

MARITAL RAPE: EVOLVING TRENDS AND THE WAY FORWARD

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Abstract

Marital rape is a term used to describe sexual acts committed without consent, or against the will of a party, where the perpetrator is the victim's spouse. This may include, the use of physical force, threats of force or implied harm based on prior assaults, causing the victim to fear that physical force will be used if he/she resists. Though males may also be victims of marital rape, this work focuses on women as victims because the rape definitions found in statutes identifies them as such. It is also argued that a woman's physical, economic and social position places her at a disadvantage. Most times, the marriage rapist is not necessarily a crazed sex fiend, but one who seeks to use sex as a means of asserting or validating his masculine identity. The victims of marital rape suffer both short and long term consequences, ranging from humiliation, fear, guilt, depression, injuries and broken bones. This work argues for the expunging of marital rape exemption from Nigeria's laws. This is premised on the fact that the law does not contain a comprehensive position for the protection of married women. It is somewhat general and inadvertently encourages the perpetration of domestic violence against women. This exemption violates the woman's right to her reproductive system, abuses her psychological, emotional and physical health, and also fundamentally infringes on her right to non-discrimination and dignity of her person.

I. Introduction

Marriage is an institution created and protected by law. The duties and obligations of the parties involved are regulated by the law applicable to the marriage in question. In Nigeria, marriage is conducted and regulated by the tripartite legal system which exists simultaneously, i.e customary laws¹, Islamic law² and statutes laws³. Under these laws, sexual intercourse is regarded as an obligation for both

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¹ Nigeria has about 300 indigenous groups and cultures see Lize Okoh "A Guide to the Indigenous People in Nigeria- Culture Trip available at <<https://culturetrip.com/africa/nigeria/articles/a-guide-to-the-indigenous-people-of-nigeria/>> accessed 7/12/19. Each of these cultures have their laws regulating marriage (which are largely unwritten).

² The Nigerian Muslim community subscribe to the Maliki Islamic School of thought.

³ The Marriage Act, 1914 and the Marriage Act, Cap. 218 LFN 1990, the Marriage Validation Act, Cap 219, LFN 1990 and the Matrimonial Causes Act Cap 220, LFN 1990.

parties⁴. Conversely, it is a right which spouses can lawfully demand from each other. However, a denial of the fulfilment of this obligation does not confer on the aggrieved party the right to forcefully take it. Thus, based on marital laws ordinarily, it will be unlawful for a spouse to force himself or herself on the unwilling and non-consenting partner⁵. This, we argue, is within the contemplation of the marital law. Even though it has not found express stipulation in the law, it can be inferred from the remedy available to a person whose spouse wilfully and consistently refuses to consummate the marriage. The law provides explicitly for a remedy in a suit for an order of restitution of conjugal rights⁶ (which may be inclusive of other marital duties e.g. cohabitation, etc) and/or the failure of which an aggrieved party can sue for an order of dissolution of the marriage.⁷

From the above, it is obvious that the law already contemplates a situation in which a party to a marriage may deny the other party the right to sexual intercourse. As it is with every right, a denial does not confer on the aggrieved party the right to arbitrarily take it. The aggrieved party is expected and obligated by law to seek redress within the mechanism provided by law itself. In this case, the options available to him/her are as discussed earlier. This appears to be the reasonable and legal course of action to take. However, when a spouse chooses to act otherwise, by taking matters into his/her hand, and forcefully having sexual intercourse with an unwilling and non-consenting wife, he is protected by law and exempted from prosecution.

The rationale for this comes from a common law principle propounded in the most seminal book, *Historia Placitorum Coronae*⁸ authored by Lord Matthew Hale who reasoned that “...a man 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

⁴ S 368 of the Plateau State Penal Code Law (Gazette 24th October, 2018) provides for the punishment of adultery, by a married person, with another, not the spouse of the marriage. It further states that the person shall be guilty of rape, if the sexual act was forceful. The provision carefully states that the punishment applies outside of marriage, meaning it is legal when sex is forced within the ambit of a legal subsisting marriage.

