



FAMILY
IN THE
LAWS
- A READER

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FAMILY IN THE LAWS

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Recognising Sexual Rights and Reproductive
Justice in Matrimony: Should the Husband be
Guilty of Rape of His Wife?

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Introduction

In Nigeria as well as in many other countries of the world, rape in matrimony is not a crime. It therefore follows that the phenomenon, "marital rape," is largely dismissed by the society as non-existing and impossible. However, a growing number of advocates: intellectuals, feminists and human rights groups are now spearheading the campaign for its criminalization.

This paper considers various factors which are responsible for the *status quo* and which, in fact, act as impediments to the removal of marital immunity from the offence of rape. The paper also adduces credible reasons that tend to justify bringing the offence of rape into the matrimonial setting, that is, making husband liable for the offence of rape whenever he has sexual intercourse with his wife without her consent. While this paper acknowledges the fact that marital rape do occur, we do not support the fact that it is not criminalized.

The paper therefore charts a middle course by advocating for actual protection of women's dignity through invocation of international and national human rights instruments and also the recognition of sexual and reproductive rights of women. Finally, the paper advocates for the establishment of courts of family division conferred with the necessary (civil rather than criminal) jurisdictions to cover any complaint of domestic violence, definition of which may include forceful sexual intercourse with a wife by the husband.

The offence of Rape under Nigerian Law

The offence of rape under the Nigerian Criminal Law is committed by "any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman by impersonating her husband."¹ It has also simply been defined as having sexual intercourse with

¹See S. 357 of the Criminal Code Cap.C38, *Laws of the Federation of Nigeria*, 2004 and S. 282 of the Penal Code Cap. 89, *Laws of the Northern Nigeria*, 1963, generally on the offence of rape.

a non-consenting female with the knowledge by the accused that his victim was not consenting.² Rape includes unlawful sexual intercourse with an unconscious female or also with one without consent after the accused has substantially impaired his victim by administering drugs or intoxicants for the purpose of preventing resistance.³

In order to convict anyone of rape, the physical element of the offence must be established. The *actus reus* (physical element) of rape is the unlawful sexual intercourse with a woman or girl without her consent. Equally the *mens rea* (mental element) of the offence must also be proved, that is, it must be shown that the accused had sex with the woman recklessly not minding as to whether she consents to sexual intercourse or not. Penalty for rape is life imprisonment, with or without caning.⁴

Meaning of Marital Rape.

Marital Rape is the husband's sexual intercourse with his wife with the knowledge that she does not consent. It is also called

² K. Chukkol, *The Law of Crimes in Nigeria*, (Kaduna: ABU Press Ltd, (1989), p. 186.

³ S. 258 of the Criminal Law of Lagos State, 2011 provides as follows regarding rape: by S.258 (1) Any man who has unlawful sexual intercourse with a woman or girl, without her consent, is guilty of the offence of rape and is liable to imprisonment for life; by S.258(2) A woman or girl does not consent to sexual intercourse if she submits to the act by reason of force, impersonation, threat or intimidation of any kind, fear of harm or false or fraudulent representation as to the nature of the act; by S.258(3) Sexual intercourse between a man and a woman who are married is not unlawful; by S258(4) Sexual intercourse is complete on the slightest penetration of the vagina.

⁴S. 358 Criminal Code *supra*.

spousal rape.⁵ The pertinent and recurring question is 'whether or not a husband can actually rape his lawful wife?' In Nigeria as well in many common law countries of the world, this question cannot be answered in the affirmative due to the fact that rape in matrimony is not seen as a crime. In recent times, however, a growing number of jurists and scholars of human rights are advocating for the criminalization of marital rape wherein a husband may be found culpable of raping his wife. These sets of advocates for marital rape comprise of intellectuals, feminists and human rights activists. The focus of their campaign is that the society should make it an offence for a man to have sexual intercourse with his wife unless the wife consents to the intercourse without any force (physical or otherwise). To them, the "no" of a woman to sex means "no" while her "yes" means "yes," even in a lawful matrimonial bed, home or setting.

Interestingly, the *Criminal Law of Lagos State*⁶ touts the same line with Common Law principles regarding the offence of rape by providing that a man cannot commit rape on his wife. This is expressly declared in section 258(3) of the law which provides thus: 'sexual intercourse between a man and a woman who are married is not unlawful'. This position of *Lagos Criminal law* has, no doubt, offended the sensibilities of the advocates of marital rape. To them, the 2011 law, though very recent in its promulgation, is however decades old in its approach to penal sanction regarding women's protection against unwanted sex.

