DonnishJournals 2041-3344

Donnish Journal of Law and Conflict Resolution
Vol 1(1) pp. 001-009 April, 2015
http://www.donnishjournals.org/djlcr

Original Research Paper

An Appraisal of the Jurisprudence of Spousal Rape in Nigeria.

[1]Ochem Charles Emeka and [2]C. T. Emejuru*

[1]College of Law, Igbinedion University, Okada, Edo State, Nigeria.
[2]Faculty of Law, Rivers State University of Science and Technology, Port Harcourt, Rivers State, Nigeria.

Accepted 20th March, 2015.

Rape, generally is a gender discriminatory offence in that it can only be committed by a male upon a female. Early law on rape was enacted with a view to protecting virgins from rape, abduction and forced marriage. It was also the intention of the law makers to protect the interest of a father in the virginity of his daughter or the interest of a husband in his wife's fidelity. As the court held in People v. Liberto[1]."The purpose behind early laws was to protect the chastity of women and thus their property value of their fathers or husbands. Today, the cardinal aim of the law of rape is to protect a woman or girl from sexual assault or sexual harassment.[2] There is a dearth of cases on rape in Nigeria.[3] Few cases are tried in Nigerian courts because of their sensitive nature. The prosecutrix rarely reports cases on rape because of the social opprobrium and media sensationalism that they engender in both the print and the electronic media. The focus of this paper is whether a man can commit rape against his wife. We shall define rape, the nature of rape, who can be raped, who can commit the offence of rape, and proof of rape. We shall also consider whether a husband can commit rape on his wife, this is the kernel of this discourse, we will also take a cursory look at spousal rape in other jurisdictions, the paper will end with some concluding remarks.

Keywords: Spousal rape, Consent, Penetration.

INTRODUCTION

Spousal rape is a situation where a man has sexual intercourse with his wife, to whom he is lawfully married without her consent. That is, non-consensual sexual intercourse with a spouse, however obtained may not be a crime. However, there is a growing trend that marital exemption is unjust and has no place in a civilized society.[4] For centuries, husbands around the world have been granted marital exemption to the crime of rape. It was not until the last half of the twentieth century that marital rape was even recognized as a legal problem. Prior to that time, most believed that it was impossible for a husband to rape his wife. This

[1] 64 N.Y.2d 154, p 167 (1984)
[2] Yakubu J.A: The Rape Crises - Society on Trial. *The Advocate* - International Journal of Law Students' Society, Obafemi Awolowo University, Ile-Ife, 1990, 14 and 15 pp 34-37
[3] However, in the United States of America, the reverse is the case. For example, in 1990, 100,000 cases of rape were reported. The surge was due to drug abuse, violent nature of American culture and an increased willingness of women to report and talk about the problem. *Vide Sunday Champion* of 24th March, 1991 titled "Rape Crises soar in America" at p 4.
[4] Fus, T. "Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approach". *Vanderbilt Journal of Transnational Law* (01-March-06) available at http://www.accesssmylibrary.comlcom2/summary 0286-17461960 ITM (last visited 20/614.

Corresponding Author: emechet@yahoo.com

conclusion according to Fus, is justified under three separate theories: the implied consent theory, the unity of persons theory and the property theory.[5]

The most common theory behind the impossibility of marital rape is the implied consent theory, which is structured around contract law. Stated succinctly by Sir Mathew Hale[6] in the Seventeenth century: "The husband cannot be guilty of 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". Hale, believed that matrimonial consent was irrevocable. This implied consent to sexual intercourse by the wife can only be revoked upon separation.[7] Until recently, this view was widely accepted.

The unity of persons' theory on the other hand, does not even recognize the wife as a separate being capable of being raped. This theory stems from the belief that when two people marry, they become one.[8] The being of the woman is incorporated into that of the husband such that the existence of the woman is effectively suspended during marriage. In this circumstance, marital rape is thus impossible because a husband is not capable of raping himself.[9] The proposition under the property theory is to the effect that, by marriage a woman becomes the property or chattel of her husband. The goal behind this theory is to inspire and perpetuate marital harmony. Under this view, sexual intercourse can never be rape because the husband is merely making appropriate use of his property.[10]

WHAT IS RAPE?