⁵ Ibid

⁶ S. 47 of the Matrimonial Causes Act, 1970

⁷ Ibid, Section 15(2) (a). Although section 21 of the same Act provides that the court shall not find that a respondent has wilfully and persistently refused to consummate the marriage unless the court is satisfied that, as at the commencement of the hearing of the petition, the marriage had not been consummated. If this is the case, there are other legitimate options open to the aggrieved party as may be found under s. 15(2)

⁸ Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (Sollom Emlyn 1736)

up herself in this kind unto her husband, which she cannot retract”.⁹ This position has been retained since 18th century and has found a place into the Nigerian laws.¹⁰ The cumulative laws criminalising rape in Nigeria, the Penal Code, the Criminal Code and recently the Prohibition of Violence against Persons Act, do carry the exception that rape, when perpetrated by the victim’s husband is not an offence.

In expounding this position, this paper will consider the aforementioned position through a careful perusal of the concept of marriage, rape, what amounts to marital or spousal rape. Then further delve into the crux of the paper by considering issues surrounding marital exemption, and the provisions of some of our laws. We believe that this will set the theme for better appreciation of the position of the authors.

II. CONCEPTUAL FOUNDATION

a. Marriage

In the landmark case of *Hyde v Hyde Woodmansee*¹¹ Lord Penzance defined marriage as the “voluntary union between one man and one woman for life, to the exclusion of all others”¹². While this definition is still valid for statutory marriages as well as Christian Marriages¹³, it is not so for Nigerian Customary marriages which are polygamous in nature and Islamic Law which has a restrictive Polygamy of not more than 4 wives with a stipulation to treat them fairly¹⁴. Globally, the trends concerning marriages have changed. The struggle for inclusion by the Lesbian, Gay, Bisexual, Transgender, Queer, Intersexual and Asexual (LGBTQLA) group has changed the narrative involving the parties to a marriage. Most countries have removed the restriction against same sex marriages. Marriages are now conducted between same sex partners.¹⁵ Nigeria however, remains among the increasingly decreasing number of States that have refused to adopt same-sex marriage. It has in fact criminalized

⁹ *ibid.* 628

¹⁰ See (n 4)

¹¹ [1866] [L.R] 1 P. &D. 139.

¹² *ibid*

¹³ Although this form of marriage does not legally recognised and it is, at best recognise as a form of customary law marriage, being that its solemnization is preceded by customary rites of marriage. It is strongly submitted by the authors that because of its prevalence in Nigeria, it should be, in least, recognized as a type of marriage practiced in Nigeria, after all, the law is made for man and not vice versa.

¹⁴ The Holy Quran 4:3

¹⁵ History of Same Sex Marriage in the United States.

such relationship since 2013.¹⁶

The interpretation section of the Same Sex Prohibition Act defines “marriage as a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law in Nigeria”. The silence to same-sex marriages in this definition is deafening and is arguably the whole purpose of the law. Thus, while polygamy is accepted as a form of marriage in Nigeria, same-sex marriage is not.

The contrast provided in the definition by the Black’s Law Dictionary¹⁷ cannot be missed. It defines marriage as “a legal union of a couple as spouse in a contract”. Here, the use of gender insensitive terms such as “couple” and “spouse” are very well intended to be inclusive of same sex marriages. This without being mentioned, does not fit in the Nigerian context of legalised marital unions.

Marriage confers on parties certain rights and obligations, the most common of which is referred to as consortium, which relates to a bundle of rights enjoyed by the parties. This includes the duty to cohabit, have sexual intercourse, maintenance etc. The breach of any of these duties by a party to the marriage, entitles the aggrieved party to sue for redress in the form of an order for the restitution of conjugal rights¹⁸ or for dissolution of the marriage¹⁹.

Generally, even though the marriages under Customary Law, Islamic and Statute Law vary in form and requirements, their effects are similar in Nigeria. Most of these marriages come with special privileges and, arguably, certain protection is accorded to parties who have contracted statutory law marriage in Nigeria.²⁰

b. Rape

¹⁶ Section 5, Same Sex Prohibition Act, 2015

¹⁷ Bryan A Garner (ed) *Black’s Law Dictionary*(10th edn, West Publishing Co. 2014) 1117

¹⁸ See (n6)

¹⁹ See (n7)

²⁰ For instance, the right to inherit one’s spouse. While both parties under statutory law marriages are entitled to inherit each other in the event of an intestate succession, wives of Islamic Law marriage are entitled to inherit only ½ of what would ordinarily be inherited by the male spouse; and in most customs under the Nigerian customary law, women are generally not entitled to inherit whether as wives or daughters of the deceased. However, the narrative for this is quickly changing since the decision of the court in *Ukeje v Ukeje* [2004] 11 NWLR (Pt 1418) 384 – 414 blazed the trail in changing perspective in the Nigerian Judiciary about upholding rights of women to inherit, whether as daughters or wives. Whether this is obtainable in practice, especially for the underprivileged who cannot afford to pursue such rights in the courts of law is a matter for another discourse.