⁵ See C. Arinze-Umobi & O. Ikpeze, 'Rape in Matrimony: Entrenched Global Disaster' in *Gender Rights Law in Nigeria*, Vol. 1 (Folmech Printing and Publishing Co. Ltd, 2008).

⁶ *supra*

Few countries in North America and in Europe have amended their erstwhile law that shielded a husband from raping his wife, by expressly providing for a possibility of the husband being found guilty of rape.⁷ This study argues that those who clamour for the criminalization of marital rape may not be entirely wrong in the name of protecting the reproductive and sexual rights of women. However, criminalizing sexual intercourse that takes place between husband and wife may also be problematic. This paper considers both sides of the arguments as follows:

Why Marital Immunity against Rape should Remain⁸

a. The theory of Lawful Sexual Intercourse

Marriage presupposes that sexual intercourse can lawfully take place between the husband and wife. In fact, sexual intercourse is indeed incidental to marriage (or one of the bases of marriage). Specifically, section 6 of the *Nigerian Criminal Code*⁹ provides that "unlawful carnal knowledge means carnal connection which takes place otherwise than between husband and wife". Similarly, the *Nigerian Penal Code*¹⁰ in section 282 makes all forms of carnal connection between a husband and his wife who has attained the age of puberty lawful. The question then is how can an offence arise out of an act which is presumably lawful? It therefore remains a valid presumption of law that a man cannot be guilty of rape of his wife.

⁷At present, all the fifty states of United States, the United Kingdom and Canada have changed their laws of rape to recognize marital rape.

⁸The idea that a man cannot be guilty of rape on his wife in a lawful and existing marriage is generally referred to as marital immunity against the offence of rape.

⁹ *Supra*.

¹⁰ *Supra*.

b. Religious Theory of Oneness and Spousal Duty

This has to do with the oneness theory which has its root in the Bible.¹¹ This theory postulates that the husband and wife are one and inseparable, and therefore, it is logically impossible to rape oneself. For centuries, the biblical injunction that husband and wife belong to "one body" has been interpreted to mean that any attempt on the wife's part to deny her husband's sexual demands was sinful.¹² Similarly, in Islamic religion, it is believed that a woman who denies her husband sexual intercourse will be cursed by the Angels.¹³ Islam conceives that a man has unrestricted sexual intercourse with his lawful wife. Except for valid and credible reasons, which necessitate mutual understanding of both spouses, the wife cannot say no to any sexual overtures from her husband. Thus, religious doctrine is in full support of the notion that it is the duty of the wife to satisfy her husband's sexual urge whenever he demands for sex.¹⁴

c. Perpetual or Blanket Consent Theory

This theory implies that the wife upon entering into a valid and lawful marriage has given unqualified blanket consent to sexual

¹¹ See *Holy Bible*, Genesis 2:24.

¹² Schwendinger and Schwendinger, *Rape and Inequality*, Sage Publication, 1983; See also *Holy Bible*, 1 Corinthians 7:2-5

¹³ Muslim Hadith (sayings of the Prophet of Islam) narrated by A. Hurayrah that the Prophet said, 'By the One in whose Hand is my soul, there is no man who calls his wife to his bed, and she refuses him, but the One who is in heaven will be angry with her, until the husband is pleased with her once more'.

¹⁴ As a corollary to the above, rape presupposes that sexual intercourse has taken place in such circumstances that such intercourse was not morally or legally expected to have taken place. This is not so in the case of sexual intercourse that takes place in a matrimonial home or setting, where sexual intercourse is indeed one of the incidental consequences of marriage.

intercourse to the husband as long as the marriage exists. This theory was given judicial *imprimatur* and is well publicized by Sir Matthew Hale in his 1736 legal treatise, *Historia Placitorum Coronae* (History of the Pleas of the Crown) where he wrote that such a rape between husband and wife could not be recognized since the wife 'hath given up herself in this kind unto her husband, which she cannot retract'. The implication of this statement is that marriage is like a contract through which the wife has agreed to sex with her husband under any condition.

