

## A CASE FOR THE CRIMINALIZATION OF SPOUSAL RAPE IN NIGERIA\*

**Abstract**

*Spousal rape (with emphasis on wife rape) in marriage is non- consensual sex (ie, rape) in which the perpetrator is the victim's spouse. It is a form of domestic violence and once widely condoned or ignored by law and society, violates human right. The reasons for the reluctance by many countries (including Nigeria), not to criminalize and prosecute spousal has been attributed to either non inclusion of its definition in its laws, or on how it is viewed traditionally, or on how religious doctrines interpreted it. In the findings of this research work, it was discovered that only very few foreign jurisdictions has allowed the prosecution of rape within marriage since 1970s till date. Spousal rape laws in many countries (Nigeria inclusive) are rarely enforced, due to factors ranging from reluctance of authorities to pursue the crime, to lack of public knowledge that forced sexual intercourse in marriage is illegal. The definition of rape in our Criminal Code Act and Penal Code exempted spousal rape as a crime. What ignited this research topic, geared from the researcher's contact with spousal rape victims in Enugu State Citizens' Rights and Mediation Centre, Ministry of Justice Enugu. In order to achieve the aim and objectives of this research study, there is an urgent need for the amendment of sections 6, 282, and 357 of Nigerian Criminal and Penal Codes to include spousal rape in its definition of rape. In order to aid this amendment, the researcher compared three key countries like the United Kingdom, United States and Kenya to see how they have pushed in the criminalisation of spousal rape. The doctrinal method of research was adopted. The research study is laid out in five chapters. The researcher recommended the strengthening of our legal and institutional framework to meet up with modern acceptable definition of rape to include spousal rape in the definition of rape in Nigerian Criminal and Penal Codes so as to aid its criminalization.*

**Keywords:** Spousal Rape, Consortium, Conjugal Right, Sexual Violence, Crime, Gross Violation

**1. Introduction**

Historically and traditionally, many cultures have had a concept of spouses' conjugal rights<sup>1</sup> to sexual intercourse with each other. Religious belief too has a concept of spousal conjugal rights to sexual intercourse. This can be seen in Common Law in force in North America and the British Common Wealth, where the very concept of spousal rape was treated as impossibility. This was illustrated most vividly by Sir Mathew Hale, in his 1736 treatise *Historia Placitorum Coronae* or History of the Pleas of the Crown, where he wrote that such a rape could not be recognised since the wife 'hath given up herself in this kind unto her husband, which she cannot retract'<sup>2</sup>. Hale's statement in History of the Pleas of the Crown was not supported by any judicial authority, but was believed to be a logical consequence of the laws of marriage and rape as understood at the time. The principle was repeated in East Treatise of the Pleas of the Crown in 1803 and Archbold's pleading and Evidence in Criminal cases in 1822. Also many people have seen spousal rape as impossible and said 'But if you can't rape your wife, who can you rape'<sup>3</sup>? It was not until *R v Clarence*<sup>4</sup> that the question of exemption first arose in an English court room. *Clarence* was determined on a different point, and there was no clear agreement between the nine Judges regarding the status of the rule on spousal rape. Traditionally, rape could only be committed outside marriage, and courts did not apply the rape statutes to acts of forced sex between spouses because it is generally believed that a woman consented to all future sexual activity with her husband through contract of marriage. For many cultures, Nigeria and some other Africa countries, the idea of spousal rape is foreign, seen as something imposed and it is the believed that such matters should be dealt with privately than by the government. However, this position is no longer tenable in the United Kingdom where it emanated from. It is not surprising that in Nigeria today, there is no known case of spousal rape because the Nigerian law does not recognise spousal rape.

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<sup>1</sup> 'Sex: A Conjugal Right, at the Way Back Machine' <<http://www.newsday.co.zw>>2014/05/31> (accessed on 15 March 2021).

<sup>2</sup> Sir Mathew Hale, *Treatise Historia Placitorum Coronae or History of the Pleas of the Crown* (1736) with notes Sollom Emlyn, R Nutt and R Gossling.