Rape is defined by the Criminal Code Act²¹, the Penal Code Act and the Violence Against Persons Prohibition Act.

Section 357 of the Criminal Code Act provides that:

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

Section 282 of the Penal Code Act provides a man is said to commit rape:

who, except in the case referred to in subsection (2) of this section, has sexual intercourse with a woman in any of the following circumstances: a. Against her will; b. Without her consent. c. With her consent, when her consent was obtained by putting her in fear of death or hurt; d. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; e. with or without her consent, when she is under fourteen years of age or of unsound mind

(2) Sexual intercourse by a man with his own wife is not rape, if she has attained puberty.

These provisions have unfortunately laid a platform for others to continually view rape as an offence against the woman in Nigeria. Alubo²² defines rape as “an act committed by a man against a woman by way of sexual intercourse, by force or without her consent or against her will”²³. He however, observed with great foresight, that with the legalization of same sex marriages in different States of the world today, it is probable that the definition of rape will concomitantly change as it may become possible to rape a man by another man, or a woman by another woman²⁴. While this may be true, the learned author seems to be convinced that rape is a gender-based crime against a female by a man and does not even allude to the possibility that it

²¹ LFN 1990, Cap. C38

²² Alubo AO, ‘Rape Under Nigerian Criminal Law: Review of and Prescriptions for 21st Century Nigeria’ *Jos Bar Journal* (2005) 1(4)

²³ *Ibid.* 79

²⁴ *Ibid.*

could also be a crime, by the woman against the man.

These provisions and gender-based definitions of rape have faced many criticisms by people who feel that the gender-sensitive definition of rape encourages the perpetration of the crime against women. According to Oyajobi, “by continuing to define rape in a sex specific language, the law provides fertile ground for the persistence of the various myths about women and rape”²⁵ this criticism captures the bane of the Nigerian Feminist who launched campaigns against the gender sensitivity of the law, which they claim engenders its perpetration.²⁶ This campaign cumulated into the conspicuously different wordings of the section 1 of the Violence against Persons Prohibition Act²⁷, which not only removes the gender-sensitivity attached to the various definitions of rape in the two legal instruments discussed above. This also revolutionised the definition of rape from its most restrictive sense of “vaginal penetration” to a more wholesome definition, which somewhat brings it in line with what is obtainable in most jurisdictions around the world²⁸. The law provides a definition of rape as:

A person commits the offence of rape if:

- a. He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;
- b. The other person does not consent to the penetration; or
- c. The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person, or in the case of a married person by impersonating his or her spouse²⁹

²⁵ Oyajobi A, ‘Better Protection for Women and Children Under the Law’ in Women and Children Under Nigerian Law, Federal Ministry of Justice, Lagos, p. 23 in Effah et al, *Unequal Rights: Discriminatory Practices against Women in Nigeria* (CRP, 1995)

²⁶ see ibid, Ilfemeje Sylvia Chika, ‘Legalization of Marital Rape in Nigeria: a Gross Violation of Women’s Health and Reproductive Rights’ *Journal of Social Welfare and Family Law* (2011) Available at <<http://dx.doi.org/10.1080/09649069.2011.571469>> accessed on 21 June, 2011 and Nasir J N and Alemika E, *Women and Law in Nigeria* (Jos University Press Ltd., 2001)

²⁷ 2015

²⁸ The definition is similarly worded and arguably influenced by that given by the Trial Chamber of the International Criminal Tribunal for Yugoslavia in the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (2001) IT-96-23 and 23/1. The tribunal came to that conclusion after it has considered the definition of rape in various national jurisdictions of Germany, Austria, Korea, Brazil, Spain, China, India, Australia, Norway and some states in the USA amongst others. For further details see <<http://un.org/icty/cases/indictindex-e.htm>>

²⁹ S. 1, Violence Against Persons Act, 2015

Another laudable innovation by this law is the inclusion of the use of any substance or additive capable of eroding the will of the rape victim. This is significant so much so that male victims who have been induced by such substance could also find remedy under this law, as incidences of the overpowering of a man by a woman through physical force, threat or intimidation, fear of harm may seem far-fetched though not impossible.