Rape which is the gravest form of sexual assault is any unlawful nonconsensual carnal knowledge of a girl or woman by a man. It is punishable with life imprisonment with or without whipping.[11] In Nigeria, the offence of rape is contained in section 357 and 282 of the Criminal and Penal Codes respectively.[12] According to section 357 of the Criminal Code:

> *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 or harm, or by means of false or fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of rape.*

INGREDIENTS OF RAPE

The gravamen of the offence of rape is penetration.[13] Rape is complete as soon as the male organ touches the folds of skin over the female vagina or organ[14]. Therefore, any slightest touch of the female *labia minora* by the penis is sufficient.

However, mere sexual gratification that is devoid of penetration, for example, the scratching or rubbing of the opening of the vagina with the penis and thus leading to ejaculation will not constitute rape but indecent assault.[15]

For the offence of rape to be committed, there need not be the rupturing of the hymen[16] nor emission of seminal fluid as was held in *R v. Marsden*.[17] In *Rv. Russen*[18] the English criminal Court held that a degree of penetration so slight as not to cause injury to the hymen would suffice in law for the completion of the offence. But the mere fact that the prosecutrix is a *virgo intacta* does not mean that carnal connection has not taken place.

Although the offence is complete upon penetration, it has been held in *R v. Mayberry* that the act of sexual intercourse which accompanies it is part of the offence. Thus, aid given after penetration makes the aider a party to the offence. This was the decision of the English court in *Cogan v. Leak*[19].

Penetration of the vulva suffices for rape.[20] However, where penetration cannot be proved, the accused may be convicted of attempted rape as was decided in R v. Pigg.[21] In R v. Offiong[22], the accused, after he had entered a lady's room without invitation, removed his clothes, grabbed her and evinced an intent to have sexual intercourse with her. The court held that these facts were not sufficient to constitute attempted rape since they only showed that the accused wanted to have and had made preparation to have sexual intercourse with the complainant. Attempted rape is punishable with imprisonment for fourteen years with or without whipping[23].

PROOF OF RAPE

To succeed in rape, the prosecution must not only prove that the accused had sexual intercourse with the prosecutrix but that it was done without her consent. The incident must also be reported to the police as soon as possible.

In *Iko v. State*,[24] the appellant, a taxi driver, was asked by the prosecutrix father, to take her to school in his taxi cab. On their way, it was alleged that the appellant parked, wound up the car's glass, locked it, overpowered the prosecutrix, removed her pant and had sexual intercourse with her. He then drove her to his apartment, off loaded her luggage and drove away.

This was around 9 p.m. The prosecutrix ran out and reported to the appellant's neighbor in her house where she

[5] *Ibid;* C.T. Emejuru, *the Socio-Legal Dilenma of Rape Vctims, Ikeja Bar Review Vol.3, Pt.2 (2010) 60-68*
[6] I Hale P. C. 628
[7] *Ibid*
[8] *Holy Bible*, Genesis 2: 24 New King James Version (NKJV)
[9] T. Fus, *op.cit.*
[10] *Ibid*
[11] Olusoga Olopade' The Law Of Rape In Nigeria- A Revisit' in Ogungbe M.O.(Ed) *Nigerian Law :Contemporary Issues* Okada, college of law Igbinedion University2003 p227 .
1978 and Section 283 of the Penal Code. See *Republic v. Nwachukwu* (1964) 2 ALL NLR 104, Saraki v. R (1964) NMLR 28. The State v. Ojo (1980)2 NCR 391.
[12] Under the Penal Code, it is rape to have sexual intercourse with a girl under fourteen years of age or of unsound mind with or without her consent.
[13] This is what Russel called the "Res in Res" (the thing in the thing.) see also Section 6 of the Criminal Code.
[14] Joel Samaha, Criminal Law, West Publishing Company 1996, 358.
[15] (1960) WNLR 1.
[16] *R. v. Hughes* 2 mood 190.
[17] 9. (1891) 2Q.B. 11 *Ola. Jegede v State* (supra), *Iko v. State* (supra) at 1181
[18] 1973Q.dR2ll
[19] See (1976) Q.B 217 for accessorial liability under Criminal Code and Penal Code, see Section 7 and Chapter v respectively.
[20] *DPP v. Morgan* (1952) 36 Crim. App. R 125
[21] (1982) 1 W.L.R 762 (Criminal Division)
[22] (1936) 3 W.A.C.A. 83.
[23] By S. 359 of the Criminal Code, attempted rape is punishable with imprisonment for fourteen years.
[24] (2001) F.W.L.R., (Pt 68), 1161 to 1196.