<sup>3</sup> MDA Freeman, 'But If You Cant't Rape Your Wife, Who[m] can You Rape?: The Marital Rape Exemption Re-examined' *Family Law Quarterly*, Vol. 15 (1981), No. 1, 1 – 29. CA Umobi, *Domestic Violence Against Women in Nigeria: A Legal Anatomy*, (Onitsha: Folmelch Printing & Pub. Co. Ltd 2008), 114.

<sup>4</sup> *R v Clarence* (1888) 22 QBD 23.

This research work contends that the husband should obtain consent from the wife before intercourse, because forced rape is a violation of the human right of the wife<sup>5</sup>. This is in alignment with the position of Umobi, where she states that; ‘Wife sexual abuse is very visible within the context of a generally abusive and explosive relationship.’<sup>6</sup> Umobi, went further to contend that notion of wives as property is fundamental to perfect understanding of a spousal rape<sup>7</sup>. In addition, she argued that, not only are wives commonly regarded and declared as the bona fide property of their husbands, but more specifically, they are seen as the sexual property of their husbands. The viewing of wives as their husbands’ property is traditional; as it is part of our patriarchal heritage, patriarchal benevolence that underpins slavery and servitude<sup>8</sup>. It is against this background that the researcher advocates that there is an urgent need to criminalize wife rape in Nigeria in order to join other jurisdictions who have criminalized spousal rape and by this means, fight violence against women by intimate partner or spouse.

## **2. Clarification of Terms**

### **Spousal rape**

Spousal rape is the common version of rape which never attracted much attention. There is a serious controversy over the matter whether it is rape at all in the strict sense of the term. An act of having sex without her consent and will is spousal rape, even though it is not a crime in Nigeria, the position is different in some western countries where it is a crime. In Nigeria, where women are still treated as economical burden, it is presumed that a woman surrenders her consent upon entering into marriage forever. However, the researcher is more concerned with the physical and mental pain which is associated with the trauma of spousal rape. Whether husbands have right to have sex with their wife without their consent is a major question of this research study. It has been described as one of the most serious violation of a woman’s bodily integrity. Therefore, any unwanted sexual act committed by a spouse without the consent or express permission of the other spouse is a crime which needs to be prosecuted.

However, from the definition of rape by the codes<sup>9</sup>, it is clear that only a man can commit the offence of rape in Nigeria and where these ingredients are proved, the *actus reus* and *mens rea* of rape is established. Where the alleged carnal connection smirks of consent, it becomes unlawful. It is also important to state that sexual relations between spouses do not come within the purview of rape in Nigeria. Section 6 of the Criminal Code goes further to depict ‘unlawful carnal knowledge’ as carnal connection which takes place otherwise than between husband and wife. In other words, spousal rape is not an offence in Nigeria. A husband cannot rape his wife as the marriage contract is deemed to imply consent to sexual intercourse which can only be revocable by a separation agreement or order of the court. Similarly, the Nigerian Penal Code does not proscribe spousal rape. It should be noted however that even where husband is shielded by virtue of the marital rape exemption, where he uses violence on the wife during intercourse, he can be guilty of assaulting or wounding his wife. However, be that as it may, to protect the integrity of the woman, her human right<sup>10</sup>, she must be protected against forced rape, notwithstanding that it is not recognised by the law in Nigeria, this is what this research study is advocating for. This could be achieved by the amendment of the existing Criminal Code and Penal Code that excludes the definition of spousal rape as a crime in Nigeria.

### **Conjugal Right**

The rights of either spouse of a marriage, which include the right to the other’s consortium, cohabitation sexual intercourse and maintenance during marriage is one of the concepts of a valid marriage. If after solemnization of the marriage, either of the spouses without reasonable reason withdraws from the society’ of the other, then the aggrieved party has a right to file petition for restitution of conjugal right in the law court. The existence of conjugal right to have sex is attached to all recognized form of marriage. This right is not disputed. The controversy arises in deciding the extent of this right. Conjugal right to have sex between spouses is not exclusive. Rather, it is dependent upon mutual consent. Again as there is right, there is remedy too to restore the conjugal right, however, the use of force was never permitted for its exercise. The

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<sup>5</sup> The Constitution of the Federal Republic of Nigeria, 1999 (as amended), Chap. 4.

