice was eventually proscribed in 1487. Today, the ancient practice of consolidating the life of a woman into that of her husband no longer holds sway. As the court noted in *Trammel v United States*, ‘nowhere where in the common law world or in any modern society is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.’^{xxx} Today the owning of slaves and the treatment of women as chattel have been abrogated. It seems however that the mind set behind such practice remain unscathed.

Under the common law, upon marriage, the woman was not allowed to own a property of her own. She was required to surrender all her real and personal properties to her husband.^{xxxi} This included her earnings, and her husband could make use of any of her resources without prior permission. Thus, the husband was like an emperor within the domestic arrangement. He ruled the home and decided what should or should not be done. The doctrine of coverture made the husband and the wife one person, and the husband was that one person, whatever decision he made was binding on his wife. He could also discipline her, yes physically by way of beating. As Blackstone stated, ‘For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement’.^{xxxii} In this regard, the common law from inception endorsed male physical domination of their wives.

So, if the man desired to have sex, the wife who by coverture had become part of him must yield to it. If she fails to do so, the husband could by force proceed.

In recent times, female writers have been vocal in their criticism of Hale's view. With reference to Hale's statement, Diane E. H. Russel, in her work, 'Rape in Marriage' states:

This reasoning as to generalised consent that a woman cannot retract her consent to sexual intercourse once she enters into marriage is the same used to argue that, if a woman initially consents to an individual sexual act, she then is proscribed from withdrawing that consent during the act.^{xxxiii}

Without dwelling on the object of her comparison vis-a-vis withdrawal of consent, the highpoint from the statement is that it would be primitive and a violation of a woman's right over her body to cling unto Hale's view which in contemporary societies has suffered a great loss of disciples. Marital rape exemption is one of the last remaining vestiges of the downside of the common law. Ironically, the English society has found a reason to depart from that view, while most of its colonies still clings unto it.

ATTEMPT TOWARDS REFORM

Today, a woman could validly refuse her husband sex. The man's right lies at the court not in brute force. Such right is enforceable under Section 47 of the Matrimonial Causes Act.^{xxxiv} It must be noted that enforcement of this right does not imply using legal mechanisms to drive the woman into having sexual intercourse with her husband.^{xxxv} The law has recognised the fact that if the refusal or denial of sex is allowed without remedy, it would have vitiated one of the core incidences of marriage. And so, denial of conjugal right could be a ground for dissolution of marriage.^{xxxvi}

Overtime, that dictatorial stance of the common law began to shift grounds. Women began to be seen as humans and not chattels and there was a recognition of the fact that their right to 'no' should be as sacrosanct as any other right. In *R*^{xxxvii} the House of Lords finally accepted that the law had shifted from the position that a husband was incapable of raping his wife. The fact of that case is worthy of note. The appellant married his wife sometime in 1984 and had

a child who was born in 1985. Sometime in 1987 the parties separated but later reconciled. On October 21, 1989, due to further matrimonial difficulties between the parties, the wife left with their son who was then four years old. She had met with a lawyer and left the appellant with a letter expressing her desire to pursue divorce proceedings. By the time the incident that gave rise to this cause took place, no proceedings had begun. The wife went to reside with her parents and some 22 days after that, when the parents had gone out, the appellant made his way into the wife's parent's house and tried to engage in sexual intercourse with her which she refused. While trying to have his way, he squeezed her neck with his hands. The key issue distilled for the court's determination was whether the fact that the woman had gone into the marriage was an implied fact that she had continuously consented to every subsequent sexual intercourse, despite the woman's refusal to consent at this point in time.

Lord Lane CJ stated that, 'a rapist remains a rapist . . . irrespective of his relationship with the victim'.^{xxxviii} The court further stated that the law should not be based on fiction, that it was fiction to hold the view that a woman once married has consented to her husband whenever he wanted the intercourse. To hold otherwise would imply that marriage once contracted, carries with it an absolute grant of consent by the wife. Implied consent in rape law is inconsistent with the notion of consent as known in all other areas of criminal law.^{xxxix}

Among the earliest steps towards the dilution of the seemingly concentrated common law position was the court's view in *Miller*^{xl} where it was held that the husband, while not guilty of rape, could be guilty of assault occasioning actual bodily harm. Such earliest attempts to say the least may have been just what they were, 'attempts.' What if the man is able to successfully engage in forced sexual intercourse with his wife without causing any significant bodily harm? That would have then amounted to a simple case of assault. In *R* referred to above, the court however thought it to be repugnant and illogical that a husband would be tried of violence occasioned in the course of the act but would not be tried for rape. Thus, as stated, it was a step. It remained doubtful whether such a view would cut into the fabric of the subject matter. There are other instances where the court has held that the husband would be guilty of rape. In *O'Brien*^{xli} the court's position was that the husband was guilty of rape when there was a decree nisi of divorce. In practical terms however, where there is decree nisi of divorce, it is evident that the conflict between the parties have approached an all-time high and the marriage is by its very nature not existent at that material time. That however, does not address the issue at its core. In *Steele*^{xlii}, the court held that the husband was guilty when he had undertaken not to

molest his wife. In *Roberts*^{xliii}, the husband was guilty where there was a formal separation order. In these instances, there are compelling reasons to state that the man to the extent that he has certain rights with respect to his wife, those rights are curtailed or in abeyance. The most burgeoning case is when the parties are living together in amity and the woman would not consent.