slept. She told her father about the incident who in turn reported to the police. The appellant denied raping her. He was convicted in the High Court. His conviction was affirmed by the Court of Appeal. But his appeal to the Supreme Court succeeded because the ingredients of rape were not proved. Also, in *Isaac Sambo v The State*[25] the appellant /accused was alleged to have raped a 10 year old girl. The story before the court was that the appellant asked the girl to help him get some water to take his bath. The girl brought the water and he asked the girl to bring the bucket into his room. Immediately she did so, he locked his room, increased his music set to the highest volume, pushed the girl onto his bed, removed her underwear and inserted his penis into her vagina. When the girl started to scream, he quickly withdrew, allowed the girl to dress up, pleaded with her saying 'please don't spoil my name' because he was a professional. He opened the door and allowed her to go.

The girl, went home and washed herself of the blood and later reported to her elder sister, she removed her dress and examined her and still found some traces of blood. She proceeded to report to the police, but medical examination of the girl never took place until 2 days after. These were the facts in the court with the story of the little girl herself. Prosecuting counsel asked the court to convict the appellant on the basis of those facts as being corroboration of the story of the little girl. The High court convicted the appellant for rape which conviction was confirmed by the court of Appeal. He proceeded to the Supreme Court and the Supreme Court allowed the appeal and set aside the judgment of the lower courts by stating as follows:

> *All the facts presented before us in this case as corroboration are no more than circumstantial evidence and because a circumstantial evidence does not irresistibly point to the appellant as having committed the offence of rape on the girl , the judgment of the high court on appeal is thereby set aside'.*

In **Opanefe v the State**[26], the appellant had sexual intercourse with an 11 year old girl. After the 1st incident, on the 2nd occasion, the appellant also made carnal knowledge of her. After the 2nd incident the little girl was crying and the appellant gave her one shilling and told her to stop crying. The girl hid the one shilling in her pant and went home weeping. The mother immediately observed her, and on interrogation related to her mother what had happened. The mother removed her underwear and one shilling fell down. She picked it and reported the matter to the police. The medical examination on the girl was conducted.

The doctor confirmed that somebody had sexual intercourse with the girl, the hymen was ruptured before the particular incident in court and as a result he could not link the accused to the present incident. The High court convicted the accused on the basis of the medical report and that the one shilling found in her pant corroborated her story. The Supreme Court quashed the conviction and set appellant free because those were mere circumstantial evidence which were not weighty enough to convict the appellant. In **Okoyomon v The State**[27], a girl between the 11 and 12 years of age testified that the accused fell on her in the bush and forcibly inserted his penis in her vagina. When she was medically examined about 10 days after the incident, her hymen was torn and she was infected with a venereal disease.

Medical evidence did not indicate how long her hymen had been torn and by whom or that the accused was also infected with the venereal disease of the same kind with that of the prosecutrix. The only corroborative evidence in support of the prosecutrix was that of an eyewitness who said that the accused was on top of the girl having carnal knowledge of her. The trial judge was doubtful as to whether the accused attempted to have sex or had carnal knowledge of her. Despite this finding, he was convicted. However the Supreme Court quashed the conviction since the prosecution failed to prove the kernel of the offence of rape, that is, penetration. The court decided that the proper offence which the accused should be convicted of was attempted rape.

WHO CAN COMMIT RAPE?

According to Section 30 of the Criminal Code, a male person under the age of 12 years is *doli incapax*, that is, he is presumed to be incapable of having carnal knowledge[28]. This presumption of the law is an irrebuttable one and cannot even be rebutted by showing that the boy has reached puberty despite his age. It follows that from this, he cannot be guilty of the offence of rape. The presumption is one of law and cannot be rebutted by showing that the accused has reached the full state of puberty as long as he is below twelve years, in the same vein; a husband cannot be guilty of rape upon his wife.[29]

CAN A WOMAN RAPE A MAN?