<sup>6</sup> CA Umobi, *op. cit.*, 114

<sup>7</sup>CA Umobi, *The Wife and Right to ‘No’ in Matrimony: The Divide*, 39th Inaugural Lecture of Nnamdi Azikiwe University, 2017.

<sup>8</sup> *Ibid.*

<sup>9</sup> Criminal and Penal Code.

<sup>10</sup>Constitution of the Federal Republic of Nigeria, 1999 (as amended), chap. 4.

researcher is of the view that conjugal right should be with mutual understanding of the spouses, where it is obtain without her consent and is derived by force, then it amount to spousal rape.

### **Rape**

Rape as a concept is the most serious kind of sexual assault and is punishable with imprisonment for life with or without whipping<sup>11</sup>. There are varied definitions of rape. Rape is an unlawful sexual intercourse with someone which is devoid of mutual consent and involves the use of force, threat or unacceptable means<sup>12</sup>. This definition has elements of legal and social connotation embedded in it. Statutory, in Section 357 of the Criminal Code Act and 282(1) of the Penal Code reveals that rape is legally perceived to be an act which can only be committed against a female. This perception ignores the fact that males can also be raped; even though this research study is concerned with the rape of a wife by her husband because it is the most prevalent type of rape. The Criminal Code does not recognise the penetration of anus or mouth of a woman or girl as acts which constitute rape. It has been argued, however, that sexual acts involving penetration of the anus or mouth of a woman or girl with the penis could be traumatic as the forceful penetration of the vagina and so they should be considered as acts which qualify to be described as rape<sup>13</sup>. This argument becomes plausible because the penis is involved, and it is a kind of sexual orientation among some people which could be unwanted. It is a deviant sexual practice whose magnitude is yet to be empirically determined in Nigeria. However, the Violence Against Persons Prohibition (VAPP) Act, supersede those of the Criminal and Penal Codes in terms of rape and other related sexual offences. Inherent in the VAPP Act is that both men and women can be raped and can perpetuate it themselves. The Act takes into consideration the fact that a person may also be raped through the vagina, anus or mouth. It also accommodates the fact that a person may also be raped with an object. Under the act, both marital and gang rape are recognized as criminal offences in Nigeria<sup>14</sup>, based on the legal provisions of the VAPP Act, a person convicted of the crime of rape is liable to life imprisonment.

### **3. Challenges and Prospects of Spousal Rape in Nigeria Vis-A-Vis other Jurisdictions**

#### **Spousal Rape as the Silent Weapon**

The issue of spousal rape is a growing concern in contemporary human society due to its endemic and pervasive nature. The unprecedented rise of this crime does not commensurate with the rate at which it is being recorded, reported and publicised. Many countries have realised the socio-economic implications of spousal rape and subsequently enacted laws making it a crime. Some of these countries include the United States of America and United Kingdom where law to incriminate spousal rape was enacted in 1993 and 1991 respectively, perpetrators are prosecuted and sentenced to prison terms. But in Nigeria, spousal rape is not included in its law; thereby making prosecution of perpetrator impossible based on the Constitutional principle of the legal theory. There have been semblances of report on rape in general by non-governmental organizations, police records, state prosecutors and media reports which signify high rate of rape in the family. However, paucity of wide-ranging official statistics constitutes challenges in establishing accurate scale of the menace. This further makes it difficult to assess the extent of direct state involvement in perpetrating gender-based violence against women or state failure to prosecute and punish perpetrators of rape. In spite of these challenges, some women are not deterred to report cases of rape to related authorities. A national survey conducted in 2005 by the CLEEN Foundation, a Nigerian NGO, found that only 18.1 per cent less than one in five of some 10,000 respondents who had been raped had reported the offence to the police.<sup>15</sup> This call for concern regarding the campaign and publicity advocacy against violation of women right particularly, spousal rape.