d. Proprietary Right of the Husband

The fourth reason relates to the argument that the wife is owned by her husband and therefore one cannot be guilty of stealing what belongs to one. Customary marriage practices that promote the idea that women are like properties of their husbands which may be treated as the owner wishes lend weight to this assertion. In some African traditions, the marriage ceremony is portrayed as an ordered procession in which women pass from hand to hand as if they were cattle or shells. The implication is that the female enters into the marriage, not as a partner to a transaction, but as that which is transacted. Even in Western culture, there is a long tradition of defining the bride as the possession of her husband, emphasizing the stereotype and continuous belief that wives have no right to refuse their bodies to their husbands.¹⁵

e. Man's Psycho-biological Make-up

Fifthly, another argument, which has to do with man's psycho-biological make-up relating to sexual arousal and satisfaction

¹⁵ L. Margolin *et al*, "Social Approval for Violations of Sexual Consent in Marriage and Dating", *Violence and Victims Journal*, Vol. 4, Issue 1 (1989), p. 47.

has also been canvassed. According to the proponents of this idea, a man is naturally sexually aggressive and when a man becomes sexually aroused, his quest and drive for satisfaction usually makes it difficult or nearly impossible for him to control himself. And this is, especially, so if the woman is his own wife. A man, who is in this state, may justifiably defy his wife's apparent non-consent and force his way to have intercourse with her. The legal and moral implications of infidelity in marriage (that is, having extra-marital affairs) may further justify a man's ordinate desire to get satisfaction sexually from his lawful wife at home, especially in a monogamous matrimonial setting. It is unthinkable that a man who has only one wife could still be denied sex by that wife.

f. Incursion of Criminal Law into Matrimonial Home

It is often argued that recognizing marital rape as an offence would invariably lead to State's intrusion into the privacy of the sacred institution of marriage. Even where a man has been reckless in having sexual intercourse with his wife without her consent, the possible intervention of the law makes reconciliation impossible.¹⁶ A matter that can reasonably be disposed of through an amicable settlement or conciliation between spouses may get out of hand if it is exposed to the full glare of the courts.

g. Sexual Assault as Alternative to Rape Charge

Lastly, it is observed that if marital rape is made a crime, women will maliciously press rape charges against their husbands. Assault is therefore suggested as an alternative

¹⁶F. Theresa, "Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches", *Vanderbilt Journal of Transnational Law*, Vol. 39, Issue 2, (2006), p. 489.

charge to press against the man who forces his wife to have intercourse. This being a lesser charge represents a compromise in marital rape situations so as to protect the sanctity of the marriage. A charge of assault readily confirms that there is an acceptance of a wrongdoing on the part of the man but it should not be labeled "rape". This has been judicially recognized in cases where the wife complained of forced sexual intercourse without her consent. The court has always held that though there is a valid presumption of law that a man cannot legally commit rape on his wife as argued above, yet the law provides that the husband may be guilty of a lesser offence. According to Lynskey, J, in *Miller's Case*¹⁷, "though the husband has a right to sexual intercourse, he is not entitled to do it by force or with violence in order to exercise that right. If he does so, he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular warrant. If he should wound her, he might be charged with wounding or causing bodily harm, or he may be liable to be convicted of common assault."¹⁸

The Problematic Nature of the Offence of Rape

Giving recognition to marital rape would eventually lead to situations whereby the husband would be risking jail term each time he is alleged to have sexually assaulted his wife. Since there is always a continuous reform of the rape laws, each reform would be automatically applicable to the matrimonial setting. A case in point is the new evolving post-penetration rape which has been enacted by the legislature in some states in America and also has received judicial endorsement in other states. Nigeria benefits immensely from the legal development

¹⁷ (1954) 2 Q. B. 282.

¹⁸ *Ibid*, p.286.

in European and American countries, and every reform creeps into our legal jurisprudence on a daily basis, therefore, the evolving and growing Nigerian feminists may advocate for inclusion of post-penetration rape within marriage. The following discussion captures the imminent problem of post-penetration rape.

What is Post-Penetration Rape?

