



# JOURNAL OF INTERNATIONAL LAW AND JURISPRUDENCE

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*A publication of Department of International Law and Jurispreudence*

**Faculty of Law  
University of Jos**

JILJ Vol. 6, No. 1, 2020

A Publication of Department of International Law and Jurisprudence,  
Faculty of Law, University of Jos, Jos, Nigeria

Published 2020

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ISSN 2141 - 1697

Printed in Nigeria by  
**MONO EXPRESSIONS LTD**  
No 8 Rwang Pam Street  
By St. Theresa's Catholic Church  
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# CULTURAL AND LEGAL PERSPECTIVES OF MARITAL RAPE ISSUES IN NIGERIA

\*Tolulope R. Ibitoye

## Abstract

*Marital rape, also known as, Spousal Rape is a form of domestic violence, public health challenge, and human right issue which occurs whenever a husband has sex with his wife without seeking her consent. It is similar to the offence of rape with the major distinction of the existence of marriage between the parties involved. Although the offence of rape is criminalised in Nigeria, marital rape is not. The major reason for this is not far-fetched: the patriarchy cultural system practiced in Nigeria elevates a husband to the position of dominance while it robs a wife of her privacy, liberty, sexuality and renders her to become her husband's property, thus, he can 'lawfully' rape her in marriage and not act illegally. Due to this, a lot of women suffer silently in the hands of their husbands, and some even die. Therefore, in a bid to resolve the problem of marital rape in Nigeria, this article defined some related concepts to marital rape; determined the prevalence of the latter globally; analysed the extant laws on rape and non-recognition of marital rape; study the patriarchy cultural system practiced in Nigeria; examined contending issues in the criminalisation/prosecution of marital rape in Nigeria; and concluded with recommendations.*

**KEYWORDS:** Marital Rape, Patriarchy, Legal Framework, Women's Rights.

## Introduction

In order to fully understand marital rape, this work shall introduce the concepts of marriage, domestic violence and marital rape in Nigeria. It will also expose the prevalence of marital rape based on the limited available data.

## *Marriage (definition and types of marriages in Nigeria)*

Primarily, in Nigeria, there are three different recognised and lawful types of marriages that a man and a woman can contract. They are: Statutory Marriage, Customary Marriage and Islamic Marriage. A Statutory Marriage is in accordance with the Marriage Act of Nigeria.<sup>1</sup> It is designed only for the celebration of marriage between a man and a woman, and the marriage has to be a monogamous one<sup>2</sup> similar to that described by Lord Penzance, in *Hyde v Hyde*<sup>3</sup>: 'as the voluntary union for life of one man and one woman to the exclusion of all others.' This dictum has become the accepted definition of statutory law marriage in all Common Law countries, Nigeria inclusive (notwithstanding the fact that polygamous marriage<sup>4</sup> is still practiced in the country). The above definitions imply that marriage is a voluntary union requiring the free-will or consent of the parties involved. Secondly, the union is for life, that is, it has no end unless

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<sup>1</sup> The Marriage Act, Cap M6, Laws of the Federation of Nigeria, 2004

<sup>2</sup> Mandyen Brenda Anzaki, 'Types of Marriages Under Nigerian Law' *The Lawyers Chronicle* <[www.thelawyerschronicle.com/types-of-marriages-under-nigerian-law/](http://www.thelawyerschronicle.com/types-of-marriages-under-nigerian-law/)> accessed 17 May, 2018

<sup>3</sup> *Hyde v Hyde* (1866) LR 1 P&D 130; see also section 18 of the Interpretation Act, Cap L23, Laws of the Federation of Nigeria, 2004

<sup>4</sup> Polygamy is the marriage of a man to more than one woman at a time.

dissolved by a court of competent jurisdiction. Thirdly, it involves two parties of the opposite sex, that is, a man and a woman; and lastly, the marriage is to the exclusion of all other members of the society.

The other type of marriage is Customary Marriage, which is the union of one man with several wives. It is largely polygamous and there is no limit to the number of wives a man can marry under customary law.<sup>5</sup> Similar to this is the Islamic Marriage, a religious one, which is also polygamous in nature and permits a man to take up to four wives, if he desires. Thus, in accordance with Section 35 of the Marriage Act,<sup>6</sup> all the three types of marriages discussed above are valid and practiced in Nigeria.

### ***Domestic Violence***

Domestic violence refers to violence within the home. It is carried out mostly against women and children. It includes rape (forced sex), physical abuse; verbal abuse, incest, female genital cutting (FGC), denial of food, denial of time for relaxation, forced marriage and child marriage.<sup>7</sup> Furthermore, domestic violence refers to violence within the home, mostly carried out against women and children. Thus, the Declaration on the Elimination of Violence Against Women defines 'violence against women' as 'any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.'<sup>8</sup> 'Violence against women' constitutes a violation of human rights and a form of discrimination.<sup>9</sup> Also, it involves intimate partner violence and sexual violence,<sup>10</sup> and according to WHO, about 1 in 3 (35%) of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.<sup>11</sup> Similarly, 17.4% of Nigerian women experience a form of physical and/or sexual intimate partner violence in their lifetime, and in the last 12 months, about 11% of them underwent physical and/or sexual intimate partner violence.<sup>12</sup> Furthermore, violence against children includes sexual violence and intimate partner violence.<sup>13</sup> The latter commonly occurs against girls within child marriages and early/forced marriages.<sup>14</sup> Also, statistics estimate that worldwide, up to 1 billion children aged 2–17 years, have experienced physical, sexual, or emotional violence or neglect in the past years.<sup>15</sup>