In other jurisdictions such as Kenya, the role of women in society development cannot be overemphasised. One of the ways to harness women potentials is to provide equal-social relations between men and women to enable them compete favourably. In Kenya, in spite of the steps taken toward gender equality, women

<sup>11</sup> Criminal Code, Cap. C38 LFN 2004, s. 358.

<sup>12</sup>Claudia Garcia-Moreno and Alessandra Guedes and Wendy Knerr, 'Understanding and Addressing Violence against Women' <[https://apps.who.int/iris/bitstream/handle/10665/77433/WHO\\_RHR\\_12.35\\_eng.pdf;jsessionid=AE4397A66312F4630DF6E093EBF0B2BC?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/77433/WHO_RHR_12.35_eng.pdf;jsessionid=AE4397A66312F4630DF6E093EBF0B2BC?sequence=1) > (accessed on 03 September 2021).

<sup>13</sup>MOA Ashiru and OA Orifowomo, 'Law of Rape in Nigeria and England: Need to Re-Invent in the Twenty-First Century' *Journal of Law, Policy and Globalization* (2015), 38: 28-38.

<sup>14</sup> Ibid.

<sup>15</sup> CLEEN Foundation, 'National Crime Victimization Survey 2005', <<http://www.cleen.org>> (accessed on 25 June 2021).

remain disadvantaged socially, politically and economically.<sup>16</sup> Women face inequality in many forms which mostly occur in domestic settings. Sexual violence in Kenya has high prevalence rate which led to the passage of the sexual offences Act into law in 2006. But the part of the law that was to address the issue of spousal rape was expunged leading to its exemption in the enactment process. Consequently, this led to legal impunity for spousal rape in Kenya without protection for married women.

In United States, legally, the history of marital rape laws spanned over several decades. Efforts to criminalized spousal rape began in the mid-1970s. Study conducted in 2003 found that twenty-four states and the District of Columbia have abolished spousal rape immunity for sexual offenses while twenty-six states retain spousal rape immunity in one form or another<sup>17</sup>, but the exemption for third-degree rape was removed 30 years later. The United Kingdom like other advanced nations at a point did not entertain the concept of spousal rape in their law. The report of the Criminal Law Revision Committee in 1984 on Sexual Offences turned down the idea of including spousal rape in the offense of rape. As the society advanced, the demand to criminalise spousal rape intensified leading to the abolishment of spousal rape exemption in England and Wales in 1991 by the Appellate Committee of the House of Lords, in the case of *R v R*,<sup>18</sup> which was promulgated in 1736 in Hale's History of the Pleas of the Crown. In 1991, spousal rape exemption was removed from British law and by 1994 a new definition of 'rape' was created by the section 142 of the Criminal Justice and Public Order Act 1994. The new definition gave a broad scope to rape which included anal sex. The Sexual Offences Act 2003 further extended the definition to include oral sex.

#### **4. The Legal Position of Spousal Rape in Nigeria**

In Nigeria, rape is committed by a man if he has unlawful sexual intercourse with a woman who is not his wife and who, at the time of the intercourse, does not consent to it. The characteristics are embedded in the two major statutes in Nigeria; the Criminal Code<sup>19</sup> and the Penal Code<sup>20</sup>. Though the concept rape by the two statutes differs, the conclusion means the same thing. The offence of rape is not defined by the two statutes instead they provide features of the offence that must be proved beyond reasonable doubt in order to secure conviction. Thus, only a woman can be victim of rape. This is not in line with some other jurisdictions where a man can also be a victim of rape. Secondly, the Nigerian laws on rape are blind to the fact that a man cannot be guilty of rape upon his wife. This is being suggested in the two statutes in Nigeria, this is further accentuated by Section 6 of the Criminal Code which defines 'unlawful carnal knowledge' as 'carnal connection which takes place otherwise than between husband and wife.' It means that a man cannot be prosecuted for unlawful sexual intercourse with his wife. Suffice to say he cannot rape his wife. Another grey area in the concept of rape in the Nigerian context is that rape has to do only with the penetration of the female genital organ (vagina) by the male penis. Other vaginal penetration by any other object or any part of the male body is not rape.