Overtime, these views and legal positions combined to shake the foundations of marital immunity for men as it concerns rape which the common law for long reinforced. The Scottish court had begun the reform by holding in *S v HM Advocate*^{xliv} that a wife does not irrevocably consent to sexual intercourse, that since she cannot in law consent to a major battery, she could not consent at one time to non-consensual battery by intercourse at some time in the future, and that a charge of rape against the husband would not undermine domestic relations more than, e.g., a charge of indecent assault based on facts other than vaginal penetration. The issue then is, how many persons have been successfully tried and convicted and subjected to full effect of punishment in recent times?

There is reason the decision in *R* was received with an academic disposition. It is because the parliament never at any point in time made any provision which categorically ousted the marriage immunity of men. Though reforms have been carried out, it remains to be seen if the outcome has been positive. Nevertheless, the pronouncement of the courts serves as veritable eye opener on the issue. Lord Keith noted in the case that the reason why there were no noticeable pronouncements by the court over 150 years was because it was thought and accepted to be the position of the common law of England. But he then made this remarkable statement:

The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one

in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.^{xlv}

The defendant's conviction was actually upheld. The cries for reform and change in existing legal positions have been global. The Indian penal code in s. 375 forbids the offence of rape; 'non-consensual intercourse with a woman.' However, in its exception, it decriminalised unwilling sexual intercourse between a husband and a wife over fifteen years of age. The implication of this in simple terms is that no form of intercourse between a man and his wife will constitute a sexual offence as long as she was fifteen years and above as at the time of the intercourse. The law tends to favour the unmarried women leaving out married women as if they were serving punishment in matrimony.

MARITAL RAPE EXEMPTION IN ISLAMIC LAW

In Islam, the sanctity of marriage is very well recognised. It is seen as an essential institution for the preservation of the human race. Much of its legal regulation are drawn from qur'anic injunctions. It must be noted that these injunctions have been subject of different interpretations among the various schools of Islamic jurisprudence. These interpretations have either favoured the treatment of women in marriages or proved to be unfavourable depending on each school's point view and how women, who are the subjects of these interpretations feel about their treatment in matrimony. The treatment of wives by their husbands and the treatment of husbands by their wives under Islamic law has not been left for each man to decide. The Qu'ran has it that:

Men are the protectors and maintainers of women, because Allah has given the one more [strength] than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient, and guard in [the husband's] absence what Allah would have them guard.^{xlvi}

The man has the primary responsibility of protecting the woman and the woman has a duty to respect and obey the husband. The protection duty of the man also covers provision of financial and other needs. And under very normal circumstances, it would also imply protection against sexual violation from anyone, including himself. The marriage between a man and woman in Islam is both a social and legal contract,^{xlvii} one with attendant duties and responsibilities. Both spouses owe each other the reciprocal duty of submitting to sexual intercourse when the other party requests for it. Though this has been a men's only right in practice. Marriage in Islam requires *tamkin khaas* (full submission). Some authors have described this as men's legal right to rape their wives'.^{xlviii} The argument that women have to submit to sexual intercourse anytime their husbands request same or risk being denied provision of *nafaqeh* (maintenance) makes one wonder what options the women have. The wife however may have legitimate reasons to refuse a sexual advance from the husband. For example, if she is menstruating or is sick. Also, a wife will be right to deny her husband sex during the day time of Ramadhan, while she's performing *Umrah* (pilgrimage), where the husband put away his wife by likening her backs to the backs of his mother and fails to expiate or if she has the knowledge that the husband had contracted sexually transmitted diseases.^{xlix} Any act of refusal outside the legitimate reasons is considered an act of disobedience.^l On the strength of that disobedience, the husband will be right to withdraw provision of maintenance from her.^{li}

Marital rape as an offence is not established as a consensus believe in Islam. As earlier stated, there are divergent views among the various schools of Islamic jurisprudence in this domain. Where a man forces his wife to have sexual intercourse with him against her will, and it was with *dhara* (excessive violence or cruelty), it may constitute grounds for judicial dissolution of marriage according to the Maliki school.^{lii} Both in the Sunni and Shia schools of Islamic jurisprudence, non-consensual intercourse with a wife is not an offence known to Islamic law.^{liii} However, it is not viewed as the right thing. There is no absolute qur'anic injunction that criminalises marital rape. But what the position ought to be can be gleaned from the Hadith which has it that 'If a man calls his wife to his bed and she refuses, and he spends the night angry with her, the angels will curse her until morning'.^{liv} Though this may seem vague, it shows that the man ought to be helpless in such a situation. There is no suggestion that he should resort to force or any form of cruelty. As a matter of fact, he is supposed to resort to reporting the wife to the Qadi or Shariah court on ground of *nashiza* (disobedience).

It must be noted that like in many developing countries, Islamic societies are patriarchal. The man is the head of the family and as it applies in Christianity, the woman is required to submit to the headship of the husband. This on its own is fine and acceptable, even by women themselves. The problem is how men exercise their headship especially when it comes to their sexual desires in relation to their wives' choices. Some writers' view is that under conditions of patriarchy, sex is male-centric and coercive.^{lv} Marital rape thus may not be seen as rape but a demonstration by men, of their headship authority over their wives.