Post-penetration rape means a rape which is committed by man on a woman who had initially given her consent to sex and while the activity was going on, withdraws her consent. Any stay over by the man renders him liable for rape. The issue of post-penetration rape reared its head for the first time in the United States' case of *States v. Way*¹⁹, where the accused was convicted of second-degree rape by the lower court on the ground that the lady withdrew her consent to sex after Way had actually engaged in sexual intercourse with her, but Way, nevertheless, continued the act. When Way's appeal reached the North Carolina Supreme Court, the court upturned the judgment and granted him a new trial, stating that a woman may withdraw consent between separate acts of intercourse, rather than during a single act. Part of the decision of the court was that if a woman changes her mind in the middle of the act, the man cannot be guilty of rape for failing to stop. In the words of the court: "If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape, although he may be guilty of another crime because of his subsequent actions"²⁰.

¹⁹ 254 S.E. 2d at 761.

²⁰ *Ibid.*, pp. 761-62.

The above represents the position of the law in all the commonwealth countries and beyond until very recently when due to some legal reforms, the law on rape took a dramatic turn in the name of protecting the women's dignity. The North Carolina case of *People v. John Z*²¹, vividly captures the new reform which some other states in the United States have equally adopted. The facts are as follows:

Sometime in March 2000, 17-year-old Laura willingly engaged in sexual intercourse with John whom she met at a party. The sex lasted for approximately ten minutes. In the course of the activity, Laura said to John, 'I need to go home' to which John responded that Laura should give him a minute. This happened three times. It was in evidence that after Laura's objections, John continued to have sexual intercourse with her for approximately sixty to ninety seconds before discontinuing the act. Laura subsequently complained that John raped her and the trial court convicted John of Rape. Dissatisfied with the verdict, John appealed against the decision. The appeal eventually got to the Supreme Court of California. On January 6, 2003, the majority of the Justices found John guilty of rape.²² In doing so, the court interpreted the California rape statute to include situation where the victim initially consents to intercourse, but then withdraws her consent after penetration.²³

²¹60 P.3d 183, 184 (Cal. 2003).

²²*Ibid.* p. 188; Six out of 7 Justices held that John was guilty of post-penetration rape.

²³Rape is defined in California as; 'an act of sexual intercourse...accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another'. Going by the interpretation of this provision, it is beyond imagination that John could

John's lawyers brilliantly canvassed various arguments in his defence, praying the court to overturn his conviction. The arguments included the following.

a. **Outrage Theory**²⁴

The argument was that a consensual beginning to sexual intercourse is not the same but may be differentiated from an act of sexual intercourse where the female never consented at all. On this basis, John's lawyers argued that the sense of personal outrage a woman feels when she has initially consented to the act cannot possibly match that of a woman where intercourse begins without her consent.²⁵ Since rape is essentially a crime of outrage, this argument reasons that continued intercourse where consent is initially given, and then taken away, can at most be considered some lesser form of sexual assault, but certainly not rape. Unfortunately, the court refused to be persuaded by this argument. The court characterized the reasoning as being unsound. According to the

be convicted of rape. However, in the current wave of reform of rape laws, the court ruled to the effect that the withdrawal of consent effectively nullifies any earlier consent and subjects the male to forcible rape charges if he persists in what has become non-consensual intercourse. It is to be further noted that it was not in dispute before the court that Laura willingly submitted to John's sexual request in the bedroom. She took her clothes off, kissed him, lay naked on the bed with him, and expressed no objection when both of them engaged in the sexual act. There was no evidence of physical force or infliction of injury of any sort. Nevertheless, the Court sent John to jail because he stayed over for less than two minutes after Laura had withdrawn her consent.

²⁴ By this theory, an attempt was being made to differentiate the degree of agony and outrage a woman who never consented to intercourse from the beginning would experience from that agony and trauma which a woman who initially consented to sexual act with a man but who withdraws the consent in the course of the activity suffers.

²⁵ This argument was eventually rejected by the court.

court, it is fruitless for a judicial body to assume varying levels of outrage among victims of different types of forced intercourse.

b. Primal Urge Theory

In a bid to save John from being jailed, the Primal Urge theory was brought forward by the defence. Here it was argued on behalf of John that courts must adopt a 'reasonable amount of time' measure into the analysis of the alleged sexual assault. In order to convict a man of post-penetration rape, a court would have to determine whether the man stopped intercourse within a reasonable amount of time after the woman withdrew her consent or not. John argued:

Sexual intercourse...is not a mechanical act that can be immediately started and immediately stopped by the turning of an ignition or a switch. It is a living act. When a female initially consents to sexual intercourse and allows a male to penetrate her, she causes certain consequences to occur...a male's primal urge to reproduce is aroused....It is only natural, fair, and just that a male be given a reasonable amount of time in which to quell his primal urge, which was originally consensually invoked, upon withdrawal of a female's consent.²⁶

It was, therefore, submitted further that the sixty to ninety seconds it took John to stop the intercourse after Laura withdrew her consent constituted such a reasonable amount of time. The court rejected John's 'primal urge' theory, on the basis that there was no statutory or judicial authority to support it.