While this is applauded as a victory for the prosecution of rape cases, a lot is still left to be desired, because, as well intended as the laws is, it has retained the marital rape exemption which forms the fulcrum of our discourse. Furthermore, this law is presently only applicable to the Federal Capital Territory, Abuja, as other states are yet to domesticate same.

c. Marital/Spousal Rape

Marital rape, also referred to as spousal rape, has found expression in our laws by way of exemption only. It is, as the name implies, a rape carried out within a marriage or where the perpetrator is the spouse of the victim. It is also defined as “any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent”³⁰. The three main laws which define rape in Nigeria as discussed above all carry a stipulation which isolates marital rape from other forms of rape and as one which does not embody illegality³¹.

III. Origin of Marital Rape Exemption

This exemption originates as far back as the 18th Century, where Hale made a notorious statement, which seems to be grounded in common law and even though his statement was not supported by any citation,³² it was accepted and adopted by the

³⁰ Raquel Kennedy Bergen, ‘Marital Rape: New Research and Directions’ (2006) The National Online Resource Center on Violence Against Women’ <https://vawnet.org/sites/default/files/materials/2016-09/AR_MaritalRapeRevised.pdf> accessed 16 August 2019. It should be noted that the gender-sensitive definition of this author is not intended by the present authors; however, it is not surprising as most rape definitions and marital rape exemptions are couched in gender-sensitive terms, implying that the woman is the usual or expected victim.

³¹ Section 357 read together with Section 6 of the Criminal Code, Section 282 (2) of the Penal Code and Section 1(c) of the Violence Against persons Prohibition Act.

³² Jill Elaine Hasday, ‘Contest and Consent: A Legal History of Marital Rape’ California Law Review (2000) 88 (5) 1398.

courts to exempt men from liability in the rape of their wives.³³ This acceptance which the exemption garnered consolidates on the common law doctrine of coverture which states that:

By marriage, the husband and wife are one person in law:(i) 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 influence of her husband, her baron or lord; and her condition during her marriage is called coverture.³⁴

Under the doctrine of coverture,³⁵ the woman is not allowed to own land or any real property; If she does before marriage, such is subsumed into that of her husband. The woman's position is such that her husband might give his wife moderate correction, since he is responsible for her behaviour, and that such correction should in the same moderation as he would his apprentice or children.³⁶ It is obvious that the position of the married woman was so unfortunate that it was better for her to remain single, as she would still be in possession of her property.

Lanbam³⁷ opines, however, that while it seems that the legal regime of common law already supports the marital exemption, before Hale's treaties, the theoretical basis of the immunity seem to be a creation of Hale.³⁸ Hasday notes that the earliest roots of the marital rape exemption are murky, and that it may be linked to the medieval Moral Theology and the Law of the Church³⁹ Though the implication of the biblical passage is that both spouses are expected to give themselves to each other, Zoe noted that in a patriarchal society, the real effect given to it was to give the husband sexual autonomy but not the wife.⁴⁰

³³ The only situation that may warrant a conviction in rape of a wife is as a principal, if he prostitutes his wife to another: See Mathew Hale, *ibid*. Other judicially provided exceptions may exist where a decree of divorce has been ordered see *R v O'Brien* (1974) 3 All E. R. 665; where the parties are living separately under a separation order of the court, see *R v Clarke* (1949) 1 All E. R. 448; Where a husband has undertaken to the court not to return to his wife see *R v Steele* (1974) 65 Crim. App. Rep. 22 and Where there is a separation agreement see *R v. Miller* (1954) 2 Q.B. 282

³⁴ William Blackstone, *Commentaries on the Laws of England* (Callaghan & Co., 1872) 442

³⁵ *ibid*

³⁶ *Ibid*. 446

³⁷ David Lanbam, 'Hale-Misogyny and Rape' 7 CRIM L.J. (1983) 148 (155) cited by Hasday 1379