But how much consent is indeed consent? General legal meaning of consent has been subject of critical assessment in recent times and moreso, in Islamic marriage, even in Christian marriage. The definitions of consent have shown that many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade.^{lvi} It has been said that the meaning given to consent 'disregards the surrender of sexual autonomy and bodily integrity by a wife in an Islamic marriage to meet a prescriptive standard of piety'.^{lvii} Thus, consent has been under-defined in such a manner as to clip the wings of a woman to refuse sexual intercourse when she does not want to. This wing clipping reaches an all-time high when the meaning given to consent is laced with religious interpretation. Obedience becomes not a matter of what God has said, but the problem of whether indeed God said it or men have interpreted it to be so. According to Hussain and Khan, consent as a concept which of course is understood as a voluntary agreement does not contextualise this prescriptive power dynamic that has permeated the very sense of self of the wife.^{lviii} It does appear that the argument is not on whether there is a case of marital rape properly so called. The argument here is that women have been so subjugated that they have lost sense of what their rights are, that the rights simply do not exist because the right to say no will be a denial of God's law for her to consent.

The truest definition of consent is when the woman or man agrees to engage in sexual intercourse independently of what God's view is regarding his or her yes or no. For someone refusing his or her marriage mate consent, having the power to choose God's wrath over the other party's pleasure takes primacy, this is the brand of freedom that women now seek; that ability to say no reasonlessly. On this part of the extreme, there is this justification that even though the woman is married, she still has the right to determine what should happen to her respecting sex. The remedy of the man is suggested to range from seeking legal redress for restitution of conjugal rights or dissolution of marriage. It is however worthy of note that

women sometimes have extra-qur'anic reasons for refusing to submit to sex when asked by the husbands. This may seem justifiable to some extent. As Shukri and Labriz stated:

In a human relationship that depends on the feelings and state of minds of individuals for its formation, one cannot reduce the woman to just an instrumental creature that has to be at all times under control and available for exploitation....It is the height of injustice, if a woman – who carries social, economic ... and family responsibilities and has a delicate and gentle temperament – would be required, regardless of her own emotional and affectionate state of mind, to always submit to the sexual demand of her husband, just because she receives provisions.^{lix}

In practical terms, she need not say no based on a number of reasons that are considered justifiable. What if she is tired? What if she is not in the mood? What if generally, her emotional state does not yield to it? Is she mandated to give in and lay like a log of wood in order to satisfy her husband? On the other part of the extreme, contrary to what several authors have argued, what wrong has the man done if he decides that since his wife has starved him of sex without justification, he will also starve her of maintenance? Fortunately, neither the Quran nor the Hadiths recommends forced intercourse as a remedy for the husband when the wife refuses him consent. The key problem which remains unaddressed in many Islamic jurisdictions is what happens to the man where he decides to force himself on his wife against her will. What crime has he committed? Indeed, has he committed any crime? What remedy does the woman have? How safe is she from the society if she decides to seek any remedies at all? At the end, it turns out that mutual understanding between the husband and the wife is very important. This understanding will enable both parties to mutually compromise for or against each other's desires regarding sex. Indeed, this will begin with greater respect for women; paradigm changes on how they are viewed. Once they are viewed as persons whose opinions also count, the problem is half solved.

THE TOLL ON WOMEN

The after effect of rape on the victim is inexplicable for someone who has not been a victim. Though victims may suffer minor to major physical injuries during the struggle, the main injury is psychological. A stranger may perpetrate the act and though it hurts, it hurts more when it is carried out by a relative or acquaintance. Victims suffer life-long psychological effects caused by the violence and loss of control of rape, coupled with a betrayal of trust. Often women trapped in abusive marriages are raped on multiple occasions.^{lx} In *Warren v State*, the Georgia court noted:

When you have been intimately violated by a person who is supposed to love and protect you, it can destroy your capacity for intimacy with anyone else. Moreover, many wife victims are trapped in a reign of terror and experience repeated sexual assaults over a period of years. When you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with your rapist.^{lxi}

Women made to engage in sexual intercourse against their will by their husbands have been found to lack confidence and have difficulty forming relationships and trusting others, often to a greater degree than women raped by a stranger.^{lxii} On this basis, the argument by some is that merely allowing a victim of marital rape to charge him with assault is not an adequate remedy because it does not redress the more serious harms: violence, humiliation, degradation and domination designed to leave scars on the victim.^{lxiii} Katz and Burt have stated that ‘Contrary to popular opinion, acquaintance rape victims suffer more psychological damage than do stranger rape victims because self-blame is higher when a woman is raped by an acquaintance’.^{lxiv}

Victims of intimate partner rape often blame themselves for their abuse. The blame most times is misguided, and women know it too but that is the effect of the self-trial they embark upon in the wake of the abuse and they do not seem to have enough strength left to avoid it. Self-blame is correlated with fear, anxiety and depression.^{lxv} Additionally, post-traumatic stress disorder has been pointed as one of the elements of the self-blame.^{lxvi} Self-blame by victims of rape when it has been taken too high may cause the victim to end it all. ‘The more women blamed

themselves for the rape, the more suicidal they had been since the rape, the greater the likelihood that they had been psychiatrically hospitalised, and the lower their self-esteem'.^{lxvii}

