

Critical Appraisal of the Concept of Marital Rape Exemption Under the Law in Nigeria

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Abstract

In relation to rape, people need to be protected from the unwanted sexual activity which infringes their right to bodily integrity and sexual autonomy regardless of who is the perpetrator. Rape is the most heinous and grievous of all sexual assaults against a person. It affects the entirety of the victim with its effects being multifarious i.e. physical, emotional and psychological. Rape within marriage is not recognized under the law in Nigeria but there are certain sexual relations that occur between married couples in coercive circumstances and in other contexts that may fit into the class recognized as rape. Law should protect all and sundry against victimization of any kind regardless of who is the perpetrator. This paper looks at the origin of marital rape exemption, the various justifications for the exemption and the concept of marital rape exemption in the rape law in Nigeria as a gender issue. It also discusses the reality of marital rape in Nigeria and concludes that the law in Nigeria should recognize that rape can occur within marriage.

Key words: Marital rape, Sexual violence, Marital Rape Exemption, Law, Nigeria.

1.0 Introduction

Rape is a significant social and health problem and one of the worst forms of possible assaults on the physical, psychological and sexual integrity of victims. Rape is an offence with a long history and one of the most horrific crimes humans know of. It not only causes physical degradation and mental trauma but also social death.¹The severity of the offence of rape cannot be over emphasized. It is a heinous, despicable and severe offence. It is a sexual offence that arises out of non-consent with the victim to sexual intercourse. Consent is necessary for sexual intercourse every time no matter the relationship between those involved. The act may be carried out by physical force, or where the person is under threat or manipulation, or with a person who is

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¹S.R. Benner and St. John F. College, 'Soul Murder, Social Death, and Humiliation: Consequences of State sponsored Rape' [2010] 4 The New York Sociologist 8 <<http://newyorksociologist.org/09/Benner09.pdf>> accessed 6 November 2017.

incapable of valid consent. Rape is coerced sexual intercourse without a victim's consent through the use of force, intimidation, verbal threats or abuse of power, duress. The relationship between the victim and the perpetrator should be irrelevant to the offence of rape, as it is for most other crimes. The issue of rape in marriage and the clamour to criminalize marital rape has become a global issue in the last few decades. The offence of rape is such that it affects the entirety of the victim negatively, the recognition of its harmfulness in all circumstances is such that the issue of marital rape immunity should not be a justification for it. The beginning of seeking a solution is to at least recognize that rape is rape regardless of the nature of relationship that exist between the victim and perpetrator. This is because the effect of rape on victims is a traumatic one across board and this would at least allow victims to seek redress under law when they are raped. The emotional sexual exploitation affects married women even more, and they deserve to be protected and encouraged to come forward and seek justice under the legal system. Taking away their right to seek redress under law is just another form of discrimination.

2.0 Origin of Marital Rape Exemption

Historically, many cultures have had a concept of spouses' conjugal rights to sexual intercourse with each other and the crime of rape required carnal knowledge, actual vaginal penetration, by a man of a woman, not his wife, by force and against her will. Thus, gender, marital status of the victim and sexual intercourse, were central to its definition and meaning.² From the history of rape as an offence, rape within marriage was not a possibility, hence a husband could not rape his wife. Although, it has always been a crime for a man to force an unmarried woman to have sexual intercourse against her will, it was not always a crime for a husband to force his wife to have intercourse.³ The legal immunity provided to a man who has sexual intercourse with his wife without consent is called marital rape exemption. It is a legal privilege accorded a man to rape his wife.

The views which contributed to rape laws not being applicable in marriage can be traced to the English Common law. Common law formulations of the offence of rape traditionally excluded nonconsensual acts of sexual intercourse between married persons.⁴ It reflected an era in Britain when women were not regarded as persons once they were married, by marriage they became one legal personality, and the one person that was created was the husband.⁵ So, it was difficult to imagine the husband raping his wife, that is, himself. It is usual today to trace the origin of the marital rape exemption rule to the English Judge, Sir Matthew Hale. The unsupported extra judicial statement made by Hale gave birth to the marital rape exemption at common law⁶ when he restated the law as it had been for centuries. This was illustrated most vividly in his 1736 legal

²S.A. Lentz and R.H. Chaires, 'Sexual Assault Statutes Targeting Authority and Power Imbalances; A Step Forward in Rape Law Reform?' [2011] 3 Freedom Center Journal 1.

³J. Klarfeld, J. 'A Striking Disconnect: Marital Rape Law's failure to keep up with Domestic Violence Law' [2011] 48 American Criminal Law Review, 1819, 1825.

⁴S.L. Ryder and S.A. Kuzmenka, 'Legal Rape: The Marital Rape Exemption' [1990-1991] 24 The John Marshall Law Review 393.

⁵E. Archampong and F. Sampson, 'Marital Rape in Ghana: Legal Options for Achieving State Accountability' [2010] 22 (2) Canadian Journal of Women and the Law 505, 507-08.

⁶L.W. Siegel, 'The Marital Rape Exemption: Evolution to Extinction' [1995] 43 (2) Cleveland State Law Review 351, 353.

treatise *Historia Placitorum Coronae* or *History of the Pleas of the Crown*, where he wrote that marital rape could not be recognized.⁷ His statement made three hundred years ago is the actual legal genesis of marital rape exemption:

“...but the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband which she cannot retract.”⁸

According to Hale, a wife's consent did not have to be sought before each sexual act rather her consent to sexual relations with her husband was ongoing and implied by virtue of their marriage. Hale's view was upturned in the 1960s and 1970s when these views of marriage and sexuality started to be challenged in most Western countries especially by second-wave feminism, leading to an acknowledgment of the woman's right to self-determination (that is, control) of all matters relating to her body, and the withdrawal of the exemption or defence of marital rape.⁹ In recent times, many legal systems and international law have come to reject the husband's privilege to rape his wife either partially or completely. There are also several additional theories for marital rape exemption which have evolved over the years from Hale's statement.