³⁸ *Ibid*

³⁹ See I Corinthians 7:3-5, *The Holy Bible* NLT (Tyndale House Publishers Inc. 1996) 883

⁴⁰ Zoe I, 'Marital Rape' <www.rapeinfo.wordpress.com/2008/5/25/maritalrape> cited by Josephine AA Agbonika, 'Marital Rape in Nigeria: Myth or Reality?' in Dakas CJ Dakas, Akkarren Samuel Shaakaa and Alphonsus O Alubo (eds), *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (Innovative Communications 2015) 402. It is further argued here that there is nothing biblical in support of marital rape, if anything the bible negates the principle of marital rape when it states in 1

A wave of feminist agitation and activism against the status of women during the 18th Century, led to the enactment of Married Women's Property Law 1882. Under this Law, a woman was allowed to have a legal personality that is independent of her husband's. As such is able to own and manage her personal property. However, while the feminist fought and won a battle against the woman's sovereign powers over her property, they then neglected the battle over (or lost the battle over) her personal sovereignty. We submit that the battle over the woman's personal sovereignty is imperative, the lack of which is antithetical to any property that she may own. Thus, a woman's right to self-ownership is violated by the retention of the exemption of marital rape in our laws. The question that begs for an answer is of what significance is her property if she does not own herself?

IV. Challenges to Marital Rape Exemption

The origin of the challenge to marital rape exemption is traceable to 1970⁴¹. Hasday noted that the 19th century feminists waged a campaign that was both vociferous and systematic against the exemption and argued that the economic and political equality would prove hollow, if women did not win the right to set the terms of marital intercourse⁴². This agitation was aimed at offsetting the age long and deeply rooted common law prerogative. However, as radical as this campaign was, it was not very successful initially. Presently, there are 127 countries that still retain the exemption of marital rape in their laws⁴³. Commenting on irrationality of the retention of the exemption, the New York Court of Appeal held that:

...rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd... A married woman has the same right to control her body as does an unmarried woman⁴⁴

Corinthians 13:5 that "love ...does not demand its own way..." and such should not be used to justify what society has twisted or perverted in support of an already patriarchal and misogynistic society.

⁴¹ See Hasday (n5) and Bergen (n2).

⁴² Hasday 5

⁴³ See UN Women Justice Report: get the data <<https://www.theguardian.com/global-development/poverty-matters/2011/jul/06/un-women-legal-rights-data>>

⁴⁴ *People v Liberta* 474 NE 2d 567, 572-73 (NY 1984) cited in Barbara Stark, 'Does International Law Really Require the Criminalization of Marital Rape?' <<http://doi.org/10.1017/S2398772300001690>> accessed 26 August 2019

Generally, the agitation against marital rape is seemingly championed by feminists alone and in a bid to favour the woman's position and eliminate all forms of unequal and discriminatory practices against the woman. While it is true that the woman is, in most cases, at a disadvantage because of her anatomy (physical strength), economic and political position which makes her more vulnerable to violence generally and rape specifically, the idea of men being raped in a heterosexual marriage is not unheard of. However, even though it is true that the incidences are higher in relation to women victims, there are a plethora of cases of women raping men. Agbonika discussed some of these incidences in her work.⁴⁵ She referred to an incident that occurred within the context of marriage where a man in Benue State was allegedly raped to death by his six wives. It was reported that his six wives insisted that he must have sexual intercourse with all of them at the same time, when he declined, they overpowered him and each took turns raping him until he died.⁴⁶ Had the exemption of marital rape been removed in our statutes, this could have also been prosecuted as rape and those women charged also rape perpetrators⁴⁷ But since, unfortunately, that is not the case, they could only be charged for murder or manslaughter as the case may be.

Furthermore, the definition of consent in the Violence Against Person's Act, states that consent could be vitiated by force, threat, intimidation, fear of harm, false and fraudulent misrepresentation, use of any substance or additive capable of taking away the will of a person. The sum of these qualifications to consent is not beyond use by a woman, assuming she cannot physically overpower the man. We argue that the marital rape exemption is as much a shield for the man as it is for the woman. However, it cannot be disputed that the woman is more likely to experience rape in marriage than the man, and the fact that the marital rape exemptions are gender specific. Be that as it may, this work focuses more on the woman as a victim of marital rape.

