

SPOUSAL RAPE IN A GLOBALIZED WORLD

Abstract

Sexual relations and activities abound between people all over the world and most times many of these activities are not illegal. However, the absence of consent of one of the participant may turn the table around making such act illegal and a crime that attracts heavy penalty. Law is dynamic; our laws keep changing as society changes. However, one area of our law that has refused to catch up with the societal change and need is our law on rape. Rape is usually referred to as the gravest and most serious form of sexual assault and is indeed one of the crimes involving emotional issues as the dignity of the raped victim is usually at stake. Rape depicts an instance where a man has forceful sexual intercourse with a woman without her consent or with her consent if such is gotten by force, threat, fraud, deceit, impersonation or intimidation. Spousal rape though not defined as a crime in Nigeria is highly debatable with different views held by different people. This paper discusses spousal rape and the resultant effect of its criminalization or non criminalization. The paper further suggests essential reforms to achieved the desired objectives.

Keywords: *Spousal Rape, Marital Rape, Consent, Sexual Intercourse, Crime*

1. Introduction

Susan Brownell Anthony wrote that ‘the day will come when man will recognize woman as his peer, not only at the fireside, but in councils of the nation. Then, and not until then will there be the perfect comradeship, the ideal union between the sexes that shall result in the highest development of the race’¹

From time immemorial, women were seen as chattels, owned subsidiaries and not independent beings.² By virtue of the dowry/bride price paid to their parents and the marriage vows of ‘to have and to hold...’ they become the property of their husbands. This position is well rooted in historical underpinnings when women were regarded as assets and rape was considered a property crime against the ‘male-figure’ in the victim’s life who is saddled with the responsibility of keeping her ‘chaste and above reproach’. This factor perhaps explains the societal antagonism towards rape victims and may be the reason why such victims were seen as an anathema to the society, frigid and victimized a second time and their rights flagrantly infringed upon by the same society that should protect them. It is even more difficult where the victim is married and the assailant her lawful wedded husband or previously intimate spouse. As simple as the offence of rape is, views are sharply divided as to whether spousal rape should be proscribed or not in Nigeria. Unlike non spousal rape, the victims who have to live with their assailants are too scared to voice their pain and usually hesitate to report to appropriate authorities because of family loyalty, fear of their assailant’s retribution or inability to leave the relationship³, so they endure the sexual violence and their loud whispers go unheard. To foreground this discourse on spousal rape, this writer will, in précis, discuss spousal rape in Nigeria and selected jurisdictions and suggest pragmatic approach to dealing with the vice.

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¹ American social reformer and women rights activist (1820-1906).

² S.B Miller, *Against Our Will: Men, Women and Rape*(Penguin, 1975) 18

³ W Blackstone, ‘Commentaries on the Laws of England’. <<http://www.mdx.ac.uk/WWW/STUDY?xBlack.htm>>

2. Spousal Rape

Spousal rape has been described as one of the most serious violations of a woman's bodily integrity. It is further described as a husband's sexual intercourse with his wife by force or without her consent.⁴ It is depicted as any unwanted sexual act committed by a spouse without the consent or express permission of the other spouse. The sexual act could be forced, induced by threat or intimidation and they include anal or oral sex, or any other sexual activity that could be degrading, unwanted and painful. It is surprising however that many people still have a problem comprehending the term as it is being described as a 'contradiction in terms.'⁵ Some have wondered why a married woman will cry foul and accuse her lawfully wedded husband of rape and opined that as long as the perpetrator is one's husband or known intimate partner, rape should be ruled out. Feminist movements and women groups advocating for the criminalization of spousal rape are told by policy makers and traditional leaders that it would be difficult to convince the ordinary man on the street that having sex with one's 'lawful wedded' wife can ever be rape. One of such statements attributed to Sir Matthew Hale, the then Chief Justice in England in his book, *History of the Pleas of the Crown 1736* and often quoted 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 himself in kind unto the husband, whom she cannot retract.'⁶ The implication is that by the act of marriage, the wife had given her consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, this means that at the point of marriage, the wife has impliedly consented to the notion of sexual relations with her husband and can never be deemed to take such consent away since it is given once and for all times. Sexual intercourse was seen as a 'duty' to be performed under the marital contract. Although the husband could be indicted for assisting someone else in such crime, he himself cannot be guilty of rape.⁷ This was then the old wisdom and the background to the marital rape exemption which many jurisdictions have followed. Though there was no authority cited by Hale, his extrajudicial declaration became a binding rule under common law and cited as rule of law. It is noted by a learned scholar⁸ however that by the time Hale wrote the treatise, matrimonial vows as well as conjugal rights were intractable and since the times of Hale, the attitude towards permanency of marriage have changed and it has been argued that the rules formulated under vastly different conditions need not prevail when conditions change. I agree totally with the view of the learned scholar and add that laws and rules should be made in line with the changing times and needs of the society.