2.1 Justifications for the Marital Rape Exemption

Legal theories supporting marital rape have no sound justifications but merely advocating unimpeded male sexual access to women to the detriment of the victim's sexual autonomy. Hale's statement has been the backbone for the justifications for marital rape exemption despite its criticisms by many English courts that no other authority was cited by Hale.¹⁰ Several additional theories have evolved for the marital rape exemption;

1. *Implied Consent and the Contract Theory*

The most common idea for the marital rape exemption is that a marriage constitutes a contract and the consent of the wife to sexual intercourse is given as a term of the contract. These are commonly and all too readily accepted reasons for the exemption that by consenting to marriage, a woman forges a contract which makes her body available to her husband at any time.¹¹ This has fostered the notion that a husband has a “marital right” to sexual intercourse¹², and the presumed consent given by the wife upon marriage to sexual intercourse is irrevocable. Thus, according to this theory marital rape can never occur because all sexual contract within marriage is assumed to be consensual¹³, the law implies consent to what took place as far as sexual intercourse is concerned regardless of whether it is violent and/or coercive it is not unlawful. This theory has been criticized on several grounds and is clearly a legal fiction. First, the implied consent in rape law is inconsistent with the notion of consent in all other areas of criminal law because the law does not allow a person to consent to serious bodily harm or injury inflicted by

⁷J. E. Hasday, ‘Contest and Consent: A Legal History of Marital Rape’ [2000] 88(5) California Law Review 1375, 1421.

⁸M. Pracher, ‘The Marital Rape Exemption: A Violation of a Woman's Right to Privacy’ [1981] 11 (3) Golden Gate University Law Review. Women's Law Forum. 717 <<http://digitalcommons.law.ggu.edu/ggulrev/vol11/iss3/1/>> accessed 14 November 2015.

⁹Hasday, (n.7) 1482.

¹⁰M.J. Gonring, ‘Spousal Exemption to Rape’ [1981] 65 (1) Marquette Law Review 120, 122.

¹¹ibid 123.

¹²Siegel, (n.6) 354.

¹³ibid.

another.¹⁴ It creates a double standard, the courts apply an implied consent theory when rape is involved but not to other violent domestic crimes. And because the states have a compelling interest in protecting their citizens from serious bodily harm, it follows that this compelling interest bars the states from recognizing a theory of implied consent to the harms resulting from rape within marriage.¹⁵ A woman may consent to sexual intercourse with her husband when she desires, but to assume that a married woman consents to be harmed exceeds the limits of the law.¹⁶ Second, under contract law, private parties are not permitted to use self-help methods to remedy a contract breach, this must normally be done through the courts.¹⁷ So even if it were to be accepted that a woman breached the marital contract by not having sexual intercourse, the husband should not enforce the contract by physically forcing his wife to have sexual intercourse. This surely exceeds the traditional contract remedies, the whole idea of viewing the marriage agreement in strict contract terms with the consent to on-demand sex as part of it is ludicrous when taken to the extreme.¹⁸ Additionally, all elements of a contract which are normally delineated are not present, ordinarily parties agree to the terms of a contract and spell them out.¹⁹ Such is not the case with traditional marriage vows, prospective spouses are neither informed of the terms of the contract nor are they allowed any options about these terms. All that a marriage obligates the parties to do is love and honour each other until death.²⁰ Marriage is not a business contract like a normal contract and should not be seen as such. Thus, reading marriage vows as bestowing irrevocable consent is ludicrous and unimaginable. The fact that matrimonial "contract" does not resemble a true contract at all is one of the strongest legal arguments for the outright rejection of this theory.²¹

2. *Women as Property*

According to this theory, the husband owned his wife as chattel. Since a husband owned the wife, rape was not treated as a crime against the wife because a man cannot steal his own property. This theory emphasizes that a married woman is really part of her husband's property, a mere chattel, so forced sexual intercourse is really a husband making use of his own property.²² Since women were regarded as property, rape law was concerned with protecting a husband's property interest in his wife's fidelity, and a father's interest in his daughter's virginity rather than a crime against the woman. So when a man other than the victim's husband rapes the victim, then it was unlawful since the man violated the husband's property right.²³ If a husband cannot rape his wife under this property theory, does it mean that a father of an unmarried daughter can have sexual intercourse with his daughter as she is his property too? I very much doubt that as this will amount to incest. So why can't rape of a woman by her husband be seen as rape under this theory?

¹⁴Pracher, (n.8)730.

¹⁵Klarfeld, (n.3) 1826.

¹⁶Pracher, (n.8)730.

¹⁷ibid 356.

¹⁸Gonring, (n.10)125.

¹⁹Ryder &Kuzmenka, (n.4) 401.

²⁰ibid402.

²¹Siegel, (n.6) 356.

²²M.D.A. Freeman, 'But if you Can't Rape your Wife, Whom can you Rape?: The Marital Rape Exemption Re-examined' [1981-1982] 15 (1) Family law Quarterly1, 16.

²³S. Seo, 'Categories and Underlying Myths of Marital Rape Exemption Provisions in the United States- To the Abolishment of Remaining Marital Rape Exemption' [2010] 1 (2) Yonsei Law Journal, 379, 383.

Though the notion of women as property is no longer prevalent in our society, different legal systems today have strongly rejected this idea. For example, women have been granted rights to incur personal legal obligations and to own property independent of their husbands.²⁴ Thus, the concept of women as property has been abandoned in our society and fails to support the marital rape exemption.