The World Health Organisation has found that intimate partner violence affects women's physical and mental health through direct pathways, such as injury, and indirect pathways, such as chronic health problems that arise from prolonged stress. This prolonged violence becomes a risk factor for many other diseases. Additionally, the impact of the severe abuse could persist long time after it has stopped.^{lxviii} According to the body, physical impacts of intimate partner violence include:

bruises and welts; lacerations and abrasions; abdominal or thoracic injuries; fractures and broken bones or teeth; sight and hearing damage; head injury; attempted strangulation; and back and neck injury. However, in addition to injury, and possibly far more common, are ailments that often have no identifiable medical cause, or are difficult to diagnose. These are sometimes referred to as 'functional disorders' or 'stress-related conditions', and include irritable bowel syndrome/ gastrointestinal symptoms, fibromyalgia, various chronic pain syndromes and exacerbation of asthma.

As already noted, the psychological impacts of intimate partner violence affect women more than the physical impacts. Such women often suffer higher levels of depression, anxiety and phobias than non-abused women.^{lxix} It is not surprising that such women may feel helpless, worthless, and dwell on suicidal thoughts, attempt same and even carry it out successfully. The World Health Organisation has found these psychological effects to be linked to alcohol and drug abuse, eating and sleep disorders, physical inactivity, poor self-esteem, post-traumatic stress disorder, smoking, self-harm and unsafe sexual behaviour.^{lxx}

On the aspect of sexual and reproductive health, it has been observed that intimate partner violence increases the chances of unintended and unwanted pregnancy, abortion, sexually transmitted infections through forced sexual intercourse within marriage, or through indirect pathways, for example, by making it difficult for women to negotiate contraceptive or condom use with their partner.^{lxxi} If a woman is left within her rights to choose whether or not to engage in sex, chances are that she is likely to take precautionary steps, at least against unwanted pregnancy, abortion and STIs. On STIs, Stefiszyn and Prezanti aver that:

Violence against women is both a cause and a consequence of HIV transmission.... An unequal balance of power in relationships, often exacerbated by violence, makes it difficult, if not impossible, for women to negotiate safe sex, particularly condom use.^{lxxii}

It must be noted that while these adverse effects can and actually do affect most victims of rape perpetrated by intimate partners, those perpetrated against wives leave far greater impacts. Secondly, unlike other forms of intimate relationships, wives are more likely to endure because of the fact that they are married and moreso when the marriage has produced children. Factors like fear of retaliation, lack of alternative means of economic support, concern for their children, lack of support from family and friends, stigma or fear of losing custody of children associated with divorce and love and the hope that the partner will change are heavy contributors to women's reluctance to leave abusive marriages. Most times, such endurance increases the chances of endless cycles of intimate partner rape.

THE NIGERIAN CASE

In Nigeria, under section 357 of the Criminal code rape involves '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 or fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband. Of importance here is this phrase in the definition, 'unlawful carnal knowledge'. The Act explaining carnal knowledge states that 'when the term 'carnal knowledge' or the term 'carnal connection' is used in defining an offence, it is implied that the offence, so far as regards the element of it, is complete upon penetration'.^{lxxiii} The problem that arises here is not about 'carnal knowledge', after all it is not prohibited, even in non-marital circumstances provided the connection was preceded by consent. The point is, when does carnal knowledge become unlawful? This is very important because it is the only way to determine if there has been the offence of rape. On this, the immediate section provides that, 'unlawful carnal knowledge' means carnal connection which takes place otherwise than between husband and wife'.

Simply put, no carnal connection between a husband and wife amounts to the offence of rape. As long as carnal connection is between a husband and his wife, it is lawful and does not matter the circumstances under which the connection was made. The Code does not make any specific provision to accommodate the individual choices of the parties. At most, the law may allow assault charges to be brought against the violating spouse, but a rape case will not be built against the man^{lxxiv} on the basis that there was penetration and the wife had not given consent since there is nothing criminal about that based on the silence of the Criminal Code.^{lxxv}

In *Ogunbayo v State*, Ogbuagu JSC read s. 357 of the Criminal Code, queried if it meant that a husband could rape his wife and answered it by simply saying that it was debatable. That debate is still on. Our courts of course have characteristically followed the common law view. In *Posu v State* the court stated comprehensively, what the prosecution must prove to ground the offence of rape. The law is settled and well-grounded that the prosecution has the burden and duty to prove the accused person guilty, of the following ingredients in order to sustain the conviction of the offence of rape:

- 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.^{lxxvi}

Under the Penal Code applicable to Northern Nigeria, the requirements for the offence of rape to be constituted are clearly pronounced:

- (i) that the accused had sexual intercourse with the woman in question;

- (ii) that the act was done in circumstance envisaged in any of the five paragraphs of Section 282(1) of the Penal Code;
- (iii) that the woman was not the wife of the accused; or if she was the wife, she had not attained puberty;
- (iv) that there was Penetration.^{lxxvii}

In principle, once the victim of the act is also the wife of the perpetrator, there is no offence of rape. This position is the same in India. In *State v. Vikash*,^{lxxviii} the man had engaged in sexual intercourse with his wife after drugging her. The court's position was that since the prosecutrix and the accused person were legally married, sexual intercourse between them even if forcible did not amount to rape. It seems that the reason for the failure of the case was its predication on the sexual intercourse. The court would probably have had a much sterner disposition against the man if the case was based on administering of the behaviour altering chemical on the wife because no amount of marital rape exemption will provide cover for intentionally administering drugs on a wife by her husband the health risk, if any notwithstanding. Nonetheless, the no matter any health or other risks that could probably arise, rape would have failed by all means.