Traditionally, women were required to submit and obey their husbands which also extend to submission to all acts of intercourse within marriage. In the custom of the Kwendzeselwa people,⁹ women were kidnapped and married off against their will but with the aid and concurrence of the prospective in-laws. This form of marriage still occurs in most rural communities and it is regarded as normal. If a woman is made to 'submit' to an act of intercourse, it should be said that 'consent' is lacking as mere submission is distinguishable from consent. The intricacies of the requirement of consent has brought about discussions differentiating 'consent' and 'submission' amid cries for raising the standard to

⁴ B.A Garner (ed) 2000 *Black's Law Dictionary* 9th edition USA: West Publishing Group 1374

⁵ G Hancox, 'Marital Rape in South Africa: Enough is Enough' 2012 .<[http:// www.osisa.org/buwa/south-africa/marital-rape-south-africa&sa=70-74.pdf](http://www.osisa.org/buwa/south-africa/marital-rape-south-africa&sa=70-74.pdf) > accessed 20 November 2017

⁶W Blackstone, 'Commentaries on the Laws of England'. (n.2)

⁷ See R v. Lord Audley (1631) 3 st. Tr. 401

⁸ O A Bamgbose, 'Reflection on the Past, Present and Future of Rape Law.' (2002) 2 *Unib Law Journal* 130

⁹A Armstrong, *Women as Victim: A Study of Rape in Swaziland. Women and Law in Southern Africa.* (Zimbabwe: Zimbabwe Publishing House Ltd, 1987) 35

‘affirmative consent’¹⁰ Affirmative consent is consent without any form of ambiguity, the consent must be real and consent vitiated by fraud, threat or fear cannot be said to be true consent.¹¹ ‘Yes means Yes’ and nothing more, no ambiguous signals or implied consent, it is explicit enough to the other sexual partner what her intentions are. The courts have consistently held that submission to sexual encounter by a person who is too young to understand the nature of the act done or someone who is forced into submission is not consent In *Rv. Fletcher*,¹² the accused was convicted of raping a lady who had not resisted his advances and held that it was wrong to assume a lady must show signs of injury or must always physically resist the accused before there can be a conviction of rape.

Some jurisdictions¹³ still uphold the traditional views as propounded by Hale and arguments put forward for the retention of spousal rape exemption among others is the fact that establishing rape within marriage is usually an uphill task, it is believed that such allegations can foreclose any form of reconciliation that may be in the offing between the spouse thus escalating the rate of divorce among couples. It is the contention of these proponents that any rule which may prevent the likelihood of reconciliation may not work, thus no need to belabor ourselves with its implementation.¹⁴ In addition, the view is also held that a vindictive¹⁵ wife may resort to allegations of rape to threaten her husband when chips are down. Those who argue for the retention of marital immunity usually rely on the dicta of Lord Dunedin in *G v. G*¹⁶ which is to the effect that the courts should not intervene in marital relationships because of its personal and private nature and its capacity of being used by a vindictive wife to get back at the husband.