<sup>5</sup> Anzaki (n. 2)

<sup>6</sup> The Marriage Act (n 1)

<sup>7</sup> A Joda and others, 'Against Violence Against Women,' Baobab Legal Literacy Leaflet No. 1

<[http://iknowpolitics.org/sites/default/files/agaist20violence20against20women\\_baobab.pdf](http://iknowpolitics.org/sites/default/files/agaist20violence20against20women_baobab.pdf)> accessed 18 May, 2018. See also Mary O Esere and others, 'Causes and Consequences of Intimate Partner Rape and Violence: Experiences of Victims in Lagos, Nigeria' [2009] 1 (1) Journal of AIDS and HIV Research, 001-007

<sup>8</sup> Declaration on the Elimination of Violence against Women. Proclaimed by General Assembly Resolution 48/104 of 20 December 1993 <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx>> accessed 17 May, 2018

<sup>9</sup> Ibid

<sup>10</sup> World Health Organisation (WHO), 'Violence Against Children' (June 7 2019) <<https://www.who.int/news-room/fact-sheets/detail/violence-against-children>> accessed 15 January, 2020

<sup>11</sup> WHO, 'Violence against Women: Key Facts' (November 29, 2017) <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>> accessed 15 January, 2020

<sup>12</sup> UN Women. 'Global Database on Violence against Women: Nigeria' <<https://evaw-global-database.unwomen.org/fr/countries/africa/nigeria>> accessed 15 January, 2020

<sup>13</sup> (WHO), (n. 10)

<sup>14</sup> Ibid

<sup>15</sup> WHO, (n. 11)

Therefore, Common Law has defined rape as unlawful intercourse by a man against a woman who is not his wife by force or threat and against her will.<sup>16</sup> The crime of rape generally refers to non-consensual sexual intercourse that is committed by physical force, threat of injury, or other duress.<sup>17</sup> In Nigeria, rape is an offence prohibited by both the Criminal Code<sup>18</sup> and the Penal Code.<sup>19</sup>

From the definitions above, it is inferred that lack of consent is the hallmark of rape. Similarly, as a result of lack of consent, violence normally follows an act of rape. Therefore, in situations where a woman or child is raped or forced to have sex, it is deemed as domestic violence.

### **Marital Rape**

Marital rape can be 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.<sup>20</sup> It occurs when a spouse forces the other spouse to take part in certain sex acts without her consent.<sup>21</sup> It is widespread as other sexual offences but grossly underreported. It includes sexual intercourse, anal or oral sex, forced sexual behaviour and other sexual activities that are considered by the victims as degrading, humiliating, painful and unwanted.<sup>22</sup> Thus, as discussed in the section above, marital rape is a form of domestic violence between married spouses involving sexual abuse, that is, 'violence against women'.

According to UN Women's 2011 Progress of the World's Women: In Pursuit of Justice Report, out of 179 countries with available data, 52 had laws against marital rape, while 127 countries did not have laws against marital rape.<sup>23</sup> Likewise, UN Women estimated that 35% of women worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non-partner at some point in their lives. However, some national studies show that up to 70% of women have experienced physical and/or sexual violence from an intimate partner in their lifetime.<sup>24</sup>

Furthermore, the Health Research Funding.org reveals 21 statistics about spousal rape in 2014. According to the organisation, only 2 surveys have ever been done in an attempt to determine how prevalent spousal rape is today. In one randomly sampled group of married

<sup>16</sup> FindLaw.com, 'Rape Crimes Defined, Common Defenses and Rape Penalties.' <<https://criminal.findlaw.com/criminal-charges/rape.html>> accessed 15 January, 2020

<sup>17</sup> FindLaw.com, 'Rape' <<https://criminal.findlaw.com/criminal-charges/rape.html>> accessed 17 May, 2018

<sup>18</sup> Sections 6 and 357, and 358 of the Criminal Code Act, Cap C38, Laws of the Federation of Nigeria, 2004

<sup>19</sup> Sections 282 and 283 of the Penal Code (Northern States) Federal Provisions Act, Cap 89, Laws of the Federation of Nigeria, 2004. Thus, while the Criminal Code is applicable in Southern States of Nigeria, the Penal Code is applicable to the Northern States

<sup>20</sup> RK Bergen, *Wife Rape: Understanding the Response of Survivors and Service Providers* (Sage Publications Inc. 1996). See also DEH Russell, *Rape in Marriage* (Indiana University Press 1990)

<sup>21</sup> Onyekachi Wisdom Duru, 'Nigerian Legal Position on Spouse Rape' Academia: Legal Essay Series: No. 4. <[https://www.academia.edu/6792858/Nigerian\\_Legal\\_Position\\_on\\_Spouse\\_Rape?auto=download](https://www.academia.edu/6792858/Nigerian_Legal_Position_on_Spouse_Rape?auto=download)> accessed 17 May, 2018