3. *Marital Unity*

This perspective views marriage as a unification of two people, husband and wife, into one entity.²⁵ Under this theory, a woman's identity is presumed to be merged with that of her husband upon marriage and the two upon marriage are incorporated into one which is the man. This theory was premised on how marriage merged the identities of the husband and wife into one—the husband.²⁶ 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 everything..."²⁷ This theory stresses that a man raping his wife was regarded to be conducting sexual acts with himself which could not constitute rape.²⁸ Consequently, forced sexual intercourse was just a husband making appropriate use of his property.²⁹

This theory lost support in the late nineteenth century with the recognition of women's legal personhood and has been rejected by courts as justification for the marital rape exemption.³⁰ The Married Women's Property Act adopted by many states allowed a married woman to sue and be sued, own and convey property, enter and enforce contracts, and otherwise enjoy the rights of unmarried women.³¹ Rape laws now protect a woman's personal safety and freedom of choice, thus the theory is logically inadequate to justify statutes which subject married women to forcible, undesirable sexual attacks by their husbands.

Arguments against the theories show that an examination of these three theories and justifications underpinning marital rape exemption cannot withstand scrutiny in the light of contemporary views of women, marriage and society³² and that Hale's statement is thus the shakiest of foundations upon which to rest the marital rape exemption.³³

2.2 *Modern Justifications*

More modern arguments have been used by the proponents of marital rape exemption to justify its existence. Five main arguments have been put forward:

1. *Difficulty of Proving Marital Rape*

One of the modern arguments offered in support of keeping the marital rape exemption is that it would be impossible to prove a marital rape case when the couple have had consensual sex several times prior to that. The point is, proving rape generally has always been difficult. Many

²⁴Sections 2-3 of the Married Women's Property Act, CAP 239 Laws of Federation, Nigeria.

²⁵L.R. Eskow, 'The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution' [1996]48 (3) Stanford Law Review677, 680; Siegel, (n.6) 357.

²⁶S.A. Adamo, 'TheInjustice of Marital Rape Exemption: A Survey of Common Law Countries' [2012] 4 (3) American University International Law Review555, 560.

²⁷ Siegel, (n.6) 357.

²⁸Seo, (n.23).

²⁹Adamo, (n.26).

³⁰ Siegel, (n.6)357.

³¹ Ryder and Kuzmenka, (n.4)400.

³²ibid399.

³³ Freeman, (n.22) 17.

crimes are difficult to prove and no one has suggested removing them for that reason.³¹ Opponents of this arguments have claimed that it is possible to prove lack of consent in marital rape cases. Corroborating evidence, such as evidence of physical force through medical testimony may be made available.³² The difficulty of proof argument lacks force when balanced against the severity of the crime. The public policy of protecting the victims of violent crimes should outweigh the argument that marital rape is too difficult to prove.³⁶ Other crimes also present potentially difficult prosecutions, yet these are still crimes. The difficulty of proof has never been proper criterion for deciding what behavior should be officially censured by society.³⁷ The rape trial of Jacob Zuma, the sitting President of South Africa in 2006 made glaring the difficulty faced by rape survivors during criminal trial. The victim was questioned on intimate and embarrassing details relating to her past sexual behaviours, which was humiliating. Zuma stated in his testimony during the trial that he believed the victim wanted sex from the way she dressed, it was provocative.³⁸ This emphasises the issue that victims of rape have to prove their innocence.

Prosecutions of alleged rapes where the victim previously consented to sexual relations present similar proof problems, yet they are not barred. The difficulty of proof argument lacks force when balanced against the severity of the crime. The problem of proving lack of consent is not a persuasive argument for continuing to uphold the marital exemption.³⁹

3. Marital Rape is Less Serious than Other Rape

Supporters of marital rape exemption have also argued that marital rape does not occur often in the society to be recognized as a serious problem and that it is less serious than other rape. They have argued that there is both a quantitative and qualitative difference between marital rape and non-marital rape.⁴⁰ The quantitative argument is that marital rape does not occur often enough in the society to be recognized as a problem and the qualitative argument is that the damage to a wife from marital rape is less severe than the damage caused to a victim of non-marital rape.⁴¹

On the quantitative argument, arguments against this theory have claimed that existing data show that 14% of married women have been raped by their husbands at least once but due to underreporting as in other rape cases, actual incidence is probably much higher.⁴² Since rape is the most underreported of crimes, marital rape which isn't even considered a crime will be the least complained about in the category of rape. Even if the number is as low as one per year, number and frequency should not determine the criminality of an act.

On the qualitative argument, the arguments against the theory is that no evidence supports the argument that marital rape is less severe than non-marital rape. Marital rape can be the most traumatic form of rape, more traumatic than other rape because of a sense of betrayal, disillusionment, destruction of the marriage and the possibility that such rape will continue over many years.⁴³ Also, marital rape victims suffer more physical injuries than other rape victims

³¹ *Ibid.*

³² Prucher (n. 8) 732

³³ *Ibid.*

³⁴ Klarfeld (n. 3) 1828

³⁵ Gifford, 'The Zuma Rape Case - 25 Court Days Later' (30 April 2006) <www.iol.co.za/news/south-africa/the-zuma-rape-case--25-court-days-later-275903> accessed 3 March 2016.