These reasons and many more put forward for the spousal rape immunity can be assailed on the grounds that they are capable of underplaying the significance and sensitive nature of rape. When the act is considered from the focal point of its dehumanizing and exploitative nature, the present non-interventionist posture of the law of rape in favour of husband no doubt ought to give way to safeguard and favour the female folk, married women inclusive.¹⁷ A radical change in the common law rule on matrimonial immunity in rape occurred in the case of *R v. R*¹⁸ when the court declared that in modern times, the supposed marital exemption in rape forms no part of the law of England. According to Lord Lane CJ, ‘The husband’s immunity no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim’

The implication of the above is that a wife is not obliged to obey her husband in all things or to suffer excessive sexual demands on the part of the husband. It cannot be said that by virtue of marriage, the

¹⁰ N S Philip-Rumney, ‘In Defence of Gender Neutrality Within Rape’. (2007) 6 *SJSJ* , 28 .<<http://www.digitalcommons.law.seattleu.edu/sjsj/vol6/iss1/40>> accessed 15 October 2017

¹¹ See Section 39 Penal Code. See also, O A Bamgbose, (n.6) p.132

¹² (1859) 8 Cox C.C. 131

¹³ Like Nigeria, Kenya, Ethiopia, India etc.

¹⁴ K O Amusa, ‘Rape Within Marriage; Matters Arising’ (2006) 1 *Journal of Law and International Studies* .<<http://www.unilag.edu.ng/index.php/personn>> accessed on 15 December 2017

¹⁵ The vindictive wife was a concept developed to show the wife not as a victim of violence but as someone who gained power through her control over her body. She might for example deny her husband sex because he had refused to give her money or quarrel with her. She might claim to have a headache or cry rape when an assault had not occurred. See L Featherstone, ‘Rape in Marriage: Why it is so hard to criminalize sexual violence’ <http://www.auswhn.org.au/blog/marital-rape> accessed on 10 January 2018

¹⁶ (1924) AC 349 at 357

¹⁷ R Priyanka, ‘Marital Rape and the Indian Legal Scenario.’ *Indian Law Journal* <<http://www.indianlawjournal.com/volume2/issue2/articlebypriyanka.html> > accessed on 20th December, 2017

¹⁸ (1991) 3 WLR 767

wife submits herself irrevocably to sexual intercourse in all circumstances and at all times. The question that comes to mind is: is she a slave? Even slaves are not subjugated to such demeaning position. If a raped victim wants to complain should she be shut out simply because she is married? Should she keep quiet because the alleged assailant is her intimate partner? It is needs to be stated that the laws are meant to meet the society's changing needs and protect people irrespective of age, marital status or gender. Spousal rape can be the most terrifying event in a woman's life, it is the most traumatic invasion one person can inflict on another. It has long been misconceived as a sex act but as stated earlier, it is not erotic, not sensual, not pleasurable, as it is violence and terror masquerading as passion.

Spousal rape is a particularly serious common problem well documented in books but hardly reported with judicial authorities. It is of note to state that women routinely raped by their spouses are usually vulnerable to repeated assault and sexual invasion. This perhaps explains why they hardly come out to report such occurrences when they happen. On many occasions, the woman's hope is to save her life, her marriage and not her chastity. After the sexual violation, such woman may suffer insomnia, posttraumatic stress disorder (PTSD), depression, substance abuse, she may have suicidal impulses, chronic physical health problems and be exposed to varying degrees of victimization, she may be disorganized at first because of the rape and later reorganize her life and adapt to the changes made in her life by virtue of the crime, others may never get over it. Whatever happens, it is not in doubt that the event affects her life.

3. Spousal Rape in Nigeria

It is important to state here that customary criminal law do not proscribe marital rape as all intercourse within the marriage is considered consensual. Women are expected to be passive partners to be seduced rather than active in sexual encounters, in fact it is a taboo for a married woman to refuse the advances of her husband.¹⁹ In addition, a customary wife must be obedient, respectful and submissive to her husband who is the head of the home, at all times therefore any act of insubordination is firmly resisted. In Nigeria, there are no explicit constitutional mechanisms for balancing women's rights and arguments based on cultural or religious norms, however, courts have generally rejected cultural defences in sexual violence cases. Nigerian courts and governments have yet to fully grapple with the implications of Indigenous sovereignty over interpersonal violence.