<sup>22</sup> Tosin Omoniyi, 'Nigeria: Marital Rape-Spoken About Only in Whispers.' (2011) Accessed on: <[www.allafrica.com/stories/201107290384.html](http://www.allafrica.com/stories/201107290384.html)> accessed 17 May, 2018

<sup>23</sup> UN Women, *Progress of the World's Women: In Pursuit of Justice Report* (2011) 1-164 <[www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice](http://www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice)> accessed 17 May, 2018. See also The WomanStats Blog, 'Violence Against Women: Marital Rape' (February 5, 2016) <<https://womanstats.wordpress.com/2016/02/05/violence-against-women-marital-rape/>> accessed 17 May, 2018. On the comparison of women's access to justice in different countries, see Anon,

'UN Women Justice Report: Get the Data' *The Guardian* (2016) <<https://www.theguardian.com/global-development/poverty-matters/2011/jul/06/un-women-legal-rights-data>> accessed 17 May, 2018

<sup>24</sup> UN Women, 'Facts and Figures: Ending Violence Against Women' <<http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>> accessed 17 May, 2018

women in San Francisco, 8% of them stated that they were a survivor of marital rape.<sup>25</sup> A similar study that was conducted in Boston found that 10% of married women were the victims of spousal rape. 30% of adult rape cases were committed by husbands, common-law partners, or boyfriends. Also, 29% of all sexual assaults of adult women were perpetrated by a husband or lover. When domestic violence is part of a relationship, the chances of spousal rape occurring rise by 70%.<sup>26</sup> Women from religious backgrounds are more likely to accept spousal rape because they fear being labeled a 'sinner' because of a possible divorce or having a spouse that commits adultery. Women with little sexual experience and/or knowledge are more likely to believe that forced sex in marriage is normal and not report it as rape. More women are upset about threats to leave a marriage or to stop loving her [83%] than they are by threats of physical violence from their spouse [70%]. Furthermore, 35% of the women who are the survivor of spousal rape endured some other form of physical violence during the incident. 69% of women who are raped by their spouse are raped more than one time. More than half of women who have reported or spoken about being raped by their husband were forced to have anal sex. About one-third of spousal rape perpetrators use objects of some form to commit their violent act. Also, 5% of women report that their husband forced their children to be part of the spousal rape incident, including engaging in sex. The percentage of victims who say that their children witnessed the sexual assault is 18%. Finally, wife rape survivors are more likely to have experienced unwanted oral and anal intercourse than women who are raped by acquaintances.<sup>27</sup> Hence, if spousal rape is that high in United States of America where the act is criminalised, it forecasts the geometric prevalence of the former in Nigeria and some other countries that have not criminalised it.

Historically, the doctrine of non-recognition of marital rape was introduced to the Nigerian Legal System (NLS) by Common Law. The latter constitutes the part of English law that is derived from customs and judicial precedents of courts and similar tribunals, rather than statutes. The NLS is based on the English Common Law and legal tradition by virtue of colonization and the attendant incidence of reception of English law through the process of legal transplant. English law has a tremendous influence on the Nigerian legal system, and it forms a substantial part of Nigerian law.<sup>28</sup>

Section 45 (1) of the Interpretation Act provides:

the common law of England and the doctrines of equity and the statutes of general application which were in force in England on 1st January, 1900 are applicable in Nigeria, only in so far as local jurisdiction and circumstances shall permit.<sup>29</sup>

Thus, the received English law comprises of the Common Law, the Doctrine of Equity, and the Statutes of General Application.

Further, the notion that a husband cannot rape his wife was predicated on the then generally accepted view of the common law principles of coverture, whereby, upon marriage, a woman's legal rights and obligations were subsumed by those of her husband, in accordance with the wife's legal status of *feme covert*, unlike an unmarried woman, a *feme sole*, who had the right

<sup>25</sup> Health Research Funding.org, '21 Amazing Spousal Rape Statistics' (Oct 9, 2014) <<https://healthresearchfunding.org/21-spousal-rape-statistics/>> accessed 17 May, 2018

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Jadesola Lokulo-Sodipe, et al. 'Legal Basis for Research Ethics Governance in Nigeria.' *Training and Resources in Research Ethics Evaluation*, (March 5, 2014) <https://elearning.trree.org/mod/page/view.php?id=142>

<sup>29</sup> The Interpretation Act, Cap 192, Laws of the Federation of Nigeria 1990.



to own property and make contracts in her own name.<sup>30</sup> Once a woman is married her, legal existence as an individual was suspended under 'marital unity,' a legal fiction in which the husband and wife were considered a single entity: the husband. The husband exercised almost exclusive power and responsibility and rarely had to consult his wife to make decisions about property matters.<sup>31</sup> Further, the doctrine was articulated by Mathew Hale, Chief Justice in England in the 18th century who wrote in 1736 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>32</sup>

Subsequently, in the nineteenth century, William Blackstone, whose treatise on the laws of England was extremely influential throughout the United States of America and the Commonwealth, offered a classic definition which illustrates the subjugation of women. According to him:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover she performs everything... Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.<sup>33</sup>