In the end, what we have is a double handicap of both the court and the legislature and the court may deserve no blame at all. It would be an overreach too serious for the court to embark on such a lofty project of creating the offence of rape over a man's forceful intercourse on his lawful wife. Judicial activism as much as it is desirable in a clime where there is legislative laxity, many would disagree with the thought of the court creating an offence. So judicial activism as much as it may aim for the sky, must have its horizon trimmed. Additionally, the legislature on the other hand may be too scared to depart from the conservative view predominant in these regions namely, that a man is incapable of raping his own wife.

One legislative instrument that has dared to adopt a rather radical disposition on the issue of rape is the Violence Against Person (Prohibition) Act, 2015. However, we are not going to bother ourselves with its contents since it has no provision to help on the instant issue. So then legislatively, marital rape exemption remains in Nigeria. The woman's right only find substance in other offences hinged on violence.

How does the marital rape exemption suit Nigeria in relation to her international human rights duties? Violence against women has been on the increase. It is fast becoming an incurable disease. Indeed, forced sexual intercourse on a woman no matter her relationship with the one using such force is without doubt an act of violence on a woman. In the United Nations Declaration on Violence against women, violence against women includes:

- a. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- b. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- c. Physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs.^{lxxix}

A community reading of the foregoing provisions shows that any community that wants abhors violence against women must also abhor marital rape and its exemption. The fact that it was perpetrated by the woman's lawful husband should not make it any less a crime. The problem with this however, is that no one can approach a court to seek redress for rape within matrimony with reliance on such a provision, she will likely return empty handed. There must be a positive law, explicitly provided, with penal sanctions in the event of default before women can exercise such right.

MARITAL RAPE EXEMPTION IN SOME AFRICAN COUNTRIES

African countries have had their ups and downs along the paths of marital rape exemption. They have however not been subjects of excessive condemnation from the western world maybe because in reality, the West are yet to solve the problem. In Kenya, at the beginning of the provision on rape in the 2006 Sexual Offences Act, one might easily believe that marital rape had been criminalised by how comprehensive the law was. Under the Act, rape is an act

which causes penetration with his or her genital organs; the other person does not consent to penetration; or the consent is obtained by force or by means of threats or intimidation of any kind.^{lxxx} Thus, a general interpretation would imply that rape is rape no matter the identity of the perpetrator. This provision is even somewhat progressive. At least male persons are also capable of being raped and can seek legal redress in the event of its occurrence. Not every African country has that provision in their rape laws, Nigeria is an example. However, the Act also expressly provides that, 'This section shall not apply in respect of person who are lawfully married to each other'.^{lxxxii} That brought to an end any hope for the abolition of marital rape exemption in Kenya under that law. Kenya has now made progress. Marital rape exemption in Kenya no longer applies by virtue of the Protection Against Domestic Violence Act of 2015.

South Africa has continued to make progress in the area of marital rape exemption contrary to the stance of most African countries. The first attempt towards abolition of marital rape exemption was made in the Prevention of Family Violence Act of 1993.^{lxxxiii} Subsequently, the provision was repealed by and restated by Criminal Law (Sexual Offences and Other Related Matters) Act of 2007. By its provision, a person charged with the offence of rape will not succeed on the defence that the victim was in marital or other form of intimate relationship with him.^{lxxxiii} That was a quantum leap, a daring disposition towards a deeply entrenched tradition. This may have been borne of the desire to provide greater protection for women amidst the increasing rate of gender-based sexual violence in South Africa. However, one thing is to make a good law, the other is to enforce it. It does appear that as it is the case with Europe and America, that most jurisdictions that have abolished marital rape exemption are still grappling with the problem of enforcement.

In 2001, a proposal for the abolition of marital rape exemption was vehemently opposed in Malawi. Till date, rape remains an offence in Malawi only to the extent that the victim was not the wife of the perpetrator.^{lxxxiv} In fact, a Supreme Court judge, Duncan Tambala was quoted stating that he would have problems accepting that an offence like marital rape should be created.^{lxxxv} According to him, such an act would be inconsistent with the continued existence of marriage. Similarly, in Tanzania, the position is that marital rape exemption continues to operate. Rape in Tanzania is constituted when among others things, if a man engages in sexual intercourse with a woman or girl not being his wife or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse.^{lxxxvi} Thus, where the

woman is not separated from her husband, the husband has unrestricted sexual rights over her, but where she is separated, the man could still do so but with her consent.

Almost 20 countries in Sub-Saharan Africa, so far, have taken a step toward criminalising marital rape.^{lxxxvii} But what could be the reason behind this seeming reluctance among many other African countries? The most notable of all possible reasons is that it is not the culture of Africans to have a woman they married 'with their own money' exercise such right, so much so that the exercise of such right could land them in jail for a very long time; sex that they are ordinarily entitled to. A second reason which is very much valid is that it is capable of being abused. Indeed, it might be. What stops every angry wife from approaching the court on allegation of rape over minor issues? Yet, this reason, as plausible as it can be is negligible when compared to the amount of physical and psychological abuse that wives experience as a result of sexual violence orchestrated by their husbands. Moreso, the problems associated with establishing a case of rape outside marriage should dissuade any woman who may want to make false rape accusation against her husband as that may fail on arrival. Such accusation must be doubt proof and with watertight evidence.