The offence of rape in Nigeria is entrenched in two main statutes; the Criminal Code²⁰ applicable to the Southern states of Nigeria and the Penal Code²¹ applicable to the Northern states of Nigeria. Both codes describe the ingredients of the offence which must be proved beyond reasonable doubt to secure a conviction. This burden lies on the prosecution and it never shifts.²² Unlawful carnal knowledge is one of the main ingredients of the offence of rape in Nigeria under both the criminal and penal codes, it relates to the physical act (*actus reus*) of the offence. The *actus reus* of rape is mainly the nonconsensual sexual intercourse. This is amplified in *Adeoti v. State*,²³ where the court held that '...the offence of rape is said to be consummated where a man has unlawful carnal knowledge of a woman or girl without her consent or against her will or with her will or consent if the consent is obtained by force or by means of threat or intimidation of any kind or by means of deceit, falsehood or fraudulent representation as to

¹⁹ I Ogunniran, 'Marital Submission: Extending the Frontiers of Marital Rape to Nigeria'. (2009) 5 *Benin Journal of Public Law* 270

²⁰ Sections 357 and 358 Cap C38 Laws of the Federation of Nigeria 2004

²¹ Sections 282 and 283 Cap P3 Laws of the Federation of Nigeria 2004

²² See *Sowemimo v. State* (2012)2 NWLR (pt.1284) 372.

²³ (2009) All FWLR (pt.454) 1450

the nature of the act...²⁴ *Mens rea* is the mental element of an offence and it is apt to state that the *mens rea* of the offence of rape is the accused intention to have sexual intercourse with the prosecutrix without her consent, he may also not care whether she consents or not. Where such consent is obtained by fraud, threat or intimidation the *mens rea* of rape is satisfied. To be held culpable for rape in Nigeria, both the physical and mental elements must be present. Though the definition given in section 357 criminal code appears absolute, it should be read in conjunction with Section 24 criminal code which states that: ‘subject to the express provision of this code relating to negligent act and omission, a person is not criminally responsible for an act or omission which occurs independently for the exercise of his will or for an act or omission which occurs by accident’

The implication is that to establish rape and the culpability of the accused person, the guilty act as well as the intention must be proved. The courts have consistently held that penetration with or without emission is sufficient to prove rape as the slightest penetration will be sufficient to constitute sexual intercourse²⁵

In *Rabiu v. State*,²⁶ per I.T Muhammad JCA (as he then was) listed the ingredients of the offence of rape which the prosecution is under a duty to prove as follows:

- That a man, the accused, had sexual intercourse with a woman, the victim,
- That the act of intercourse was unlawful, not being between husband and wife.
(Underlined for emphasis)
- That in giving the evidence of intercourse, complete penetration is proved.
- That the accused had the requisite mens rea that is, intention to have intercourse with a woman without her consent or that the accused acted recklessly not caring whether the woman consented or not. Also, the prosecution must adduce evidence to corroborate the complaint made by the victim and although this is not required as a matter of law, it is required in practice.

From the foregoing it is clear that only a man can commit the offence of rape in Nigeria and where these ingredients are proved, the *actus reus* and *mens rea* of rape is established. Where the alleged carnal connection smirks of consent, it becomes unlawful. It is also important to state that sexual relations between spouses do not come within the purview of rape in Nigeria. Section 6 Criminal Code goes further to depict ‘unlawful carnal knowledge’ as carnal connection which takes place otherwise than between husband and wife.²⁷ In other words, spousal rape is not an offence in Nigeria. A husband cannot rape his wife as the marriage contract is deemed to imply consent to sexual intercourse which can only be revocable by a separation agreement or order of the court. Similarly, the Nigerian Penal Code does not proscribe spousal rape. In Nigeria, where it is proved that the prosecutrix was not the wife of the accused and the intercourse was unlawful and non-consensual, the accused may be held culpable. It should be noted however that even where husband is shielded by virtue of the marital rape exemption, where he uses violence on the wife during intercourse, he can be guilty of assaulting or wounding his wife.²⁸