Thus, the principles of coverture united husband and wife by subsuming a married woman's civil identity and according husband's wide-ranging control over their wives. As elaborated by scholars, 'the laws of nature and divine revelation' jointly designed the husband as the head of the family.<sup>34</sup> As such, man is, or should be, woman's protector and defender. Coverture principles were also applauded to reflect 'the law of nature, which gave strength to the man and feebleness and dependence to the woman.'<sup>35</sup>

Throughout the nineteenth century, a husband enjoyed substantial rights to his wife's person.<sup>36</sup> The common law gave husbands the authority to chastise, or correct their wives, as long as the corporal punishment did not cause permanent injury.<sup>37</sup> As an indubitable conviction that a man cannot be guilty of a rape upon his own wife, especially up to the nineteenth century, rape laws stated what a 'male person' could not do to 'any woman, other than his wife.'<sup>38</sup> It was emphasized that 'a man cannot be guilty of a rape upon his own wife;<sup>39</sup> that 'a husband does not become guilty of rape by forcing his wife to his own embraces;<sup>40</sup> and that 'the consent of the wife to sexual connection having been given by the act of marrying, he is not guilty of an assault

<sup>30</sup> American History USA, 'Coverture' <<https://www.americanhistoryusa.com/topic/coverture/>> accessed 16 January, 2020

<sup>31</sup> Encyclopaedia Britannica, 'Coverture' <<https://www.britannica.com/topic/coverture>> accessed 16 January, 2020

<sup>32</sup> (Sir) M Hale, *The History of the Pleas of the Crown (1736)*. <<https://archive.org/details/historiaplacitor01hale>> accessed 18 May, 2018

<sup>33</sup> W Blackstone, 'Commentaries on the Laws of England.' <<https://lonang.com/library/reference/blackstone-commentaries-law-england/>> accessed 18 May, 2018

<sup>34</sup> J Schouler, *A Treatise on the Law of the Domestic Relations* (Little, Brown, & Co. 1870) 16-21

<sup>35</sup> JP Bishop, *Commentaries on the Law of Married Women* (Kay & Brother 1871) 27

<sup>36</sup> Schouler, (n 34)

<sup>37</sup> Blackstone, (n 33)

<sup>38</sup> Thomas W. Waterman, *A Complete Practical Treatise on Criminal Procedure* (6th ed. Banks, Gould & Co. 1853) 67

<sup>39</sup> Oliver L. Barbour, *The Magistrate's Criminal Law* (Wm. & A. Gould & Co. 1841) 66

<sup>40</sup> Bishop (n 35)

in having such connection.<sup>41</sup> Hence, 'it is lawful for a husband to have carnal knowledge of his wife, and the fact that he uses force does not make him guilty of rape.'<sup>42</sup> These male prerogatives which were enshrined in English Common Law evolved around the conviction that a wife became her husband's physical and sexual property as part and parcel of the marriage contract.<sup>43</sup>

The Common Law principle discussed above was received into the Nigerian society, and until now, rape within marriage (forced or coerced sexual intercourse between wife and husband) is not recognized as a crime by Nigerian law. At best, a husband who forces his wife to have sex may be found guilty of assault, wounding, or grievous harm depending on the degree and effect of the force he used on his wife, but, not rape.<sup>44</sup> But this is usually limited to situations where the couple have separated (they are not living together or co-habiting).

Additionally, the non-recognition of marital rape in Nigeria was embraced due to the already established practice of payment of bride price during customary/traditional marriages prior to the coming of the British into Nigeria and the introduction of their legal system. Bride price is an amount of money or quantity of goods given by the groom's family to the bride's. Initially, bride price was more like a pleasantries being exchanged between the husband-to-be and the future in-laws.<sup>45</sup> It was a way for a man to appreciate a woman, and show her how much he loves her. For many Nigerians across all religions, it's neither the fashion nor the glamour that symbolizes a wedding. It's the payment of the bride price. If the bride price is not paid, the couple do not marry. The tradition dates back more than 2,500 years, according to anthropologists and cultural historians.<sup>46</sup>

Bride price is highly significant to customary law marriages in Nigeria and other African countries because, firstly, it is an instrument to ratify a marriage. It is one of the highest honours confirming a bride's value and womanhood; giving the husband the full rights to the sexual, economic, or procreative powers of his wife.<sup>47</sup> Secondly, it fosters a friendly relationship between both families providing a material pledge that the woman and her children will be well-treated and a level of compensation to her natal family for the loss of her company and labour.<sup>48</sup> Thirdly, it is a symbol of sincerity and good faith connected with a woman's reputation and esteem in the society. It is a token that highlights a degree of commitment and chivalry in a man and shows he does not only value his bride, but also holds a high regard for her family.<sup>49</sup> Fourthly, it constitutes a significant aspect of our cultural heritage; and lastly, it signifies the beginning of a marriage (as it is paid at the introduction phase in most cultures), it as well depicts the end of that marriage, as the bride price is usually refunded to the man when the woman is no longer interested in the marriage.<sup>50</sup>

<sup>41</sup> Emlin McClain, *A Treatise on the Criminal Law* (Callaghan & Co. 1897) 207