³⁶ Siegel (n. 6) 361

³⁷ *Ibid.* 58

³⁸ *Ibid.*

³⁹ Ryder and Kuzmenka (n. 4) 410

⁴⁰ Siegel (n. 6) 359

because women resist their husbands to a greater degree than other victims will resist because they are less afraid of their husbands.⁴⁴ Psychologists and studies have shown that victims of marital rape tend to suffer trauma longer than other victims.⁴⁵ The frequency and severity of the psychological and physical effects of marital rape makes it a serious problem and necessitates abrogating the marital rape exemption. Thus, clearly, there is enough quantitative and qualitative evidence to suggest that marital rape is serious and that legal systems need to address it. Arguments against this theory show that it cannot be justified that marital rape is less serious and traumatic than non-marital rape.⁴⁷

3. *Prevention of False Rape Accusation*

This justification for the marital rape exemption is hinged on the protection of the husband against a wife's false accusation of rape. The "lying woman" justification premised on the idea that women are vindictive liars, posits that criminalizing marital rape results in women filing false rape charges to gain leverage against their husbands in divorce and custody proceedings.⁴⁸ Arguments against this theory have claimed it is unconvincing for several reasons, first the criminal justice system is designed to handle fabricated claims through criminal proceedings. There is no legitimate reason to suggest that courts could not expose false accusations of marital rape as skillfully as they expose falsehoods of other alleged crimes.⁴⁹ Even courts have acknowledged that if the likelihood of false accusations were a reason to avoid criminalizing certain activities, then nothing other than murder would be a crime.⁵⁰ Another weakness of this theory pointed out⁵¹ is that it fails to recognize the social stigma attached to rape and that in reality, rape victims are hesitant to report the crime due to this social stigma so any woman bent on revenge will likely choose a tactic less embarrassing for her.

4. *Criminal Law Should Not Invade the Sanctity of Marriage*

The justification is that preservation of marital privacy and domestic harmony required that the law stay out of the relationship between husband and wife. The belief is that extending the law of rape to married couples would undermine the institution of marriage.

According to this theory, if laws could intrude on family relations and the private sphere of the family, the possibility of reconciliation and restoration of marital harmony would be unlikely.⁵² Supporters of this argument have suggested that criminal law should be a last resort in family issues and that it is only in exceptional cases that criminal law should be allowed to invade the bedroom. The antagonist of this theory claims that the approach concentrates not on the well-being of the family unit as it claims but rather on the welfare of the husband and men. If the criminal law has no place in bedrooms apropos rape, why has it a place as regards assault, kidnapping and theft?⁵³

⁴⁴Klarfeld, (n.3) 1828.

⁴⁵ Siegel, (n.6) 359.

⁴⁶ibid.

⁴⁷P.N.S. Rumney, 'When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape' [1999] 19 Oxford Journal of Legal Studies 243-244.

⁴⁸Klarfeld, (n.3) 1828-1829.

⁴⁹ Siegel, (n.6) 361.

⁵⁰ibid.

⁵¹ibid 362.

⁵²E.J. Sack, 'Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory' [2009-2010] 24 St John Journal of Legal Commentary, 535, 551-552.

⁵³Freeman, (n.22) 18.

The supporters of this justification who believe that it protects the sanctity of marriage argue that the criminalization of marital rape will destroy any chance of reconciliation and will violate marital privacy.⁵⁴ The question then is, is a marriage where rape is involved worth saving at all? The Supreme Court of Virginia argued against this justification in the case of *Weishaupt v. Commonwealth*⁵⁵ by stating 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."

Marital rape creates an unstable home environment for all family members. It is of utmost importance to recognize the damage being done by it. Hence, to argue that the marital rape exemption avoids and should avoid interference with the marital privacy at the expense of a woman's continued abuse is problematic. Though, the matrimonial bedroom is a private place that the law should not venture into, when a crime has happened in it, the bedroom ceases to be private. These justification only helps such a husband escape liability rather than protect the sanctity of marriage. In a Supreme Court case in New York, the court held that just as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy.⁵⁶

As much as it is true that the sanctity of marriage is worth preserving, the law should create a hybrid position so that while preserving the sanctity of marriage it also protects on the other hand the victims of rape within marriage. There should be a measure of balance introduced by the law as the most effective means of social control.

5. *Alternative Remedies.*

This theory states that a wife has other alternative remedies in family law as well as in criminal law such as prosecuting for assault and so does not need the protection of criminal law with respect to rape. The argument is that the victim can pursue other legal remedies, such as assault charges and divorce. Advocates of this justification believe it is unnecessary to subject marriages to the intense pressure of rape prosecution when other less invasive alternatives exist.⁵⁷ Arguments against this position claim that the alternatives are inadequate and that it ignores the rationale of rape laws, rape is not just a matrimonial misconduct. There is a qualitative difference between the crime of rape and the crime of assault. Unlike battery and assault laws, rape laws recognize rape as both a psychological and a physical crime which deeply harms a woman's sexual integrity and autonomy. The fact that rape statutes exist is a recognition that the harm caused by a forcible rape is different and more severe than the harm caused by an ordinary assault.⁵⁸ This could even be deduced from the nature of the punishment for rape as compared to assault, rape penalties are more severe than assault penalties. Thus, if assault laws were sufficient to deal with the crime of rape, there would be no reason to have rape statutes.⁵⁹ Another reason assault law is inadequate remedy for marital rape victims is that not all women who are raped by

⁵⁴ Siegel, (n.6) 362

⁵⁵ [1984] 315 S.E. 2d 847, 855 cited in Klarfeld, (n.3) 1827.

⁵⁶ Cited in Siegel, (n.6) 363.

⁵⁷ Klarfeld, (n.3) 1828.

⁵⁸ Siegel, (n.6) 363.

⁵⁹ *Ibid.*

their husbands are physically assaulted or battered.⁶⁰ So, it simply means that such women will have no remedy if marital rape is not a crime.