CONCLUSION

In the end, one question that deserve attention is, will the abolition of marital rape exemption result in increased protection? In other words, will such abolition prevent a man from resorting to force? In answering that, we may need to look at how far the threat of life imprisonment has succeeded in dissuading men from rape outside matrimony. Indeed, it is difficult to sustain an argument that the penalty of life imprisonment has succeeded in protecting women from rape. On the other hand, it is insensitive to preserve the status quo in such a manner that it would hand men a free pass to always have intercourse with their wives, against their will and under all circumstances. The undisputed and unnegotiable position is that a woman has a right to the autonomy of her body, even against her husband and contrary to whatever it is that may be argued on religious grounds, she is entitled to enjoy that bright no matter the consequences on her marriage.

On the other hand, where a man forces himself on his wife without her consent, is he deserving of punishment? To what extent should the man then be punished? This is very debatable. The

difficulty is that many who easily find this view reasonable simply do not buy the idea that the act should attract maximum penalty and this is agreeable. Even judges do exercise discretion in rape outside matrimony. Again, since the aim of criminalising one's forceful intercourse on his wife is to protect the woman, it can also be reasoned that the law should proceed on that and give effect to the safety and freedom of the woman by punishing the man, but many would frown at the tag, 'rape' for such an offence. Then the question comes up again, will the desire for justice among aggrieved wives be satisfied if the law goes ahead with the protection but the offence is not tagged, 'rape?' The stigma that comes with being tagged a rapist is arguably one of the reasons the criminalisation of marital rape has continued to be an issue in most developing countries moreso, when the victim is the wife of the perpetrator. Therefore, the time may be ripe for a departure from the marital rape exemption in Nigeria but in a more acceptable manner.

ENDNOTES

ⁱ [2013] 17 NWLR (Pt. 1382) 100

ⁱⁱ [2000] 4 SCC 75

ⁱⁱⁱ The male pronouns are used in this article to represent the perpetrator while the female pronouns are used to represent the victim in order to properly delineate the social demographics. This however does not imply that the male person is incapable of being raped nor does it portray that a male cannot be a victim of domestic violence. In the US, one report has it that 91% of the victims of rape and sexual assault are female and 9% are male. *See* C. A. Rennison, 'Rape and Sexual Assault: Reporting to Police and Medical Attention 1992-2000' [2002] *NCJ* 194530.

^{iv} Criminal Code Act 2004, s. 357

^v *Iko v State* [2001] 14 NWLR (Pt.732) 195

^{vi} See Uwaegbulem Izunwanne, 'Sexual Consent; Is it Overrated?' (2019) <<http://dx.doi.org/10.2139/ssrn.3763305>> accessed 30 July 2023

^{vii} *supra* (n5)

^{viii} For example, Paul in 1 Corinthians 7:4 while urging both husbands and wives to fulfil their marital duty (sex) to each other stated that the wife's body does not belong to her alone but also to her husband and the reverse is also the case. Referring to sexual intercourse as a duty owed by spouses to their other halves connote the creation of a right. By the posture of the verse stating that their bodies do not belong to them alone, as in their respective capacities, it means that the other spouse has acquired a certain quantum of interest on the wife's or husband's body. Verse 5 of the above chapter urges them not to deprive each other except by 'mutual consent' and it should be for a time for purposes of prayer.

The biblical provisions above regarding the giving and withholding of consent is reduced to a moot point by contemporary circumstances. For example, in the above verses, it is easily agreeable that the wife and husband owe each other that reciprocal duty of sexual gratification. However, in the second ambit, they could in reality deprive each other for any reason, prayer does not come within the contemplation. In truth there may be no tangible reason by biblical standards, it is just a person deciding what he or she will do with her body at a particular point in time. Also, there is no iron cast time within which consent could be withheld. At best, the above verse may be interpreted as saying, though you are within your right, though you could withhold consent for any reason whatsoever, try to consider the other person's feelings too. It is noteworthy that, the Bible never recommended force as an option for either of the spouses in the event of refusal by the other spouse. Therefore, it can be surmised

that the man is not to deploy force in the event of withholding of consent. In the same manner, the Bible is silent as to the options of the man where the consent is withheld for too long, or when the withholding is unreasonable in the first place.

The matrimonial causes laws usually invoke remedy after a period of one year, for example, in Nigeria, Section 15 (2) (g) of the Matrimonial Causes Act grants dissolution after one year has elapsed and a depriving party has not restored the right. This indeed is a mere legal hurdle to avoid premature dissolution as any marriage where there has been deprivation for that long may have irredeemably broken down.

^{ix} Jill Elaine Hasday, 'Contest and Consent: A Legal History of Marital Rape, [2000] (88) *California Law Review*; 1373 at 1486.

^x *ibid*

^{xi} Marriage is restricted to a union of man and woman here because same sex marriage is prohibited in Nigeria. See Same Sex Marriage (Prohibition) Act, 2013, s. 1 (a), (b).