²⁴ Per Agube J.C.A at page 1483

²⁵ (2011) All FWLR (pt. 565) 234

²⁶ (2005) 7 NWLR (pt 925) 491 at p. 511. See also section 282(1)

²⁷ The section purports to imply that intercourse between husband and wife are lawful and that sexual connection between unmarried persons is unlawful; it is noted that this act do not carry with it any criminal liability except perhaps the absence of consent is proved. See *Upahar v.ate* (2003)6NWLR(Pt 816) 230, *Ogunbayo v. State* (2007) 8NWLR (Pt 1035)157

²⁸ See the case of *Alausa v. Odusote* (1941) 7 WACA 140

It is crystal clear that spousal rape is not specifically criminalized in Nigeria, there are a few enactments that deal with domestic violence and impliedly rape in Nigeria one of such is the Violence Against Persons (Prohibition) Act of 2015 which expands the definition of rape to include both genders as capable of committing the offence and further defines the offence as an intentional penetration of the vagina, anus or mouth of another person with any part of the body or anything else²⁹. The Act prohibits all forms of violence against persons in private and public life. Though the Act do not address concerns about spousal/marital rape, it proscribes spousal battery with imprisonment not exceeding three years or fine not exceeding Two Hundred Thousand Naira or both.³⁰

4. Spousal Rape: A Comparative Study

In most countries of the world,³¹ the offence of rape is now described using gender neutral terms, a complete departure from the common law stance where the victim must be a woman. The marital rape exemption which was rooted in the infamous statement of Sir Hale are now jettisoned and the term 'rape' abandoned and replaced with words like 'non consensual sexual intercourse', 'sexual assault', 'sexual violence' among others.

It is important to state that before the enactment of sexual offences law in South Africa, some of the judgements from that jurisdiction reflected the rape myth³² of rape being executed by only strangers and reinforced the believe that because a woman had previously consented to sexual intimacy and intercourse, she is likely to do so in the future, and so further forced intercourse is not seen to be rape. In *State v. Moipolai*³³ which was a case involving a pregnant woman and her long-term boyfriend, the judge reduced the accused person's sentence from ten years to five years because according to him, the rape was not as serious as if a stranger had committed it. The court opined thus: '.....this rape should therefore be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable.' Similarly in *S v. Modise*³⁴ where divorce proceeding was pending between appellant and complainant, the husband who attempted to rape his wife was convicted and duly sentenced but not without some sentimental undertones.³⁵ There are instances where the sentence of a rapist was reduced on the basis that he had been non violent and indeed 'tender' in raping the victim³⁶ and where the sentence of five years was increased on appeal to ten years.³⁷ It is noteworthy to emphasize that when South Africa joined the progressive trend of criminalizing spousal rape, the country became one of the first countries within Africa and one of the few members of the 15-member Southern African Development Community to criminalize spousal rape.³⁸ The Prevention of Family Violence Act, 1993, The Criminal Law (Sentencing) Amendment Act, 2007³⁹ and The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 have copious provisions as regards

²⁹ See Section 1 Violence Against Persons(Prohibition) Act 2015

³⁰ Section 19 Violence Against Persons(Prohibition) Act 2015

³¹ Canada, South Africa, United States of America

³²R E Briones, 'Rape Attitudes and Beliefs: A replication study. *Graduate Theses and Dissertations*' (2009).<<http://http://scholarcommons.usf.edu/etd/1876>> accessed 10 November 2017

³³ (2004) ZANWHC,19

³⁴ (2007) ZA NWHC, 73

³⁵ Gura j, stated thus:"the desire to make love to his wife must have overwhelmed his somewhat violent behavior.....however, minimum force, so to speak was resorted to an order to subdue the complainant's resistance.....this relationship of husband and wife should never be overlooked by any judicial officer."