The concept that a husband cannot be guilty of rape upon his wife is held sway in Nigeria law based on the theory of Mathew Hale, who wrote that: ...the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract.<sup>21</sup> Subsequently, in *Posu v The State*<sup>22</sup> the Supreme Court provided ingredients of the offence of rape when it held that in a charge of rape or unlawful carnal knowledge of a woman without her consent, it is the duty of the prosecution to prove the following ingredients beyond reasonable doubt: that the accused had sexual intercourse with the prosecutrix; that the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation that the prosecutrix was not the wife of the accused; that the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not; that there was penetration.

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<sup>16</sup>K Winifred, 'The Legal Impunity for Marital Rape in Kenya' < [www.theequalityeffect.org/uploads/2013/04/](http://www.theequalityeffect.org/uploads/2013/04/) > (accessed on 25 June 2021).

<sup>17</sup>Joann M. Ross, 'Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage'

< <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1085&context=historydiss> > (accessed on 25 June 2021).

<sup>18</sup> UKHL 12.

<sup>19</sup> Cap C38, Laws of the Federation of Nigeria, 2004, ss. 357 and 358.

<sup>20</sup> Cap 89, Laws of Northern Nigeria, 1963, ss. 282 and 284.

<sup>21</sup> D Finkelhor and K Yllo, *License to Rape: Sexual Abuse of Wives* (New York: The Free Press 1985), 24. See also JE Hasday, 'Contest and Consent' *California Law Review*, vol. 88(5) (October 2000) and the views of JC Smith, *Criminal Law* (5th edn, London: Butterworth, 1983), 405-407.

<sup>22</sup> [2011] 2 NWLR (Pt. 1234)393, 416-417.

The above juxtaposition by the Codes as it concerns rape and spousal rape notwithstanding, there is a paradigm shift in the definition of rape and attempted rape by the Sexual Offences Act, 2015, which did not take cognizance of any gender disparity when it comes to rape. Suffice it to start that the clause in our law which states that a man cannot be guilty of the rape of his wife has been removed with the intent of section 2(1)(a-c)<sup>23</sup> which states: A person commits the offence called rape if; he or she intentionally and lawfully commits an act which causes penetration with his or her genital organs; the other person does not consent to the penetration or the consent is obtained by force or means of threats or intimidation of any kind.

### **5. Spousal Rape a Barometer of the Gross Violation of Women**

The Nigeria legal system fails to recognize that spousal rape is a criminal offence despite the global trend towards criminalization of spousal rape in over 50 countries of the world since 1997.<sup>24</sup> This factor has exacerbated the persistent flagrant violations of women's health and reproductive rights in both public and private spheres in Nigeria. Spousal rape is obsolete and highly oppressive to women; denying them their health and reproductive rights provided by laws in terms of right to highest standard of health and spacing out of their children. Indeed, spousal rape is a barometer of the gross violation of women dignity with its attendant consequences.

The international human rights instruments such as the Declaration on the Elimination of Violence against Women (DEVAW) acknowledged that spousal rape is a violation of human rights of women.<sup>25</sup> Specifically, DEVAW declared that spousal rape is a form of violence against women.<sup>26</sup> Also, the Beijing Declaration and Platform for Action defines violence against women as physical, sexual and psychological violence that occurs in the family, including spousal rape.<sup>27</sup> It is not acceptable for the man to force his wife to have sexual intercourse when she is evidently not emotionally and medically stable.

Other International declaration did not only criminalise spousal rape but also gave it colouration of gross violation of women's right. For instance, the 1993, United Nations Declaration on the Elimination of Violence against Women established spousal rape as a human rights violation. It is obvious that these sections of the Nigerian criminal statutes are a gross violation of women's health and reproductive right.