The alternative of divorce is also a remedy that has been suggested if a woman suffers marital rape. It makes more sense to suggest that if a man is dissatisfied with his sexual marital relationship, he should seek a divorce instead of raping his wife⁶¹ which is a more harmful option than the divorce option. In the case of *State v. Smith*,⁶² the New Jersey Supreme Court held that if a wife's repeated refusals are a breach of marriage contract, his remedy is in a matrimonial court, not in violent or forceful self-help. Rape is therefore not a remedy for non-consummation of marriage.

Arguments against the marital rape exemption have emphasized that the face of rape victim has changed and that no category of women is exempted from rape. Since it is accepted that non-consensual intercourse can legitimately be defined as criminal, the distinction between wives and other rape victims is invidious and a denial of the full humanity of a wife in a sexual context.⁶³ Hence, it is revolting as the grounds upon which it was laid down have vanished long since and the rule persists from blind limitation of the past.⁶⁴

3.0 Effect of Rape on Victims

The effects of rape can include both the initial physical trauma as well as deep psychological and emotional trauma. Although rape victims commonly report injuries and issues after the sexual assault, rape doesn't always involve physical force. The most common and lasting effects of rape involve mental health concerns and diminished social confidence.⁶⁵

Physical effects of rape could be visible bruising or bleeding in and around the vaginal or anal area and bruises on other parts of the body from coercive violence. But both forced and other types of rape can have many other physical consequences like Painful intercourse (with significant other). Urinary infections, Uterine fibroids – non-cancerous tumors in muscle wall, Pregnancy, Sexually transmitted diseases (STDs) – HIV, genital warts, syphilis, gonorrhea, chlamydia, and others.⁶⁶ Some health outcomes can be fatal such as suicide, homicide, maternal mortality and AIDS related deaths.⁶⁷

Victims also experience psychological and emotional effects of rape. One of the most common psychological consequences of rape is self-blame. Other common emotional and psychological effects of rape include Post-traumatic stress disorder (PTSD) – feelings of severe anxiety and stress, depression, flashbacks – memories of rape as if it is taking place again, borderline personality disorder, sleep disorders, eating disorders, dissociative identity disorder, guilt,

⁶⁰ *ibid*

⁶¹ *ibid* 364

⁶² (N.J. 1981) 426 A.2D 38, 44 cited in *ibid* 364.

⁶³ J. Koshan, 'The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience – The Equality Effect' [2010] 1, 15. <<http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>> accessed 7 January 2016

⁶⁴ P.N.S. Rumney, 'When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape' [1999] 19 Oxford Journal of Legal Studies 243.

⁶⁵ Samantha Gluck, 'Effects of Rape: Psychological and Physical Effects of Rape' (26 May 2016) <<https://www.healthypace.com/abuse/rape/effects-of-rape-psychological-and-physical-effects-of-rape/>> accessed 25 October 2017.

⁶⁶ *ibid*.

⁶⁷ 'Effects of Sexual Violence' (Rape Victim Advocates) <<https://www.rapevictimadvocates.org/what-you-need-to-know/effects-of-sexual-violence/>> accessed 25 October 2017.

distrust of others – uneasy in everyday social situations, anger, feelings of personal powerlessness – victims feel the rapist robbed them of control over their bodies etc.⁶⁸

4.0 Marital Rape as Sexual Violence

Sexual violence, in times of peace and armed conflict situations, is widespread and considered to be one of the most traumatic, pervasive, and most common violations human beings suffer. Sexual violence means that someone forces or manipulates someone else into unwanted sexual activity without their consent.⁶⁹ Sexual violence as defined by World Health Organisation (WHO) is any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.⁷⁰ In other words, sexual violence is a sexual act committed against someone without that person giving consent.

Whether sexual violence occurs in the context of an intimate partnership, within the larger family or community structure, or during times of conflict, it is a deeply violating and painful experience for the survivor.⁷¹ A wide range of sexually violent acts can take place in different circumstances and settings. These include, for example: rape within marriage or dating relationships; rape by strangers; systematic rape during armed conflict; unwanted sexual advances or sexual harassment, including demanding sex in return for favours; sexual abuse of mentally or physically disabled people; sexual abuse of children; forced marriage or cohabitation, including the marriage of children; denial of the right to use contraception or to adopt other measures to protect against sexually transmitted diseases; forced abortion; violent acts against the sexual integrity of women, including female genital mutilation and obligatory inspections for virginity; forced prostitution and trafficking of people for the purpose of sexual exploitation.⁷²

Thus, Rape is a kind of sexual violence, regardless of the circumstances in which it occurred. Rape is a crime that denies the victim sexual autonomy and has thus been seen more as a crime of violence than a sexual act. Marital rape is as serious as any other kind of rape. It can be equally if not more emotionally and physically damaging than non-marital. Though it had been widely condoned or ignored by the law in the past, international conventions now repudiates marital rape and have even been criminalized by most jurisdictions. The reluctance to criminalize and prosecute marital rape has also been attributed to traditional views of marriage especially in a patriarchal society like Nigeria, where a woman is expected to be a subordinate figure to her husband, interpretations of religious doctrines especially Christianity where it has been explained that one has a conjugal duty to have sexual relations with one's spouse stating that a spouse does not have authority over their bodies but the other spouse does,⁷³ ideas about male sexuality and

⁶⁸ Samantha Gluck, (n.65).

⁶⁹ 'What is Sexual Violence' (National Sexual Violence Resource Centre) <http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Factsheet_What-is-sexual-violence_1.pdf> accessed 26 October 2017.

⁷⁰ Etienne G. Krug, et al, (ed), *World Report on Violence and Health* (World Health Organisation Geneva 2002) 149 <http://apps.who.int/iris/bitstream/10665/42495/1/9241545615_eng.pdf> accessed 26 October 2017.