<sup>42</sup> Wm L. Clark, Jr, *Hand-Book of Criminal Law* (West Publishing Co. 1894) 190

<sup>43</sup> Kate Painter, 'Wife Rape in the United Kingdom' (Paper presented at the American Society of Criminology 50th Anniversary Meeting, San Francisco, November 20th-23rd 1991) <[www.crim.cam.ac.uk/people/visitors/kate\\_painter/wiferape.pdf](http://www.crim.cam.ac.uk/people/visitors/kate_painter/wiferape.pdf)> accessed 18 May, 2018

<sup>44</sup> See also *Alawusa vs. Odusote* [1941] WACA 140

<sup>45</sup> Chika Oduah, 'Bride Price Custom Honored in Nigeria, Despite Concerns.' *Voice of Africa News (VOANews)* (Updated November 30, 2019). <<https://www.voanews.com/africa/bride-price-custom-honored-nigeria-despite-concerns>> accessed 18 January, 2020

<sup>46</sup> Ibid

<sup>47</sup> Ruth Omorodion, 'Without Bride Price, There Is No Marriage.' *The Nigerian Observer*, (August 15, 2015) <<https://nigerianobservernews.com/2015/08/without-bride-price-there-is-no-marriage/>> accessed 18 January, 2020

<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> Ibid

However, as beautiful as the practice may seem, there is a concept behind it which believes that women are commodities to be bought and sold. This is rooted in patriarchal beliefs of Africans. In practices, where a bride price is paid, it is common for the husband to believe that by paying the bride price, he now owns his wife. This licenses marital rape and domestic abuse as the wife is seen as the husband's 'property.'<sup>51</sup> For instance, in Sharia law,<sup>52</sup> the husband may withdraw maintenance to his wife if she refuses him sexual intercourse. Rape of a wife is generally not recognized as an offence by customary laws in Nigeria and is not penalized even when the wife suffers bodily harm in the course of the husband forcefully having sex with her<sup>53</sup> because the wife is regarded as the property of the husband. As such, he is free to have her at will notwithstanding her disposition. This attitude is predicated on the notion that on the payment of bride price, the husband becomes the 'owner' of the wife just as he owns other items of property including goats, sheep and chicken and reserves the right to discipline her, including having sexual intercourse with her any time he desires.<sup>54</sup> Impliedly, under customary law marriage, a woman is a piece of property owned by the husband.

The practice in Nigeria is to the effect that sex within the marriage, irrespective of the fact that the woman's consent is obtained or not; or whether the sexual intercourse is accompanied with force or violence is irrelevant; the relevant fact is that sexual intercourse is lawful in both statutory and customary law marriages of Nigeria, based on Common Law principle of coverture, and the customary practice of bride price, hence, the husband cannot be guilty of marital rape.

### **The Extant Laws on Rape and Non-recognition of Marital Rape in Nigeria**

In the Southern Nigeria, the law prohibiting the offence of rape is provided for in sections 357 and 358 of the Criminal Code Act. Section 357 states that:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false 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.

Also, Section 358 provides that 'any person who commits the offence of rape is liable to imprisonment for life, with or without caning.' The joint effects of both sections define the act of rape to mean the act of having unlawful carnal knowledge of a woman or girl, without her consent. Hence, the act of rape is performed only by a man, that is, a woman cannot rape a man. Also, the sections imply that a husband cannot rape his wife, but, a married woman can be raped by another man impersonating her husband; and any man guilty of this act will be sentenced to life imprisonment.

Further, in order to fully understand rape, the phrase 'carnal knowledge' is defined in Section 6 of the Criminal Code Act as being 'complete upon penetration', and 'unlawful carnal

<sup>51</sup> Melissa Mordi, 'The real cost of bride price.' *The Guardian*, (May 09, 2019) <<https://guardian.ng/features/the-real-cost-of-bride-price/>> accessed 18 January, 2020

<sup>52</sup> It is the Islamic law practiced in the northern part of Nigeria by the predominantly Muslim population

<sup>53</sup> Joda (n 7)

<sup>54</sup> Carol Arinze-Umobi, and Ogugua Ikepeze, 'Rape in Matrimony: Entrenched Global Disaster and Underdevelopment of Women: Nigeria in Focus.' (2005) 1-16. <<http://www.csus.edu/hhs/capcr/docs/2005%20conference%20proceedings-papers/c%20arinze-umobe.pdf>> accessed 18 May, 2018. See also O Olopade, *Law and Medical Practice in Nigeria* (College Press & Publishers Ltd 2008) 153

knowledge' means 'carnal connection which takes place otherwise than between husband and wife.' So, unlawful carnal knowledge can only take place between persons who are not husband and wife, and such cannot be punished by the law unless the woman withholds her consent. However, carnal connections that occur between husbands and wives are lawful, even though there is absence of consent of the wife.