The continuous retention of the exemption of marital rape in our statutes is a perpetuation of the advantage that the then *feme sole* (a woman without a husband) enjoyed by virtue of remaining single, since an unmarried woman could sue any person who rapes hers. It would appear that marriage opens a woman to the

⁴⁵ Agbonika 420-422

⁴⁶ *ibid.*

⁴⁷ This is significant as it would have given a judicial debunking of the myth that women are the only victims of rape.

possibility of being violated sexually without the protection of the law. This argument is more succinctly captured by West when he states that “On marriage, it means... that a wife is by virtue of her status available to her husband for forced sex whenever and however imposed, regardless of the presence or absence of either her consent to, or desire for sex itself.”⁴⁸ He further states that “being married, then, in countries with the marital rape exemption, means that one’s body is essentially boundary-less, or porous, and one’s own will is irrelevant with respect to sexual penetration by one’s husband...”⁴⁹ It cannot be said in clearer terms than this, that women in countries which retain marital rape exemption like Nigeria, are not viewed as having equal rights to men. Furthermore, such acts of discrimination and violations of their rights are sanctioned by the very laws which are meant to protect them.

Nigeria may present a peculiar circumstance different from that of other countries where dowries or bride prices are not paid. In Nigeria, customary marriages are only valid on the condition that the dowry or the bride price of the woman is paid. Without the payment of bride price, the marriage is never accorded any social or cultural recognition. Suffice it to mention that bride price payment is not restricted to marriages conducted under the customary and Islamic laws. Before marriage under the Act or statutory law marriages are conducted, the practice is that the cultural rites and the bride price payment are made first. Although this is not a requirement of statutory law, this practice only goes to show how much significance Nigerians defer to their culture and religion. Because men pay dowry in Nigeria, most men feel that they are making payment for the bride and consequently have a right over her and her body hence the rhetoric “I have paid for it,” which is common with Nigerian men when referring to the sexual duties that a woman is obligated by law to perform in marriage. While it is true that submitting to reasonable sexual demand is a requirement between couples, it is demeaning to the woman if such expectation arises from the perception that she has to submit because dowry has been paid on her.

While arguing that the payment of bride price has further increased the marginalization and subjugation of women in the home, Ifemeje⁵⁰ opines “that the man who has paid bride price feels that the woman is his property and denies her a

⁴⁸ Robin West ‘Marital Rape, ‘Consent, and Human Rights: Comments on “Criminalizing Sexual Violence Against Women in Intimate Relationships”’ *AJIL Unbound* (2017) 109 (197) 5. <http://doi.org/10.1017/S2398772300001434> accessed on 16 August 2019.

⁴⁹ *Ibid*

⁵⁰ Ifemeje Sylvia Chika, “Gender Based Domestic Violence in Nigeria: A Socio-Legal Perspective *Indian Journal of Gender Studies* (2012) 19(1)(137-148)

voice at home⁵¹.” But if this is the case, then how different is the position of the married woman to that of the prostitute? If the husband feels he has irrevocable right to sexual intercourse with his wife, because of the payment of some token, does that not put the position of woman even lower than that of the prostitute who is paid at every point of sexual intercourse? Another question that begs for answer is how much dowry or bride price could be paid to justify perpetual sexual duties by a wife? Especially given that, in contemporary times, dowry or bride price are just a token given to the woman’s family as a symbol of cultural compliance.

States in the Southern and Eastern Nigeria have enacted laws to regulate the payment of exorbitant sums as bride price of prospective wives.⁵² In India, one of the countries with the highest rates of marital rape, dowry is being paid by the woman and entails a significant transfer of wealth from the family of the bride, to the bridegroom, or groom’s family.⁵³ Dowry is often represented as the cause of serious social problems, including harassment, abuse and even murders of brides in India. Legislative attempts to deal with the situation yielded virtually no diminutive effect of either dowry or violence⁵⁴. In the West, where dowry is usually not paid, only recently has the removal of the statutory exemption to marital rape been completely successful. Although authors have argued that some of the pieces of legislations contain lesser punishment for marital rape. Some require a couple to be separated at the time of injury, others only recognise marital rape if it involves physical force and/or serious physical harm. While some vastly reduced the penalties, some others create special procedural requirements for marital rape prosecutions⁵⁵ or even a withdrawal of the suit at the instance of the victim. Thus, marital rape is not a product of dowry payment, but it is based on a deep rooted cultural and archaic social norm and entrenched ideal fuelled by patriarchy and misogyny.