³⁶ *State v. Sebaeng* (2007) ZANWHC 25

³⁷ *State v. Mvamvu* 2005 (1) SACR 54 (SCA)

³⁸ Others include Lesotho, Namibia, Tanzania and Zimbabwe.

³⁹ Section 3(A) thereof states that the relationship of the husband and wife can no longer be a mitigating factor and so, marital rape must be treated like other rape.

sexual assault and rape within marriage.⁴⁰ The law expanded the offence of rape, making it applicable to all forms of sexual assault and penetration without consent using gender neutral terms.⁴¹Section 5 of The Prevention of Family Violence Act specifically provides that: ‘Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.’(Underlined for emphasis)

Rape in India is a grievous offence out rightly but it is not an offence within the bounds of marriage. The retention of rape within marriage is given statutory backing by virtue of Section 375 of the Indian Penal Code which provides that: ‘sexual intercourse or sexual acts by a man with his own wife , the wife not being under 15 years of age is not rape.’ Other instances where the husband can be liable for marital rape include when the wife is between 12 – 15 years of age, when she is below 12 years of age or when she is judicially separated from the husband.⁴² The only way a man can be held guilty of raping his wife in India is where such lady is below the age of consent. ⁴³ However, some legal options are available to women in sexually abusive relationships. One of such is The Protection of Women from Domestic Violence Act (PWDVA) 2005 which is a common law Act that provides protection against marital rape under the status of domestic violence in all states and union territories of India except Jammu and Kashmir. It is of note to state here that the PWDVA, 2003 provides only civil remedies and some of the acts that fall within its purview include any act causing harm, injury, anything endangering health, life etc. whether mental, physical or mental.⁴⁴ In addition, the woman can claim ‘Marital Cruelty’ under Section 498A of the Indian Penal Code but the problem with coming under this section is that unless severe physical injuries or psychological illness is occasioned, prosecuting marital rape under this legislation and getting criminal remedies will not likely succeed. Although Sexual offences against women have become a very sensitive issue in India, spousal rape have still not attained the status of a crime this is in contrast to the Indian Constitution which upholds equality before the law,⁴⁵ prevents the state from discriminating amongst the citizens on any ground and reiterates the fundamental duty of every Indian citizen to renounce practices derogatory to the dignity of women⁴⁶ it should be mentioned that in response to the public outrage and protest that followed the sensational Jyoti’s gang rape case (*State v. Ram Singh & 4 others*⁴⁷) in Delhi sweeping reforms of the Indian rape laws were made with the enactment of the Criminal Law (Amendment) Act on 3rd February, 2013 which amended the Indian Penal Code, The Code of Criminal Procedure 1973, The Indian Evidence Act 1872 and The Protection of Children from Sexual Offences Act, 2012., victims of sex related offences can now be compensated, sentence for rape was increased and the provisions are now gender specific than they use to be, only a man can rape a woman now, however these reforms were not extended to married couples, this was reflected in the case of *State v. Vikash*⁴⁸ where the court recent acquitted a man who allegedly drugged and raped his wife. The court per Virender Bhat, J held: ‘The prosecutrix (the wife) and accused

⁴⁰ See section 59 and 60 of Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 (Act No32 of 2007)

⁴¹ See Section 3 Criminal Law (Sexual Offences and Related Matters) Ammendment Act, 2007

⁴² Indian Penal Code (45 of 1860), Section 376. And each of these stipulation attracts various terms of imprisonment ranging between 2 and 7years with or without fine

⁴³ B Gupta & M Gupta, ‘Marital Rape: Current Legal Framework in India and the Need for Change’ (2013) 1 *Galgotias Journal of Legal Studies*.<[http:// www.galgotiasuniversity.edu.in/uploads/file/Marital_Rape.pdf](http://www.galgotiasuniversity.edu.in/uploads/file/Marital_Rape.pdf)> accessed 10 January 2018