⁷¹ 'Sexual Violence' (World Health Organisation) <http://www.who.int/reproductivehealth/topics/violence/sexual_violence/en/> accessed 26 October 2017.

⁷² Etienne G. Krug, et al, (n.70) 149-150.

⁷³ 1 Corinthians 7 verse 3-5, Kings James Version.

female sexuality, and cultural expectations of subordination of a wife to her husband—which continue to be common in many parts of the world. While marital rape exemption protects the husband from criminal charges of rape, it imposes harsh physical, emotional, and legal consequences on the woman who is the victim of her husband's forcible sexual assaults.⁷⁴ Marital rape denies a married woman sexual autonomy and disregards the serious harm suffered by the victim as well as the right to legal recourse against the perpetrator which an unmarried woman has.

Marital rape has been recognized as a form of violence in International law. The United Nations Declaration on the Elimination of all forms of Violence against Women (DEVAW) states that rape is sexual violence.⁷⁵ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) though does not explicitly refer to violence against women, but the Committee on the Elimination of Discrimination against Women, the treaty body established in 1982 to monitor implementation of the Convention on the Elimination of All Forms of Discrimination against Women has made clear that all forms of violence against women fall within the definition of discrimination against women as set out in the Convention.⁷⁶ In the Committee's General Recommendation No. 19 (1992) states that:

“Gender-based violence against women is “violence that is directed against a woman because she is a woman, or violence that affects women disproportionately. It includes acts that inflict physical, mental or **sexual harm** or suffering, threats of such acts, coercion and other deprivations of liberty.”

In an in-depth study on all forms of violence against women by the United Nations (UN) Secretary General, it was stated that the most common form of violence experienced by women globally is intimate partner violence that includes a range of sexually, psychologically and physically coercive acts used by an intimate partner.⁷⁷ The fourth world conference on women in Beijing in 1995 and the resulting Beijing Declaration and Platform for Action states that violence under International law includes:

“Physical, sexual and psychological violence occurring in the family, including *battering...marital rape...and violence related to exploitation.*”⁷⁸

The Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples' Rights defines violence against women as including all acts perpetrated against women which cause or could cause them physical, *sexual*, psychological and economic harm.⁷⁹ Thus, marital rape is a form of sexual violence and a breach of the victim's fundamental human rights under international law.

5.0 Marital Rape Exemption under the Law in Nigeria

The law supports the idea that marriage is the prescribed avenue for the satisfaction of innate impulse, particularly in man, hence, sexual intercourse in whatever garb within marriage cannot

⁷⁴Pracher, (n.8) 718.

⁷⁵Declaration on the Elimination of Violence against Women (DEVAW)

<<http://www.un.org/documents/ga/res/48/a48r104.htm>> accessed 5 February 2015.

⁷⁶UN Ending Violence Against Women: From Words to Action Study of the Secretary General', (2006) 10. Sales No: E.06.IV.8 <<http://www.unwomen.org/-/media/headquarters/media/publications/un/en/englishstudy.pdf?la=en&vs=954>> accessed 1 September 2017.

⁷⁷ibid43.

⁷⁸UN Report of the 4th World Conference on Women, (UN Doc.A/Conf.177/20/Rev. Sept. 15 1996).

⁷⁹ Article 1(j) of the Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples' Rights also known as the Maputo Protocol

be considered a sexual offence.⁸⁰ The definition of rape in the penal laws in Nigeria expressly excludes marital rape from the definition of rape.⁸¹

A man cannot be prosecuted in Nigeria for raping his wife. This inability is based on the definition of rape itself. In other words, rape cannot occur within the context of marriage. The assumption of the Nigerian law is that as long as a husband is married to a woman, he is immune from a charge of rape on her⁸² and the immunity is available as long as they are legally married. It is presumed that a wife has consented to have sexual relations with her partner throughout the life span of the marriage and such consent is irrevocable during the subsistence of the marital relationship. It can only be removed upon divorce or separation. So it means that a man who has sexual intercourse with his wife against her will even if force is employed while still married will not be guilty of rape.⁸³

However, it must be observed that Section 282(2) of the Penal Code has a qualification. It states:

“Sexual intercourse by a man with his own wife is not rape if she has attained puberty”.

It simply means that, a man who has non-consensual sex with his wife who has not attained puberty may be guilty of rape within the wordings and simple interpretation of Section 282(2) of the Penal Code. It is instructive to observe that, by the provision of Section 282(2) of the Penal Code, a lot of men who marry very young girls especially in the northern part of Nigeria can safely be convicted of raping their child-wives who might not have attained the age of puberty. This provision is a partial marital rape exemption of which I am not aware of any case where such interpretation has been brought to bear.

In *Alawusa v. Odusote*,⁸⁴ in accordance with his native Law and custom, the appellant shaved his wife's pubic hair. Consequently, the Husband/Appellant was charged with indecent assault - the charge was based on section 360 of the Criminal Code

“Any person who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanour, and is liable to imprisonment for two years.”

The trial court held the accused guilty of the charge for indecent assault brought against him. On appeal, the High Court upheld the ruling of the Magistrate Court but slightly amended the statement of charge to be “*indecent assault on a female*” instead of just “*indecent assault*”. On further appeal, the West African Court of Appeal held that an assault between husband and wife cannot really be characterized as ‘indecent’ but that a man can commit common assault on his wife.