The implication of the combined reading of Sections 357 and 6 of the Criminal Code Act on the prosecution, especially, in finding a man guilty of the offence of rape is for the former to prove to the court the ingredients of rape beyond reasonable doubt. In *Posu v The State*,<sup>55</sup> the Supreme Court highlighted the 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:

- (a) that the accused had sexual intercourse with the prosecutrix;
- (b) that the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation;
- (c) that the prosecutrix was not the wife of the accused;
- (d) that the accused had the *mens rea*, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not;
- (e) that there was penetration.<sup>56</sup>

This decision means that the *actus reus* of penetration, and *mens rea* of an intention to have sexual intercourse with a woman or girl without her consent must be present and proved to the court. Hence, rape is legally recognised in Nigeria upon penetration of a male penis into a woman's vagina and nothing more. None-penile penetration, for instance, by other body parts like finger or inanimate objects like sticks are unknown, while it is only the female vagina that can be penetrated, not her anus or mouth. However, the United States of America and United Kingdom have amended their laws to cover these possibilities. Thus, the FBI's Uniform Crime Report (UCR) Summary Reporting System (SRS) of USA redefined rape as 'Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.'<sup>57</sup> Similarly, the Sexual Offences Act 2003 (UK) defines rape as when a person:

- (a)...intentionally penetrates the vagina, anus or mouth of another person
- (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.<sup>58</sup>

On the other hand, a man will be guilty of rape where subsequent upon penetration, he immediately withdraws his penis or abruptly terminates the unlawful act. Evidence showing that the accused continued in the act and discharged semen is also admissible in proof of carnal

<sup>55</sup> (2011)2 NWLR (Pt. 1234)393 at 416-417.

<sup>56</sup> See also *Ogunbayo v. The State* (2007) 8 NWLR (Pt. 1035)157 where it was held that 'the essential ingredients of the offence of rape are penetration and lack of consent. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape.'

<sup>57</sup> The United States: Department of Public Archives, 'An Updated Definition of Rape', (January 6, 2012) <<https://www.justice.gov/archives/opa/blog/updated-definition-rape>> accessed 18 January, 2020

<sup>58</sup> Legislation.gov.uk, *The Sexual Offences Act 2003*, <<http://www.legislation.gov.uk/ukpga/2003/42/part/1/crossheading/rape>> accessed 18 January, 2020

knowledge.<sup>59</sup> It was also held in *Jegade v State*<sup>60</sup> that a degree of penetration so slight and light not to have caused any injury or laceration of the hymen would be sufficient in law for the offence of rape to be complete, while the mere fact that the victim is a virgointacta does not mean that carnal connection has not taken place.

Similarly, Sections 282 and 283 of the Penal Code Act (applicable in the North) proscribe the offence of rape in Nigeria. According to Section 282:

- (1) 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 has been obtained by putting her in fear of death or of 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 to puberty.

As earlier discussed, in Nigeria, a husband cannot commit the offence of marital rape, where he has sexual intercourse with his wife, but, without her consent because the offence is alien to the Nigerian Law. However, the Penal Code Act added 'puberty' to its law, thus, a husband cannot be guilty of marital rape where his wife, whether young or not has reached puberty. Also, by Section 283 of the Penal Code Act, any man found guilty shall be punished with imprisonment for life or for any less term and shall also be liable to fine.

From the dual provisions of the Criminal and Penal Code Acts, can a man be guilty of marital rape in Nigeria? The answer is NO, as expressly stated by Section 6 of the Criminal Code Act, and Section 282 (2) of the Penal Code Act. This Common Law principle was justified by Sir Hale in seventeenth century when he stated that 'the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their natural matrimonial consent, and contract, the wife hath given up herself in this kind into her husband which she cannot retract.'<sup>61</sup>

Therefore, a husband cannot be guilty of rape of his wife by the mere reason that she has given a single blanket consent on the day she accepted to enter into the contract of marriage with the husband, violent sexual intercourse also inclusive.<sup>62</sup> More so, the incident of rape of a wife by her husband is unknown in customary law as the wife is the property of the husband and so he is free to have her at will. The wife is not expected to complain.<sup>63</sup> One major reason given to justify this form of violence is that it is based on payment of bride price and once that is paid, husbands now own their wives and therefore could discipline them; this gives the impression that consent perpetuates the idea that a woman is a piece of property owned by the husband.<sup>64</sup>

<sup>59</sup> *R v S Marsden* (1891) 2 QB.

<sup>60</sup> (2001) FWLR (Pt. 66) 72 at 73.

<sup>61</sup> Hale (n 32)

<sup>62</sup> *Arinze-Umobi, and Ikpeze* (n 54) 7

<sup>63</sup> Commonwealth Secretariat, 'Violence Against Women' (London SW1 5HX)

<sup>64</sup> *Arinze-Umobi, and Ikpeze* (n 54) 7

Therefore, it is inferred from the Nigerian Criminal Laws that the moment a woman gets married, she surrenders herself and all her rights to her husband, the man can deal with her as he likes, and she will be at his beck and call always, sexually, and/or otherwise. This means a woman cannot be heard of being raped by her husband, even in the absence of consent, but, a husband may be guilty of committing assault on his wife or physical restraint trying to have sexual relations with her.<sup>65</sup> Thus, the marital rape exemption makes one wonder who is actually safeguarded?

### The Patriarchy Cultural System in Nigeria

The objective of this section is to examine the nature of a patriarchal system, how it affects the society, especially statutory and customary law marriages, and its effects on Nigeria's position on non-recognition of marital rape in the country.