### **6. Challenges and Prospects on Prosecution of Spousal Rape in Nigeria**

The first challenge in criminalising spousal rape in Nigerian is to modify the existing statutes; Criminal Code and the Penal Code and then try to domesticate the VAPP Act across the 36 States of the Federation as to give a paradigm shift in the definition of rape to include spousal rape. The provisions of the statutes with regards to spousal rape were discussed in section 6 of the Criminal Code, it supported spousal rape exemption. For sake of emphasis, Section 6 of the Criminal Code defines 'unlawful carnal knowledge' as 'carnal connection which takes place otherwise than between husband and wife'. This definition does not provide a legal locus point to incriminate spousal rape. Similarly, section 282 of the Penal Code, on the offence of rape, clearly provides that: A man is said to commit rape save where he had sexual intercourse with his wife, has sexual intercourse with a woman in any of the following circumstances: against her will; without her consent; with her consent when her consent has been obtained by putting her in fear of death or of hurts, 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; with or without her consent, when she is under 14 years of age or of unsound mind.

Generally, the statutes apparently do not recognise spousal rape as such; the Nigerian judicial system does not empower the courts to treat cases of spousal rape. This implies that victims of spousal rape are not protected by the law. In other words a married man cannot be guilty of raping his wife. Consequently the woman's sexual rights are at the mercy of her husband who chooses to violate her at his will.

Since the concept that a man cannot be guilty of rape upon his wife is predicated on section 6 and 282 and 357 of the Criminal Code and Penal Code; arguably, the researcher is of the opinion that the two statutes

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<sup>23</sup>Sexual Offences Act, 2015

<sup>24</sup>S. C. Ifemeje, 'Legalization of Marital Rape in Nigeria: A Gross Violation of Women's Health and Reproductive Rights in Nigeria' *Journal of Social Welfare and Family Law*, vol. 33, (2011), 39 – 46, 43.

<sup>25</sup>'Declaration on the Elimination of Violence against Women' (A/RES/48/104 85th plenary meeting 20 December 1993 article 2(a) hereinafter the DEVAW).

<sup>26</sup> Ibid.

<sup>27</sup>'Beijing Declaration and Platform for Action' (Adopted at the 16th plenary meeting, on 15 September 1995) section D (113(a)).

have to be amended in order to criminalise spousal rape as it is the case in other jurisdictions as alighted in this work. Thus, rape has to be redefined in both the Criminal Code and the Penal Code to capture the definition of rape with emphasis on spousal rape. This would form the basis for legal prosecution of perpetrators of spousal rape.

## **7. Conclusion**

This study has researched in detail, a critical evaluation of the Criminalization of spousal rape in core three countries, namely; United States of America, United Kingdom and Kenya in order to see how it will help in the Criminalization of spousal rape in Nigeria. In the findings of this research study, it is glaring that even the United Kingdom where Nigeria borrowed most of her laws has criminalized spousal rape. Lord Mathew Hale's positions as well as the provisions of the common law and by extension the Nigerian Criminal Code<sup>28</sup> and Penal Code<sup>29</sup> are no longer tenable in modern legal systems universally. The 20th and 21st Centuries have witnessed a lot of social engineering in law reform albeit by judicial activism. As Lord Lane stated in *Regina v R*<sup>30</sup> that 'we take the view that the time has now arrived when the law should declare that a rapist remains subject to the criminal law irrespective of his relationship with his victim'. More so, this view was supported by Lord Keith when he posited that husbands and wives are now for practical purposes equal partners in marriage; thus, a wife is not obliged to obey her husband on all things nor to suffer excessive sexual demands on the part of her husband. The wife's health must be held paramount. In the context of domestic violence, legal remedies are grossly inadequate as already treated, and strategies must be introduced to close this lacuna between the formal legal rights of the battered women, and their rights in practice. There must be a change in the attitude towards spousal rape which is a form of family violence. The experiences of these other jurisdictions are instructive and has assisted in the identification of issues and areas to be considered in addressing and possibly reforming the area of law in Nigeria that will aid the criminalization of spousal rape.

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<sup>28</sup> Section 357 and 358.

<sup>29</sup> Section 282.

<sup>30</sup> [1992] IAC Page 599 at 611.