To exclude spousal rape from the ambit of rape law brings to mind the question of the victims being protected. Legal opinion has since moved away from this view and marriage is no longer considered as a license to commit rape.⁸⁵ Rape within marriage should even be an aggravating factor in sentencing of marital rape in certain circumstances rather than being overlooked as something not worthy of attention of the state and law. In *R v. O.F.B.*, the Canadian Court of Appeal held that sexual assault committed by a domestic partner or former domestic partner

⁸⁰ A.O. Yusuff, ‘Gender Inequality and Selective Victimization under the Nigerian Law of Rape’ [2007-2009] 2 & 3 Ahmadu Bello University, Zaria Journal of Private and Comparative Law 97, 101.

⁸¹ Sections 357 and 6 of the Criminal Code and Section 282 of the Penal Code

⁸² O.A. Fatula, *Feminism, Women, Family and Children's Law* (Afric Law Centre 2015) 139.

⁸³ Section 252 of Criminal Code and Section 264 of Penal Code.

⁸⁴ [1941] 7 W.A.C.A. 140.

⁸⁵ Yusuff, (n.80) 102.

should be treated as an aggravating factor for sentencing purposes because it violates the victim's emotional, psychological and physical autonomy in a way that may permanently harm her intimate and trust relationships, relationships that most view as integral to a fulfilled life.⁸⁶ For example, France, has gone beyond removing the marital exemption and considers a spousal relationship as an aggravating factor that can increase the penalty for rape.⁸⁷

In *Regina v R*,⁸⁸ Lord Lane hit the matter point blank in his lead judgment when he said:
"*...the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections...is no longer acceptable.*"

Law is dynamic and made for the society, so as the society changes, law should change to adapt to the changing society. Rape is a crime of violence. Sexual intercourse is supposed to be a consensual act between partners and where a partner does not consent, it is rape. It is therefore wrong for a man to pressure his wife verbally or physically force her to have sexual intercourse without genuine consent, even if she had consented in early sexual intercourse and then changes her mind in future. The law should protect all victims regardless of gender, status, etc. Why should the law turn deaf ear to a wife or a victim's complaint simply because she is married?⁸⁹

5.1 The Reality of Marital Rape in Nigeria

Marital rape may be difficult to accept in Nigeria because of the cultural, religious aspect and prevailing social norms, but it does occur. Cases of marital rape often involves a male accused and female victim, it is thus, a highly gendered crime. Though it does not mean cases of female accused and male victim is not a possibility. For example, in Ogbadibo Local Government Area of Benue State, a man was allegedly raped to death in the early hours of the morning by his six wives. He had returned late that night from a beer parlour where he usually hung out and headed to the room of his youngest wife to have sex with her when his other wives, armed with sticks and knives demanded that he sleep with all of them. When he resisted, he was overpowered and each wife took turns with him until he passed on to the afterlife.⁹⁰

The general perception is that marriage gives an absolute right to the husband to have access to sex and this can be taken with or without the consent of the wife. The very act of a wife refusing sexual intercourse is unthinkable. The essence of a reform is address imminent dangers in the society, the clamor for the abolishment of marital rape exemption is based on the fact that it occurs in marriages. Nothing more can destroy a marriage than a forceful act of sexual intercourse. All these justifications are based on a social myth about sex, women and marriage and also on false assumptions.

Generally, it is still thought that it is inconceivable for a man to rape his wife in Nigeria. It cannot be right or justiciable that a husband will have the right to rape his wife just because they

⁸⁶[2006]ABCA 207, cited in J.Koshan, J., "Sentencing for Spousal Sexual Violence: Different but Equal" (2010) <http://ablwg.ca/2010/08/20/sentencing-for-spousal-sexual-violence-different-but-equal/> accessed 7 January 2016.

⁸⁷ Articles 222-24 of the French Criminal Code, http://www.legislationonline.org/download/action/download/id/3316/file/France_Criminal%20Code%20updated%20on%2012-10-2005.pdf (Accessed 10th January 2016).

⁸⁸ [1991] 2 All E.R. 257.

⁸⁹Fatula, (n.82) 141.

⁹⁰S. Malcolm, 'Rape under Nigerian Law: Time for a Review' (25 July 2012)

<<https://saymalcolm.wordpress.com/2012/07/25/rape-under-nigerian-law-time-for-a-review/>> accessed 18 September 2017.

are married.⁹¹ A woman has the right to give or withhold consent to sexual intercourse whether married or single. Every woman has a right to sexual autonomy regardless of her marital status. Marital rape in Nigeria is not a myth nor is it theory, it is a reality. The truth is many Nigeria women are victims of domestic violence and marital rape but people do not talk about it because it seems to be an acceptable part of marriage.⁹² Stories of men having sexual intercourse with their wives against their wishes abound. In November, 2013, a 45-year-old trader, Muina Adelami asked a family court in Lagos to dissolve her eight-year-old marriage to her husband Shuaib, a clerical officer, on the ground that his sex drive was high. According to her, the husband would have sex with her against her wish and beat her if she resisted him. She recalled an incident when she fainted and after assisting her to come round, he continued having sex with her. She said there are times she would cry but he will start beating her whenever she complains. Shuaib's defence was that he had a high sex drive and added that it was his right to have sex with his wife, adding that sex cannot kill her.⁹³

Another victim said her husband does not believe that she has any right to refuse him whenever he wants to have sexual intercourse with her. Even whenever she is sick or tired and pleads with him, he violently rapes her and proceeds to dehumanize her by flogging her, stripping her naked in front of people in the compound and pouring water on her. All efforts to access justice has failed because the current laws does not recognize marital rape, she can only charge him for assault which is a lesser offence⁹⁴

The discussions at a focus group sessions correlated with the findings from the questionnaire regarding intimate partner rape/violence. The participants remarked as follows⁹⁵:

"My husband has this uncanny way of showing his authority over me. As far as he is concerned, I must succumb to his sexual advances all the time without complaint."