^{xii} Constitution of the Federal Republic of Nigeria 1999 (as Amended), s. 37, and 45 (a), (b).

^{xiii} *People v Liberta*, 64 N.Y.2d 152 at 164 (1984)

^{xiv} *Warren v State* 336 S.E.2d 221 at 225 (1985)

^{xv} 405 U.S. 458 (1972).

^{xvi} Matrimonial Causes Act, s. 15 (2) (g)

^{xvii} *Weishaupt v Commonwealth*, 227 Va. 389, 315 S.E.2d 847 (1984).

^{xviii} Sandra L. Ryder and Sheryl A. Kuzmenka, 'Legal Rape, The Marital Rape Exemption' [1991] (24) (2) *John Marshal Law Review*; 410

^{xix} *ibid*

^{xx} Criminal Code Act 2004, s. 358

^{xxi} Matthew Hale, *History of the Pleas of the Crown*, (Vol. 1, E. & R. Nutt and R. Gosling, 1736) 629

^{xxii} [1886-1890] All E.R 133, 152

^{xxiii} S. Brownmiller, *Against our Will: Men Women and Rape* (Simon & Schuster, 1975) 11-22.

^{xxiv} M.D.A. Freeman, 'But if you can't Rape Your Wife, Who[m] Can You Rape? The Marital Rape Exemption Re-examined' [1981] (15) *Family Law Quarterly*; 1, 8

^{xxv} William Blackstone, *Commentaries on the Laws of England* (Vol 1, 1765) 625-626

^{xxvi} J.S. Mill, *The Subjection of Women* (Longman, 1912, First Published 1869) 463

^{xxvii} *The Bible*, Matthew 19:5 has it that, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'?' *New American Standard Bible*

The preservation of matrimonial rape exemption with the above verse as a reference point appears to have had a lopsided interpretation over the ages for the sole reason that it has been relied on directly or subtly to justify a man's use of force to enforce his conjugal rights without any argument advanced for the women.

^{xxviii} See Deuteronomy 22: 28, 29.

^{xxix} Maria Pracher, 'The Marital Rape Exemption: A Violation of a Woman's Right of Privacy' [1981] (11) (3) *Goldengate University Law Review*; 10.

^{xxx} 455 U.S. 40 (1980).

^{xxxi} Frederick. Pollack & Frederick W. Maitland, *The History of English Law Before the Time of Edward I* (Vol 2, 2d ed., Reissued 1968, First Published 1895) 403-404

^{xxxii} William Blackstone (n2) 445.

^{xxxiii} Diane E. H. *Rape in Marriage* (2d edn., Indiana University Press, 1990) 17

^{xxxiv} Under Section 47 of the Matrimonial Causes Act, a party whom conjugal rights have been denied may approach the court for a decree of restitution of his conjugal rights if without any just cause, the party against whom the decree is sought refuses to cohabit with and render conjugal rights to the partner.

^{xxxv} By Section 15 (2) (g) of the Matrimonial Causes Act, where the other party to the marriage has for a period not less than one year, failed to comply with a decree of restitution of conjugal rights, it suffices as a ground for the dissolution of the marriage.

Though the argument may be that the law providing for a period not less than one year is a little too much for a either a man or a woman to endure before seeking dissolution of the marriage. Either way, the constant is that brute force is not a remedy for denial of conjugal rights.

^{xxxvi} Michael Jefferson, *Criminal Law* (2nd edn, Pearson Education Limited, 2009) 569

^{xxxvii} [1992] 1 AC 599

^{xxxviii} *supra*

^{xxxix} Maria Pracher, 'The Marital Rape Exemption: A violation of Women's Right of Privacy' [1981] (11) *Golden Gate University Law Review*. 717, 730