I. Effects of Marital Rape Exemption

Proponents of the abolishment of the marital rape exemption have often times tried to justify such activism by citing a plethora of reasons. Ifemeje⁵⁶ argues that the

⁵¹ *ibid.* 142. This includes, of course, the right to refuse his sexual advances. Any objection may earn her beating, rape or even divorce.

⁵² Limitation of Dowry Laws, 1956 (Laws of Eastern Nigeria, Cap. 76)

⁵³ Mary K Shenk, Dowry and Public Policy in Contemporary India, the Behavioural Ecology of a “Social Evil” *Human Nat.* (2007) 18(242-263) 243

⁵⁴ *ibid*

⁵⁵ *Ibid.* Hasday 1484

⁵⁶ Ifemeje (n 28)

legalization of marital rape is a gross violation of Women's Health and Reproductive Rights. Reproductive right is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity in all matters relating to the reproductive system and its functions and process."⁵⁷Ifemeje further argues that institutionalized barriers have seriously impeded the full realization and protection of women's reproductive rights and this has resulted in eroding their bargaining power when it comes to negotiating safe sexual behaviours with their partners in order to avoid life threatening sexually transmitted diseases or unwanted pregnancy.

We agree absolutely with her position and further state that the patriarchal entrenched subjugation of women has made some women rather timid and turned them into mutes for fear of being labelled un-submissive or being beaten or disenfranchised from economic advantages in the home-front. They do not dare raise their voices in objection to their husbands' sexual advances, such that even when express consent is given, such consent is influenced by the above factors and cannot be real consent. Some women have to seek their husband's permission before they can submit themselves to any contraceptives to avoid pregnancy⁵⁸, even if such pregnancy may be detrimental to her health. These women are forced to submit to sexual intercourse with their husbands even if they are doubtful of his fidelity, thereby making them vulnerable to sexually transmitted diseases.

The factors that work against the married woman are overwhelming and this is further compounded by the law legalizing marital rape; hence, making her situation helpless in a so called democratic society. Suffice it to state here that the instances of marital rape, stemming from total dependence on men folk is not very common with urban-class women, who work and are somewhat self-reliant.

Bergen⁵⁹ notes that despite the myth that rape by one's partner is a relatively insignificant event causing little trauma, research has shown that marital rape often has severe and long lasting consequences for women⁶⁰. Physical effects ranging from vaginal injuries, lacerations, soreness, bruising, torn muscles, etc., while gynecological consequences may include vaginal stretching, anal tearing, pelvic pain,

⁵⁷ Nwosu-Jiraba N, Ojo O, Musa R, and Ighorodje M, *Reproductive Health and Rights* (Liberty 2007) 3 cited in Ibid.

⁵⁸ This different from an invitation to have a discussion about it, and if he declines such permission, she is prohibited from having such protection.

⁵⁹ Ifemeje 5-6, (n 28)

⁶⁰ Ibid

urinary tract infections, miscarriages, still births, bladder infections, infertility and sexually transmitted diseases, and inability to use contraceptives.⁶¹ We may add that the failure of contraceptives may lead to unwanted pregnancies. Psychological consequences result from the shock of being raped by someone they once presumably love and trusted or, whom they most certainly expect protection from. Research has also shown that women who experience marital rape are more likely to experience multiple rapes by the same person. Psychological effects include anxiety, shock, intense fear, depression, suicidal ideation, sleeping disorder, post-traumatic stress disorder, etc. These effects are overwhelming, to say the least. If all of these do not erode the woman's right to self-dignity and invariably her enjoyment of the right to life, we cannot say what else could.