Another added:

"I dare not refuse my husband sex, even when I am sick he will always force himself on me."

Yet another added:

"I would not have minded so much if it is just a case of employing his veto power to force me to have sex with him. What I could no longer stand was the constant beatings that accompanied the sexual abuse. At times I will be so beaten to a point of unconsciousness."

One participant reported:

"It was becoming a nightmare awaiting my husband's return. He will always rape and beat me in his drunken stupor."

⁹¹ Spousal Rape in Nigeria: Myth or Reality (22 April 2015) <www.slideshare.net/mobile/eseosaolotu/spousal-rape-in-nigeria> accessed 18 September 2017.

⁹² Fatula, (n.82) 144-145.

⁹³ C. Agbo, et. al., 'Marital Rape: Who will Push the Cause of Victims?' *Leadership Newspaper* (25 October 2014) <<http://leadership.ng/news/388170/marital-rape-will-push-cause-victims>> accessed 13 December 2015.

⁹⁴ O. Akor, 'We Were Violated and Forced to Keep Quiet' *Daily Trust* (15 February 2015) <www.dailytrust.com.ng/news/feature/-we-were-violated-and-forced-to-keep-quiet/103230.html> accessed 5 November, 2017.

⁹⁵ M.O. Esere, et. al. 'Causes and Consequences of Intimate Partner Rape and Violence: Experiences of Victims in Lagos, Nigeria' [2009] 1 (1) *Journal of AIDS and HIV Research* 001-007. <<http://www.academicjournals.org/JAHR>> accessed 5 January 2017.

On the issue of jealousy, a participant added:

"I never seem to do anything right in the sight of my husband. He was always in the habit of beating and forcing me to have sex with him on the pretext that I had a lover."

Findings have shown that marital rape in Nigeria is a reality. The legal bond of marriage does not remove the sexual autonomy of a spouse in any given situation with the result that the other spouse, usually the man, is not allowed to coerce sexual intercourse.⁹⁶

6.0 Circumstances of Forceful Sexual Intercourse within Marriage that Can Justifiably Be Recognized as Rape

Marital immunity is a notion that denies women the same decision making powers as men over sexual choices and to the extent to which the Nigerian rape law supports the notion, it amounts to a selective victimization of married women by the law.⁹⁷ Marriage should not be a sanctuary for rapists anymore.⁹⁸ It is not all coercive sexual relations within marriage that should be categorized as rape.

Most marital rape incidence occurs in a violent marriage. Battering and rape in marriage are closely related. Marital rape often involves severe physical violence, threats of violence and use of weapons by men against their partners. Importantly, some researchers have found that men who batter and rape are particularly dangerous men and are more likely to severely injure their wives and potentially even escalate the violence to murder. In situations where violence and battering is involved in marital rape, it should be an aggravating factor to the offence of marital rape. It is submitted therefore that a husband should, in appropriate instances, be made triable and punishable, if convicted, for the rape of his wife.⁹⁹ The following circumstances constitute instances that can be justifiably recognized as rape within marriage as well as aggravating factors:

- 1) Multiple rapes: Where a husband habitually abuses the wife victim sexually, it should be justifiably recognized as rape within the context of the law.
- 2) Violence or Threat of Violence using weapons and causing bodily injury or death: The plight of battered women makes the reform of the marital rape exemption from rape law application to be imperative. Violence beyond that which is inherent in the offence should be triable. Thus, where the act of intercourse was accompanied with infliction of bodily injury or even death, rape within marriage should be recognized.
- 3) Vulnerability of victim, that is, where victim has health issues or physical disability or underage and has not attained puberty or is pregnant.
- 4) Contagious or Transmissible Disease: A husband can be tried where the wife objects to sexual intercourse based on a contagious or transmissible disease, untreated or uncured, suffered by the husband.¹⁰⁰
- 5) Non-cohabitation: Where the victims are separated and cohabitation has been withdrawn, or where there is a matrimonial proceeding pending between the spouses, forceful sexual intercourse should be recognized as rape.

⁹⁶ 'Reforming Sudan's Legislation on Rape and Sexual Violence' (Redress and Kchred Position Paper September 2008) 1, 31 <http://www.redress.org/downloads/country-reports/Position%20Paper%20Rape%205%20SEPT%2008%20_3_.pdf> accessed 16 October 2017.

⁹⁷ Yusuf, (n.80) 103.

⁹⁸ Seo, (n.23)397.

⁹⁹ Yusuf, (n.80) 104.

¹⁰⁰ ibid.

Marital rape exemption should not be part of any good law. It is a legal fiction which has become offensive and unjust. The continued recognition of marital rape exemption amounts to a perpetuation of gender inequality and discrimination against married women.

7.0 Conclusion

Without diminishing the weight of arguments against marital rape exemption generally and particularly under Nigerian Law, it is somewhat arguable that some measure of protection should be given to what goes on in the bedroom between the husband and wife from the view of the public. The law should aim at creating a balance between protecting women from sexual violence in the home and protection of the marriage institution. This is because making a husband generally liable for all kinds of assertive or coercive but not harmful sexual intercourse, goes to the root of the marriage. It may be used vindictively, to blackmail or even extort and legal obstacles should not be put in the way of sex at home.¹⁰¹ Thus, the rape law should provide for certain instances that will justifiably be recognized as rape within marriage so as to create a balance between preserving the marriage institution and protecting the victims of rape within marriage.

The elimination of myths around the justifications of marital rape is crucial for eradicating discrimination and securing justice, impartiality and equality and thereby fulfilling the human rights of all individuals in practice. Nigeria should abolish the marital rape exemption and quit living in the relic of the past and reform its law to meet up with the society.

¹⁰¹ibid 105.