⁴⁴ See Section 3 The Protection of Women from Domestic Violence Act (PWDVA) 2005

⁴⁵ See Article 14 of the Indian Constitution

⁴⁶ Article 51A (e) of the Indian Constitution

⁴⁷ FIR No 413/2012, SC NO: 114/2013

⁴⁸ SC No 1/14 FIR No 256 dated 17.10.2013

(Vikash) being legally wedded husband and wife and the prosecutrix being major, the sexual intercourse between the two, even if forcible is not rape and no culpability can be fastened on the accused.⁴⁹

It has been held⁵⁰ that marital rape exemption is offensive to the ideas of personal liberty and the rule is not sound. This writer is of the firm believe and opinion that when rape is viewed more in terms of its exploitative and humiliating nature and not as a shield for a sexually abusive husband and women are no longer viewed as chattels of the husband but partner in the marriage contract, then the dignity of the women will be safeguarded and their sexual autonomy protected and guaranteed.

In Malawi, rape is defined by virtue of Section 132 of the Malawian Penal Code⁵¹ thus: ‘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 fraud or means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman by impersonating her husband, shall be guilty of a felony termed rape’. This section and the subsequent two sections (sections 133&134) make no mention of spousal rape or clarify the position of spouses as regards rape within a marriage. The law makes no provision for marital or spousal rape as this does not exist under the Penal Code, no reference whatsoever is made to the position of husband and wife vis a vis rape. There has never been an explicit exemption for marital rape in the Malawian laws, but given the fact that Malawian laws originated from the English legal system, the British common law has had much influence on the law in Malawi. In addition, decisions of courts also seem to suggest that there exist marital rape exemption.⁵² However, though it is widely accepted that marital rape is not an offence there is evidence that women complain of actions amounting to marital rape in civil cases. This mostly comes as a prayer for divorce on grounds of sexual abuse. For example in the case of *Roger Moffat vs. Grace Moffat*,⁵³ the defendant, the wife to the complainant told the court that she had deserted the complainant husband partly due to sexual abuse. The sexual abuse consisted of the defendant having sexual intercourse with her whilst menstruating and when she was unconscious/asleep. The court concurred with the defendant that the actions of the complainant amounted to sexual abuse. The court however did not go further to pronounce this as spousal rape though the husband was having sex with the defendant when she was unwilling and without her consent. In *R v Mwasomola*,⁵⁴ a customary law court in Malawi held that a man who killed his wife because she refused to consent to sex, was guilty only of manslaughter because his wife’s refusal to have sex with her husband amounted to provocation. Marriage in this case was understood to result in presumed and perpetual consent, an understanding of marriage that mirrors the patriarchal devaluations of women embedded in British common law. It is unfortunate that these customary law sanctions do not now tend to be enforced against husbands who commit acts of domestic violence against their wives. This situation prevails because factors such as patriarchy, gender stereotypes and gender roles support the impunity for marital rape. Even though in Nigeria, a husband cannot be guilty of raping his wife, if he uses force or violence to obtain intercourse, he may be guilty of assault or wounding.⁵⁵

The marital rape exemption was abolished in England and Wales in 1991 by the court in *R v. R*⁵⁶ and corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. Equality within the institution of marriage is a prerequisite of equal citizenship. The

⁴⁹ www.indiankanoon.org/doc/100624392

⁵⁰ Pasham J. In *Smith v. Smith* 85 N.J 193 (1981)

⁵¹ No 263 of 1969

⁵² N.R Kamyongolo & B Malunga, ‘The Treatment Of Consent In Sexual Assault Law In Malawi’ www.theequalityeffect.org accessed on 20 November 2017

⁵³ Civil Case No. 10 of 2007.