²⁶People v. John Z *supra*, note 21 above.

- To the court, John was not entitled to persist in intercourse once Laura withdrew her consent.²⁷

Recognition of marital Rape May Lead to Post-Penetration Rape

- The legal world can be described as unipolar, as a result, those principle of laws and cases judicially established by courts in United States and Europe are of persuasive authorities in Nigeria. In addition, the offence of rape is of common law origin applicable in all commonwealth jurisdictions and United States. If the meaning of rape has been extended to cover situation when consent is withdrawn during intercourse, then every husband risks a jail term if he overstays his welcome on his lawful wife. Any rejection of sexual overtures by the wife automatically puts the husband on a threshold of imprisonment if he persists. Even where the wife concurs to have intercourse with the husband, such husband may be advised to be watchful to ensure that the wife keeps on consenting to the act till the

²⁷ The third point of argument was christened 'mistake of fact'. Here, John finally argued that based on the fact of his case, there was no ascertainable evidence of withdrawal of consent on the part of Laura. He claimed that even if the California statute covered post-penetration rape, the state failed to provide sufficient evidence that the victim, Laura, actually withdrew her consent. In that the prosecution did not show beyond a reasonable doubt that Laura's actions and words constituted an unequivocal withdrawal of consent. The argument continued that assuming but not conceding that Laura did withdraw her consent, the state did not show that John continued the act with force after that point, therefore, the state failed to prove John's guilt beyond a reasonable doubt. The court responded to the last argument by relying on the fact of the case, as shown by the record which stated that Laura physically struggled with John even when she was on top of him, and asserted her need to go home three separate times, yet John continued the act. John was eventually found guilty of post penetration rape and was sent to jail.

end. Better still, he should keep a stopwatch by the bedside in order not to overstay on the wife, should she withdraw the consent. This, no doubt, will make a mockery of matrimonial love and mutual bond.

As of today, all the fifty states of United States and many European countries have criminalized marital rape. Now that rape laws have been interpreted to include post-penetration, then in no time, post-penetration rape would be introduced into the matrimonial setting. This will be awkward and counterproductive to the intimate love and affection expected to reign in matrimony.

Debunking the Arguments

The above are credible arguments to sustain marital rape immunity in Nigeria. Nevertheless, advocates and scholars of criminal law, who support marital rape, may not be persuaded by the above arguments. They too have developed counter arguments to debunk the claims of those who are antagonists of marital rape. They maintain the position that the effects of rape, generally, whether arising from marital setting or otherwise, are not palatable. These effects could range from bodily injury to permanent disability or even death. Apart from the outrage and psychological trauma a raped woman is subjected to, which may be everlasting; there is the inevitable loss of dignity as a human being. It may also result in unwanted pregnancies and its attendant burdens. As such, they contend that rape should be recognized even in a matrimonial setting.

Feminists' Position Regarding Marital Rape

From a feminist perspective, rape in a matrimonial setting between the husband and wife is related to patriarchal traditions that define women as the property of either their

fathers or husbands. Therefore, it must be condemned in its totality and a man who forces his wife to have sexual intercourse should be made to face the wrath of the law. Regarding the oneness theory therefore (as argued above), it is contended that the Bible, which supports the oneness theory also enjoins a husband to take care of his wife and to cherish her.²⁸ If this is the case, then it is argued that no definition of care can be widened to include forceful sexual intercourse by the husband on his wife. Viewing marriage as a contract also does not extend to a woman giving an un-retractable and blanket consent to sex at all times. It is quite illogical and unthinkable that a woman in her right senses could sign a marriage contract which involves violent sexual intercourse.

It is also argued that women cannot be regarded as being the property of their husbands. The fact that bride-price is often paid as a preliminary condition to a valid marriage makes such marriage contract reminiscent of slave trading which is prohibited under the law in all parts of the world. A woman should not be seen as a mere appendage to the husband but rather a companion and a faithful partner whose rights and dignity must be respected. A marriage is based on love and respect for each other, although sexual occurrences are a norm in marriages, a woman should never be forced against her own free will to have sex.