The term patriarchy refers to a society, which rest upon the principles and practices of male domination and which seek to justify and legitimise domination.<sup>66</sup> Patriarchy operates in both the 'public' and the 'private' sphere of life. While the public sphere relates to politics and employment, the private sphere, which is the focus of this work relates to the family and the division of labour among individuals within such family. As discussed above, women's exploitation and the use of violence against them by their husbands was an acceptable practice under the Common Law. This practice was extended to sexual intercourse between couples as exemplified in Sir Hale's statement.<sup>67</sup> Furthermore, in a customary marriage, a husband has the power to discipline his wife, that is, beat her, but not in a cruel or violent manner, and may confine her in order to ensure her obedience.<sup>68</sup> This is permissible as the customary law, premised on the practice of bride price, sees a woman as one of her husband's properties, although, some husbands misuse the opportunity and chastise their wives as they wish.

Law, therefore, in a patriarchy system emerges as powerful symbol and a vehicle of male authority and domination. In the name of tradition, nature or objective reality, the law and legal institution of patriarchy seeks to induce people to accept specific attitudes to women and to accept the status quo as just and beneficial, the result that<sup>69</sup> the dominance of the male group is made to seem a feature of life, not a one sided construct imposed by force for the advantage of a dominant group.<sup>70</sup> Thus, the central argument of this system is that patriarchy leads to the subordination and oppression of women and causes the historical pattern of systematic violence directed against wives.<sup>71</sup> The theory maintains that the primary element of patriarchy is a relationship of dominance, where one party is dominant and exploits the other party for the benefit of the former.<sup>72</sup>

Society has been shaped by the thoughts and ideologies of one half of the population while the other half, the women, have been subjugated for centuries and made to be of no value. In fact, in certain cultures, the worst thing a woman can hear after the pain of childbirth is 'it's a

<sup>65</sup> Morolake, Omonubi-McDonnell, *Gender Inequality in Nigeria*. (Spectrum 2003)

<sup>66</sup> Olugbemi A. Fatula, *Feminism, Women, Family and Children's Law* (Legal Researchers, Consultants & Publishers 2015) 75

<sup>67</sup> Hale (n 32)

<sup>68</sup> Bacon, *Abridgement of the Law* (Tit Bacon and Feme (B) 1936). In Fatula (n 66)

<sup>69</sup> Fatula, (n 66)

<sup>70</sup> Catherine McKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987)

<sup>71</sup> RE Dobash, and R Dobash, *Violence Against Wives* (Free Press 1979). See Mildred Daley Pagelow, *Family Violence* (Praeger 1984). See also K Yllo, 'Through a Feminist Lens: Gender, Power, and Violence.' In *Current Controversies on Family Violence*, R Gelles, and D Loseke, (ed. Sage 1993)

<sup>72</sup> Tolulope Monisola Ola, and Johnson Olusegun Ajayi, 'Values Clarifications in Marital Rape: A Nigerian Situation' (2013) 9(35) *European Scientific Journal*, 291

girl' - it is that bad.<sup>73</sup> In Nigeria, women are discriminated against at almost every level; in government, in the family, in religious circles and in business. This discrimination stems from deep cultural and religious beliefs that put women in the same space as minors and chattel. The unmarried woman is her father's property (or of the oldest male) while the married woman is her husband's property.<sup>74</sup> Unfortunately, the theory and practice of Family Law has resulted in the institutionalization of injustice affecting women.

Apart from Family Law, the Nigerian criminal laws are also patriarchal in nature, especially towards married women as they encourage a husband's sexual dominion over his wife irrespective of the fact that the wife gives her consent or not, particularly, as Section 282 (2) of the Penal Code Act expressly permits marital rape.<sup>75</sup> The few exceptions under which a man can be criminally liable with regards to marital rape (but would not be guilty of same) is where the husband forcefully has sexual intercourse with his wife while they are living apart, separated or divorced. In such instances, he would be guilty of the offence of assault on her. Likewise, under the various customary laws, the husband dominates the wife and the latter is seen as the husband's property, hence, he can have sex with her anytime, with or without her consent, and can likewise, discipline her.

In Nigeria, marital rape is part of the acts of male dominance, but, is not taken serious or problematic enough by the police or the media. More so, women hardly report marital rape to the police for fear of recrimination from both the husband and wider family. Even where the women report to the police, the latter treat such complaint as a trivial act of 'two people fighting' or as a private affair between the husband and wife.

Besides, the tradition or culture and religious beliefs in Nigeria as a typical patriarchal society see the wife as a property of her husband, who has moral right to beat her as penalty for insubordination and or perceived wrong doing.<sup>76</sup> Furthermore, laws to protect women from violence are inadequate in Nigeria. For example, marital rape is generally not recognised as an offence in any system of law in Nigeria, even when the wife is wounded in the course of forced sexual intercourse.<sup>77</sup> Formal mechanisms to seek redress in cases of domestic violence or rape, through police investigation followed by a court proceeding, are often ineffective. This is particularly the case in rape cases, where police are not adequately trained to handle such cases and the burden of proof remains with the prosecution, requiring a woman to prove that she did not consent, or where a woman's testimony, under Muslim law, is not as valid as that of a man.<sup>78</sup> As the society has embraced the patriarchy system in which wives' rights are subjugated to that of their husbands, there is need for a thorough re-orientation by the government via platforms, such as, media, public lectures and internet so as to educate and enlighten the populace about the evils of patriarchy system on the growth and development of a nation, and the negative consequences it has on women.