^{xl} [1954] 2 QB 282

^{xli} [1974] 3 All ER 663

- xlii (1976) 65 Cr App R 22 (CA)
- xliii [1986] Crim LR 188 (CA)
- xliv 1989 SLT 469
- xlvi *R v. R* (supra n37)
- xlvii Qur'an 4: 34
- xlviii Kecia Ali, 'Marriage Contracts in Islamic Jurisprudence', (*The Feminist Sexual Ethics Project* June 19, 2003) <<https://www.brandeis.edu/projects/fse/muslim/marriage.html>> accessed 20 July 2023
- xlix Nadia Aghtaie, 'Breaking the Silence: Rape Law in Iran and Controlling Women's Sexuality' in Nicole Westmarland and Geetanjali Gangoli (eds.,) *International Approaches to Rape* (Bristol University Press, 2011) 137.
- l *Ainunnisa Rezky, Andini Naulina, and Raditio Jati, 'Comparative Perspective on Marital Rape: Western Law and Islamic Law' [2019] (130) Advances in Economics, Business and Management Research; 130*
- li Jerusalem Post, 'Wife Cannot Deny Husband Sex 'Even When Riding on a Camel'' Jerusalem Post (28 April 2015) <<https://perma.cc/K8YZ-HCDE>> accessed 1 August 2023
- lii Muhammad Jawad Mughniyya, 'The Right to Maintenance' <<https://perma.cc/89N8-E95A>> accessed 1 August 2023
- liii Delfina Serrano, 'Rape in Maliki Legal Doctrine and Practice (8th–15th Centuries C.E.)' [2007] (5) *HAWWA*; 166, 170
- liiii Mohd Mukhils Bin Mohd Nasri and Mohd Afandi Bin Awang Hamat, 'Islamic Perspective on the Legality of Marital Rape in the Framework of Maqasid Al Shariah' (36th International Conference on Islamic Jurisprudence) [2017] 161, 168–75.
- liv Hadith No. 143, <<https://sunnah.com/muslim/16/143>> accessed 3 July 2013
- lv Andrea Dworkin, *Intercourse* (2008, Basic Books) 63–67
- lvi Catharine A. MacKinnon, 'Rape Redefined' [2016] (10) *Harvard Law and Policy Review*; 431, 452
- lvii Iqra Saleem Khan, 'Consent in Marriage: A Radical Feminist Analysis of Pakistani Law' [2019–2020] (26) (3) *William & Mary Journal of Women and the Law*; 681
- lviii Rafat Hussain & Adeel Khan, 'Women's Perceptions and Experiences of Sexual Violence in Marital Relationships and Its Effect on Reproductive Health' [2008] (29) *Health Care for Women International*; 468, 477
- lix Shukri and Labriz, 1992, pp 58-63 S. Shukri, and S. Labriz, 1992. 'Mard: Sharik ya Ra'is? (Partner or Master)' [1992] (1) (2) *Zanan*; 26–32.
- lx D. Finkelhor & k. Yllo, *License to Rape: Sexual Abuse of Wives* (Holt, Rinehart and Winston, 1985) 127.
- lxi 336 S.E.2d 221 at 222 (1985)
- lxii *ibid*
- lxiii Sandra L. Ryderand and Sheryl A. Kuzmenka (n17) 412
- lxiv Bonnie L. Katz & Martha R. Burt, 'Self-Blame in Recovery from Rape, in Ann Wolbert Burgess (ed.), *Rape and Sexual Assault* (Garland, 1988) 162
- lxv *ibid* at 166
- lxvi David Valentiner and ors., 'Coping Strategies and Posttraumatic Stress Disorder in Female Victims of Sexual and Non-Sexual Assault' [1996] (105) *Journal of Abnormal Psychology*; 455, 458
- lxvii Bonnie L. Katz, 'The Psychological Impact of Stranger Versus Non-Stranger Rape on Victims' Recovery' in Andrea Parrot & Laurie Bechhofer (eds.), *Acquaintance Rape: The Hidden Crime* 267 (John Wiley, 1991) 162, 163
- lxviii WHO, 'Understanding and Addressing Violence Against Women' [2012] *WHO*; 5,6
- lxix *ibid*
- lxx *ibid*
- lxxi *ibid*
- lxxii Karen Stefiszyn and Alex Prezanti 'The Impact of the Protocol on the Rights of Women in Africa on Violence against Women in Six Selected Southern African Countries: An Advocacy Tool' [2009] *The Centre for Human Rights (Faculty of Law) University of Pretoria*; 7, 27
- lxxiii Criminal Code Act, s. 6
- lxxiv Man is used here because at present, by law, only a male person can commit the offence of rape in Nigeria.
- lxxv Advocating for female bodily autonomy is not to be stretched beyond reasonable limits. Married couples have their specific sexual behaviours that have been formed over time and are not subjected to any further negotiation. The campaign for the abolition of marital rape exemption therefore is not for husbands to 'seek' consent before proceeding but to 'have' consent before proceeding. A man may not need to seek consent before proceeding to perform sexual acts on his wife. Most times, this is dictated by their sexual habit. A husband could attempt to perform sexual acts on his wife while she is unconscious and asleep. The fact that there was no prior consent should not be incriminating except the wife had made it clear that she does not subscribe to such acts during her sleep. Thus, in matrimonial setting, having consent may often imply that the man for example have probably

attempted to proceed on those acts and in a manner incidental to the couple's sexual behaviour and the woman has submitted in a manner also incidental to their sexual behaviour. It is left for the woman to clearly and categorically deny him consent at this instant time that is now in issue.

^{lxxvi} [2011] 2 NWLR (Pt. 1234) 393

^{lxxvii} S. 283 of the Penal Code

^{lxxviii} SC No 1/14 FIR No 256

^{lxxix} UN Declaration on Violence Against Women, Art. 2

^{lxxx} Sexual Offences Act, 2006 (Kenya), s.3

^{lxxxi} *ibid*, s.43.

^{lxxxii} Prevention of Family Violence Act of 1993, (South Africa) s. 5 (now repealed)

^{lxxxiii} Criminal Law (Sexual Offences and Other Related Matters) Act of 2007 (South Africa), s. 3, 56 (1).

^{lxxxiv} BBC News, 'Row Over Malawi Rape Bill', (BBC News, 26 December 2001)

<<http://news.bbc.co.uk/2/hi/africa/1728875.stm>> accessed 16 June 2023

^{lxxxv} *ibid*

^{lxxxvi} Sexual Offences Special Provisions Act, 1998 (Tanzania), s.5

^{lxxxvii} Ephraim Nyondo, 'Should Malawi Criminalise Marital Rape?' (20 January 2015) The Nation,

<<https://mwnation.com/malawi-criminalise-marital-rape/>> accessed 16 June 2023