Presumption of Law against Marital Rape

Reacting to the legal presumption of law, that a husband cannot be guilty of committing rape on his wife unless they are separated by courts, it is argued that the definition of rape laws which specifically criminalizes unlawful intercourse and,

²⁸Holy Bible, Ephesians 5:28-29.

consequently, exempt husbands from culpability is considered outdated and nothing but a relic of the chauvinistic era, when women were considered to be mere chattels. Law is dynamic in any society and Nigerian Criminal Law on the offence of rape should reflect modern realities including widening the offence of rape to include forceful sexual intercourse with one's wife, as this can translate to protection of women's human dignity, free will and sexual freedom. A wife's 'no' must be 'no' while her "yes" must not be obtained out of coercion, intimidation or force.

The Fallacy of Psycho-Biological Nature of Man

Furthermore, the argument that a man's psycho-biological nature may compel him to force his wife to sex has no scientific validity, and if that notion is accepted, it would amount to promoting lack of self control and consequently impunity on the part of the man. If lack of self control by a person who is not insane were a valid defence in law, then there would be no one behind bars. For example, would stealing even for the reason of excruciating hunger be condoned? Though it may evoke some sympathy but it would not change the fact that the accused person is a thief and has to be punished.

Also, it is contended that the fear that criminalizing marital rape will lead to a floodgate of prosecutions as women will want to maliciously press rape charges against their husbands has been mooted by the statistics available from countries where marital exemption has been removed.²⁹ It is true that promotion of the sanctity of marriage and marital reconciliation are important ways by which the fabric of the society is maintained but marital immunity at the expense of one party is

²⁹ F. Theresa, *op. cit.*

not a fair means of achieving this goal. According to Theresa Fus, it is unthinkable to extend marital privacy to nonconsensual acts.³⁰ Marital reconciliation is also an unlikely benefit of marital immunity. If a woman is ready to press rape charges against her husband, the marriage has already passed a stage of reconciliation. Therefore, pressing criminal charges, whether in form of rape or post-penetration rape, can hardly be blamed for the dissolution of such marriage.

No Alternative Charge to Rape

Protagonists of marital rape do not support "assault" as an alternative criminal charge to rape. It is contended that if the word 'rape' is considered harsh so also is the action sought to be so called. They considered assault to be too broad and can even be used to describe a situation which did not involve a physical contact. Forceful sexual intercourse with the wife should be considered a rape and not assault. Supporters of marital rape submit that regarding it to be a mere 'sexual assault within marriage' is too weak and inappropriate to describe such a grave violation of women's sexual freedom. To them, if forceful and violent sexual intercourse between husband and wife is regarded as mere assault, the court may even refuse to punish the man for such assault. Thus, in *Alawusa v. Odusote*,³¹ it was held that if a husband uses force or violence to obtain intercourse he may be guilty of assault or wounding though the full force of the law would not be meted to him. Based on the foregoing, protagonists of marital rape submit that the use of the word 'rape' would be a means of creating stronger protection for the woman. It would also reduce impunity.

³⁰ *Ibid.*

³¹ (1941) WACA 140.

Lastly, protagonists of marital rape suggest that, since some common law jurisdictions notably United Kingdom, Canada, and the entire fifty states of United States have all allowed marital rape through judicial activism and/or by way of legislation, Nigeria should follow these countries by ensuring that marital rape becomes a crime.

Charting a Middle Course

Having considered the arguments and contention on both sides, it is our intention to chart a middle course. While not supporting either extremes, we agree that rape within marriage is detestable but may be curtailed through proper advocacy as herein below provided.

Advocacy for Sex Equality Argument in Marriage

First and foremost, it is pertinent to stress the fact that the socially constructed and traditionally sanctioned sexual inequality within marriage is a major conducive factor responsible for marital rape. Equality of sexes should be recognized in marital union. The word equality may be said to be of no definitive clarity. It means different things to different people and as a result it is capable of varying interpretation. Equality both in its prescriptive and descriptive senses³² could be very confusing and sometimes one is tempted to query whether 'equality' really exists or whether we should only pretend to believe it exists. Nevertheless, the ideal or goal of equality principle in everyday social interaction is to ensure justice, equity and fairness. It is to ensure meritocracy as against partiality. These will, in, turn lead to social cohesion and harmony. Therefore, sexual equality as suggested here does