⁵⁴ 4 ALR(Mal) 572

⁵⁵ See *Alausa v. Odusote* (1941) 7 WACA 140

⁵⁶ (1991) 3 WLR 767

recognition of the right of married women to live their lives free of sexual violence constitutes an historic landmark achievement in the advancement of women's rights. However, it appears that lip service is being paid to the proscription of spousal rape and what is obtainable in practice is way different from what the legislations stipulates. Though the criminalization of spousal rape alone may not bring an end to the experience of rape within marriage, it is however necessary if women are to achieve full legal personhood.⁵⁷

5. Conclusion and Recommendations

It is not in doubt that controversies have trailed spousal rape in recent times. Needless to say civilized, thriving and progressive democracies have embraced the proscription of rape within marriage leaving others behind. Even though some countries (including Nigeria) have not formally criminalized marital rape, in countries where it is criminalized, the practice is problematic and enmeshed in uncertainties. First are the social and cultural norms contending with it the culture of silence, of treating the incident as a private family affair, of protecting family name from embarrassment and denigration. Notwithstanding the enactments, these laws are ignored as the act is not socially considered a crime and invariably, incidents are not being reported or taken up to the necessary authorities for prosecution⁵⁸ because of fear of victimization. Closely related to the first problem is the 'heavy' burden of proof that the courts place on the prosecutrix. Tricky issues like consent and penetration have to be proved beyond reasonable doubt, and for married women, it may be difficult to prove that she has not consented thus complicating such provisions,⁵⁹ as a result the victim is subjected to yet another traumatizing experience.

On the issue of criminalizing rape within the marriage, it is recommended that the law should move beyond these perceived stereotypes and see the sexual invasion as being an exploitative and violent act⁶⁰ irrespective of the parties involved. Rape is rape; the idea of parsing and qualifying the concept, differentiating the one within and the one outside marriage should be discarded. It is this writer's humble opinion that If the society must change the gender stereotypes of male domination that may necessitate marital rape, parents must teach their male children the importance of respect for their mothers, sisters as well as wives right from cradle, if this is done the issue of forcing sex or demanding same from the wife or other female folk will be history, a fall out from this, will invariably lead to marital rape in the future.

With respect to the consequences of rape, studies⁶¹ have shown that marital rape victims have been found to suffer insecurity, sexual dysfunctioning, psychological and emotional problems and it is submitted that when women are put into perspective in future legislations on rape, their sexual orientation and autonomy will not only be secured but also protected. It should be noted that a world without rapists would be a world in which women move freely without fear of men; that world is possible, it is feasible. It is hoped that when policy makers do the needful, then that world will become a reality and whenever the need arises to subject the law of rape in Nigeria to structural reforms, the opinion expressed in this work will be a convenient platform.

⁵⁷ F Sampson, 'The Legal Treatment of Marital Rape in Canada, Ghana, Kenya and Malawi- A barometer of Women's Human Rights' (2010) .<[http:// www.theequalityeffect.org/pdfs/maritalrapebarometer.pdf&sa](http://www.theequalityeffect.org/pdfs/maritalrapebarometer.pdf&sa) > accessed on 15 November 2017

⁵⁸ E. O Obidimma & A.E Obidimma, 'Spousal Rape in Nigeria: An Aberration' (2015) 13 *International Journal of African and Asian Studies* .<[http:// www.iiste.org/Journals/index.php/JAAS/article/viewFile/25622/26274](http://www.iiste.org/Journals/index.php/JAAS/article/viewFile/25622/26274)>

⁵⁹ A Choudhary, ' Marital Rape: A Crime Undefined' .<[http:// www.lawctopus.com/academike/marital-rape-a-crime-undefined](http://www.lawctopus.com/academike/marital-rape-a-crime-undefined)> accessed 10 January 2018

⁶⁰ The penis should be seen as a weapon, the same way a gun or knife is used during a violent attack.

⁶¹ T M Ola & J O Ajayi, 'Values Clarification in Marital Rape: A Nigerian Situation.'(2013) 9 *European Scientific Journal* .<[http:// eujournal.org/index.php/esj/article/download/2199/2084](http://eujournal.org/index.php/esj/article/download/2199/2084) See also J Bourke, 'Sexual Violation and Trauma In Historical Perspective' (2010) <[http:// www.arbor.revistas.csic.es/index.php/arbor/article/viewFile/808/815](http://www.arbor.revistas.csic.es/index.php/arbor/article/viewFile/808/815) > accessed 10 January, 2018