II. Nigeria's International Obligation to Criminalize Marital Rape

The non-criminalization of marital rape in Nigeria is a violation of a host of international conventions, treaties and documents to which Nigeria is a signatory or party to. A 2006 report on violence against women by the Secretary General of the United Nations (UN) reiterates the due diligence obligation of states under the Beijing Platform "to treat all forms of violence against women and girls as criminal offences"⁶² Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates State Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular, to ensure on a basis of equality of men and women, the same rights and responsibilities during marriage and at its dissolution⁶³. Also, the rights to decide freely and responsibly on the number and spacing of their children and have access to information, education and means to exercise these rights⁶⁴. There are several ways in which Nigeria's retention of the marital rape exemption is in violation of this international obligation.⁶⁵ The combined effect of the domestic and sexual violence provisions, the reproductive health rights

⁶¹ *ibid*

⁶² Secretary General, *Indepth Study on all forms of Violence against Women*, paras 112-113 UN Doc. A/61/122/Add.1 p. 12 cited in Melanie Randall and Vasanthi Venkatesh, 'Criminalizing Sexual Violence Against Women in Intimate Relationships: State Obligation Under Human Rights Law' (2016) ASIL Vol. 109, p. 192

⁶³ Article 16 Para. (c) Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) adopted by the UN General Assembly in 1979

⁶⁴ *Ibid* Para (e) of Article 16

⁶⁵ Since Nigeria has both signed and ratified the Convention

provision of the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and other Cruel, Inhuman and Degrading Treatment of Punishment⁶⁶, the African Charter on Human and Peoples' Rights (ACHPR), the Protocol on the Rights of Women in Africa are to the effect that Nigeria has an international obligation to criminalize marital rape which is a form of violence against the woman. It can do this by the abolition of the marital rape exemption clause in its statutes.

III. Conclusion

To continue to retain the exemption of marital rape in our legislation is to continue, by legal means or machinery of the law, to deprive the woman of the right to herself. If the woman cannot control what happens to her body, how can she enjoy any of the constitutionally guaranteed rights? A woman's self-sovereignty should be without any qualification, cannot be subjected to anything if at all the law requires her to be free and equal to her male counterpart. This should be guaranteed without having to cite any reason relating to her health: physical, emotional or psychological. It should be because she is – a human, and exists the same way the man does. Unless and until such a right is guaranteed, and the exemption is expunged from our laws without any qualification, the woman can never truly be equal to the man.

Based on the foregoing, we recommend the amendment of Nigeria's rape Statutes (the Penal Code, the Criminal Code and the Violence against Persons' Prohibition Act) to eliminate the exemption of marital rape stipulations in the laws. Furthermore, it is imperative that the Penal and Criminal Code Acts definitions of rape be amended to eliminate the gender sensitivity of the laws, so as to remove the double standard it creates against the male folk as it is no longer a myth that men can also be victims of rape. The rape definitions need also to be broadened and not restricted to only vaginal penetration.

We further recommend that in the absence of a marital rape criminalizing law, marital rape victims can approach the courts on a fundamental human rights enforcement claim, since the law as it is, is inconsistent with the non-discriminatory

⁶⁶ 1984, ratified by Nigeria in 2001

provision of the constitution, also as argued in this work, a violation of the woman's right to dignity of the human person and her right to life generally. However, we are not unmindful of the conservative nature of Nigeria's judiciary, and that it may be difficult and somewhat near impossible for one to succeed. Even if that is possible, the judgment shall be in form of damages and not a conviction.

We recommend that there is a need for sensitization by women groups e.g. the Federation of Women international (FIDA) to women as to their right to the control of their person, which is analogous to the above mentioned constitutional provision, women need to know that they are not owned by their husbands and their bodies belong to them, that they have the right to refuse sexual intercourse with their husband if they have health concerns, are not emotionally or psychologically ready or they just do not have a desire to at the particular time. The perpetual silence in this area is fuelled by lack of knowledge and enlightenment. They need to know that their refusal does not amount to an assault on their marriage, rather it is a call for men to generally have self-control and respect for their wives. For men to see their wives as partners in the marriage whose opinions and voices matter, rather than a piece of furniture which can be used at his whim. Women need to know that their values exceed any dowry paid on them, and that their position as wives is not equivalent to that of a prostitute who must render the services she was paid for, the marriage institution is much more honourable than that.

We further recommend that communities should express support in strong terms for the enforcement of current laws and for new legislation to combat domestic and sexual violence. This can be achieved by support for educational and prevention programs at the local, state and national levels.

Finally, the victims of marital rape may choose to remain in a marriage for various reasons such as fear of more violence, financial insecurity, a sense of low self-worth and a false hope that their partners will change. Support group can be a source of strength and encouragement where victims are able to discuss freely with other victims of spousal abuse. Legal aid service at no or low cost should offer legal information and assistance.