³²P. Westen, "The Empty Idea of Equality", *Harvard Law Review*, Vol. 95. No. 3 (1982), p. 537.

not envisage that individuals of different sexes should be physically indistinguishable from each other. It means rather that those of one sex, by virtue of their sex, should not be in a socially advantageous position *vis-a-vis* those of the other sex. A society in which this condition obtained would be a non-sexist society.³³

A sex equality analysis is characteristically skeptical of the traditions, conventions, and customs that shape the sex and family roles of men and women.³⁴ Culture and tradition as a matter of social control differentiates men and women in matters of sex and parenting. This is informed partially as a result of biological make up of both sexes. The societal expectations regarding the roles of these sexes are therefore different. In some circumstances, these culturally ordained roles make it harder for women to assert their reproductive freedom and autonomy, whereas the same is not the case with the men folk.

In this discussion, it is our view that traditions that expect a woman to submit herself to sex in a matrimonial setting, under any condition, at the will of her husband conceives the woman's body as a field or farmland which should be readily available for tilling at any time, anyhow and anywhere by the husband. It is therefore arguable to say that the customary morality governing sexual expression values men's sexual freedom, decisional autonomy and pleasure more than women's. This sexual double standard is reflected in the fact that a wife with higher libido than her husband cannot openly express desire for sex at any time she wants, otherwise she risks being labeled a sexual

³³*Ibid.*

³⁴*Ibid.*, p. 540.

pervert. Therefore, it is suggested that equality of sexes in marriage should be encouraged in all its ramifications.

Advocacy for Sexual and Reproductive Rights of Women
 Marital rape or forceful sexual intercourse in marriage runs contrary to women's reproductive and sexual autonomy. Women's reproductive rights extend to their taking or having decisional control over themselves. It guarantees women's ultimate right in taking decisions regarding reproductive choices, including sexual intercourse and to enjoy reproductive freedom from forced pregnancy, rape or any form of sexual abuse. There are many international treaties, conventions and human rights instruments affirming women's sexual and reproductive rights. State parties to these various treaties and conventions are under obligation³⁵ to uphold those principles enshrined in the instruments and to create enabling conditions necessary for women to fully exercise those rights.

Sexual and reproductive rights of women³⁶ recognize women as self-governing agents who are competent to make decisions in a

³⁵Every treaty is binding upon the parties to it and must be performed by them in good faith, and a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. See art 26 and 27 of Vienna Convention on the Law of Treaties 1969, *United Nations Treaty Series*, vol. 1155, p. 331.

³⁶For instance, The International Conference on Human Rights, Teheran, Iran, held on 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 provides thus; "Art 16 - The protection of the family and of the child remains the concern of the international community. Parents (husband and wife) have a basic human right to determine freely and responsibly the number and the spacing of their children" (emphasis mine); Art 14 (a-d) of the Protocol on the Rights of Women in Africa, AHG/Res. 240 (XXXI) 31st Sess. (11 July 2003) which provide: "States Parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and

manner that conforms to their sexual freedom and liberty without coercion. It also endorses "voluntary motherhood" which means that women have the right to say "no" to sex in marriage. In the same vein, they have the right to negotiate when and how to submit their bodies to men for sex. These writers do not advocate for abortion (as one of the indices of voluntary motherhood) but our argument here, by way of extension of reasoning, endorses permissible family planning, which includes abstinence and controlled timing of sex. Therefore, recognizing women's right to make decisions about sex and motherhood breaks path with sexual stereotype and traditional prejudice against women.

It is our humble submission that a marriage situation where the woman must subject herself to sex in return for and as consideration for the husband keeping her under a shelter and providing her food and other ancillary comfort, without recognizing her residual right to say "no" to sex or to express her decisional autonomy to the contrary, is nothing better than a legalized and institutionalized prostitution.