<sup>73</sup> Olamide Adeyemi, 'The Problem Of Patriarchy In Nigeria' *Huff Post*, (September 29, 2016) <[https://www.huffingtonpost.com/entry/the-problem-of-patriarchy-in-nigeria\\_us\\_57ed8208e4b095bd896a096e](https://www.huffingtonpost.com/entry/the-problem-of-patriarchy-in-nigeria_us_57ed8208e4b095bd896a096e)> accessed 19 May, 2018

<sup>74</sup> Ibid

<sup>75</sup> See also sections 357 and 358 of the Criminal Code Act

<sup>76</sup> Titi Salaam, 'A Brief Analysis on the Situation of Women in Nigeria Today.' (*Democratic Socialist Movement (DSM)* March 1st 2003) <<http://www.socialistnigeria.org/women/1-3-03.html>> accessed 19 May, 2018

<sup>77</sup> Ibid

<sup>78</sup> Ibid

### **Contending Issues in the Criminalisation and Prosecution of Marital Rape in Nigeria**

In Nigeria, and like other developing countries, women face several issues or challenges with respect to the exercise of their rights in marriage, particularly, the criminalisation and prosecution of marital rape.

The chief amongst them is the reluctance of the Nigerian legal system to recognize it as a crime at all. This is largely due to the traditional beliefs and patriarchy system practiced in Nigeria in which a married woman is seen as her husband's property; sex is considered to be the exclusive right of a husband which is unthinkable for a wife to deny her husband. Unfortunately, in jurisdictions where marital rape is criminalised, several citizens are unaware of the existing laws as a result of their cultural ideas about marriage which are enshrined in their conscience.

Similar to reluctance by the Nigerian legal system is the condemnation of women who are courageous enough to speak up. The society condemns such a wife; family members/relatives judges her; religious leaders/bodies frowns at and/or silence her; and even law enforcement officers, such as, the Police that she primarily reports to discourage, ignore, shut her up, call her names or threaten to punish her if she tries to institute an action against her husband.

Another problem is procedural in nature. Practically, to prove rape in court is quite challenging, but more herculean is the proving of marital rape as sexual relations are expected in marriage and the court places a burden on the woman to prove beyond reasonable doubt that her husband actually raped her. This may be very tough to discharge by the prosecution.

Finally, what impact will the prosecution of a husband have on the marriage between him and the wife who instituted the case against him? For instance, what will happen to their marriage when he fulfils his jail sentence and returns home? Will they remain married? Will the wife continue to stay in their matrimonial home? What will be the attitude and reaction of the in-laws towards her? What will happen to the children of the marriage? Negative answers to the above questions are part of the problems relating to the criminalisation and prosecution of marital rape offences in Nigeria.

### **Conclusion and Recommendations**

This paper has examined spousal rape in Nigeria by defining some of its related concepts, such as, marriage, domestic violence and rape. It studied the influence of the Common Law principle of Coverture on Nigerian statutory marriage, and the customary law practice of bride price and its implications on Nigerian customary marriage. In addition, it discussed the extant laws on non-recognition of marital rape and the patriarchy cultural system practiced in Nigeria; and discussed contending issues in the criminalisation/prosecution of marital rape in Nigeria.

Therefore, in spite of the contending issues in the criminalisation/prosecution of marital rape in Nigeria, it is recommended that the Nigerian society should endeavour to exterminate all cultural and traditional beliefs/practices that are ill-disposed to the cause of women, especially, marital rape. This can be done through education and re-orientation of the citizenry. Women should also be encouraged to break the culture of silence and speak out by reporting cases of marital rape to the law enforcement agencies for necessary legal actions.

Similarly, the police and other law enforcement agencies should be taught to desist from discouraging, silencing and abusing wives who run to them for legal protection. Additionally, the government has to provide safe/refuge houses for victims seeking refuge from their abusive husbands or angry relatives/in-laws. More non-governmental organisations centred on female affairs, like marital rape cases should be established by the Nigerian people.



Further, the Nigerian legal system should align itself with jurisdictions like UK and USA by criminalising marital rape. This can be done by amending the Nigerian Constitution and the applicable Criminal Codes. While at this, Chapter II of the latter on socio-economic rights should be made justiciable, and the definition of marital rape should be included in the laws. To ensure effective trial, the burden of proving spousal rape should be made different from other types of rape. This is necessary because sexual intercourse is expected in marriage and if the defence relies on consent, it places on the prosecution a difficult evidential burden to discharge. This difficulty was recognised by Lord Keith in *R v R*<sup>79</sup> 'when there is no separation, this may be harder to prove'.

Correspondingly, international instruments, such as CEDAW, and DEVAW that have been ratified by Nigeria should be domesticated into the Nigerian laws. And finally, the enforcement of the law should be made more stringent in order for husbands not to abuse the law or deny their wives of their sexual rights in marriage.

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<sup>79</sup> *R v R* (1992) 1 A.C. 599