Conclusion

We are, greatly of the opinion that marital rape is a condemnable act; not only within the purview of law but also when viewed in the context of human rights. However, we do not support its (marital rape) criminalization, especially in recognition of the sacred nature of marriage between man and woman. Bearing in mind the Nigerian environment, one tool that is suggested as a solution to marital rape incidents is that

promoted. This include: a) the right to control their fertility; b) the right to decide whether to have children, the number of children and the spacing of children;

advocates should push for greater recognition of women's rights and dignity. In doing so, related human rights provisions that are guaranteed by the constitution, national laws and international human rights instruments³⁷ to which Nigeria is a signatory may be invoked to serve as the basis upon which violations of women's reproductive rights with impunity must end. There are a plethora of cases which typify the positive attitude of our courts to human rights protection. Even if it has been difficult getting ratified international human rights instruments to work in Nigeria, the fundamental human rights provisions contained in Chapter IV of the Constitution and relevant provisions of the African Charter on Human and People's Rights will suffice for this purpose.

For instance Section 34(1)(a) and (b) of the 1999 constitution of the Federal Republic of Nigeria (as amended) provides that every individual is entitled to respect for the dignity of his person, and accordingly no person shall be subjected to torture or to inhuman or degrading treatment and no person shall be held in slavery or servitude.

We submit that rape and its effects on the woman is a violation of this provision. Forceful sexual intercourse robs a woman of her dignity. Thus rape exemplifies torture and is both inhuman and degrading. Consequently, an aggrieved victim of this violation could approach the court for the enforcement of her fundamental human rights. We noted that the effects of rape whether on a married or unmarried woman are a violation of

³⁷Examples are the Universal Declaration of Human Rights (UDHR) GA/Res/217A (III) of 10 Dec. 1948, International Covenant on Civil and Political Rights (ICCPR) General Assembly Resolution 2200 A (XXI) of 16 December 1966, African Charter on Human and People's Rights (ACHPR) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), etc.

this provision and therefore worthy of being brought to the notice of the courts³⁸ and attracting appropriate non-criminal sanctions of the law.

In the African Charter on Human and People's Rights (Ratification and Enforcement) Act³⁹, the provision of article 5 is also directly relevant to this discussion. It provides as follows:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly, slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Rape, whether within or outside marriage, represents a direct breach of the above provisions and many other provisions that are provided for in the Act. If the inviolability of human beings, respect for life and integrity of persons are endangered with the non-recognition of the crime of marital rape in Nigeria, invoking this provision would serve as a saving grace for women. Forceful sexual intercourse within marriage erodes the dignity of the victim. It is also submitted that rape, definitely, impacts negatively on the physical and mental health of the woman which is guaranteed under article 16 of the African Charter.⁴⁰

³⁸S. 46 of the 1999 Constitution makes provision for anyone whose fundamental rights are about to be or have been contravened to apply to the high court of the relevant state for redress.

³⁹Cap A9 Vol.1 *Laws of the Federation of Nigeria* 2004.

⁴⁰Article 16 of the Charter provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.

In addition, Article 18(1)(2)(3) are also instructive in combating marital rape. It provides:

- (1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.
- (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
- (3) The State shall ensure the elimination of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

The protection of the family, which is guaranteed by this Article 18(1)(2), cannot be attained with the continued exemption of a husband from being legally responsible for forceful intercourse with his wife. In such situations of sexual violence, the children are morally derailed while such a family lays down a tradition of violence and repression of rights. We note and readily agree that the subsisting spousal exemption from rape under the Nigerian law, in a way, promotes deprivation and erosion of women's right, therefore we suggest that the court system should be imbued with relevant authority with a view to acting as a catalyst to eliminate discrimination against women and violation of their rights. Establishing 'courts of family division' is highly necessary to take charge of any cases of sexual violence, especially when accompanied with physical injury. Those courts must be willing to interpret the human rights provisions to accommodate any act of spousal rape.

We further suggest that traditional societies and male chauvinists must be enlightened appropriately in order to wean

them of their age long prejudice, stereotype and biases against women. Women should be seen and recognized as companions in family settings whose rights and dignity must be respected and protected from abuse, as the society cannot pretend to be unaware of various cases and incidents of women brutality by their husbands. In conclusion, law is dynamic and an agent of change in the society and though we still maintain that the act of a husband forcing his wife to have sex should not be criminalized, we advise that Nigeria should join the league of progressive nations by specifically making a law on the subject-matter. Such law should be administered by courts of family division. With the proposed law in existence, alongside the human rights provisions as contained in various legal instruments, it is hoped that women's sexual freedom and reproductive justice would be better guaranteed. Thus, a woman, either in her matrimonial home or outside, should have the right to decide whether, when, and how long to permit her body to be shared with another person, even her own husband.