As the law stands today in Nigeria, a woman cannot rape a man or another woman because a woman is not physically capable of having penile penetration of a man or another woman. This is deducible from the wordings of section 357 and section 282 of the Criminal and Penal Codes respectively. However, a woman may be convicted of rape as an accessory under Section 7 and Chapter V of the Criminal and Penal Codes respectively. For example, a woman who aids, counsels or procures a man to rape another woman will be regarded as the actual perpetrator of the crime and can be convicted of the same offence as the principal offender[30].

CONSENT IN RAPE

One area of *mens rea* of which is still controversial is in relation to the accused's knowledge of his victim's lack of consent. In this wise, an attempt has been made in *R v. Olugboja*[31] to distinguish between consent and submission. Absence of consent is an essential ingredient that the prosecution must prove for a conviction in rape to stand. The prosecution must

[25] (1993) 6NWLR (PT 300) 399.

[26] C.T. Emejuru, *the Socio-Legal Dilenma of Rape Vctims, Ikeja Bar Review Vol.3, Pt.2 (2010) 60-68*

[27] (*1973*) 1All NLR 16

[28] Okonkwo C.O., *Okonkwo And Naish, Criminal Law In Nigeria(2nd ed)* Ibadan: Spectrum Books,(2009) p.272.

[29] See section 6 of the Criminal Code Cap C38 Laws of the Federation of Nigeria 2004, hereinafter referred to as LFN. See also Section 145 of the Evidence Act 2011.

[30] It has been argued earlier on that rape is a gender discriminatory offence. It is the duty of our policy makers to amend the law of rape so as to make it cover a situation in which a man is raped by a woman. Recent trends in advanced countries of the world have demonstrated that the males in Nigeria have to be protected against sexual harassment by the females. For example, in a French Court in 1973, two ladies were convicted of raping a man. They gave him a lift in their car and drove him to their apartment where they had sexual intercourse with him in turn against his wish.

[31] See Olugboja (supra).

prove both the *actus reus* - that the accused had sexual intercourse without the consent of the complainant or prosecutrix, and the *mens rea*- that he had the intention to have sexual intercourse with her without her consent.

Consent must be real. Thus, consent obtained by means of force, threat, fear, harm, deceit, intimidation, false or fraudulent representation as to nature of the act or by impersonation of the husband of a married woman is consent unlawfully obtained.[32] By virtue of section 283 of the Penal Code, a person may still be convicted of rape despite the girl's consent in a situation in which she is below 14 years of age or is a *non compos mentis*. The rationale for this is that submission by a person of weak intellect or who is too young to understand the nature of the act is no real consent.

A mistaken belief that the complainant was consenting, even though unreasonable, may well negate intention. This was the decision of the court in *DPP v. Morgan*[33] where the House of Lords held that where the accused person believed that the woman was consenting, he would not be guilty of rape despite the unreasonableness of his belief.[34] This decision was criticized because no requirement then existed in law in relation to "reasonable" interpretation given by the court. In 1976, the decision in the case was incorporated into the law by virtue of the Sexual Offences (Amendment) Act 1976. In **DPP v. Morgan,**[35] a husband who invited three young men to have sexual intercourse with his wife without her consent was convicted of rape despite the fact that he never had sexual intercourse with her directly. In the same vein, an impotent man can be convicted of rape under Sections 7 and 357 of the Criminal Code.

In England, the offence of rape is committed when a man has sexual intercourse with a woman with the knowledge that she does not consent or he is reckless as to whether she consents or not. In **R v Olugboja**,[36] it was held that if a lady is frightened into submitting to sexual intercourse, the accused will be culpable despite the absence of struggle on the part of the former.

When proving consent, it does not lie in the mouth of the accused to say that the complainant is a prostitute, or a woman of loose moral turpitude or that she had been having sexual intercourse with the accused on regular occasions in the past. It will also not avail him to say that the complainant is his concubine. However, these facts may make the court to infer consent in legitimate circumstances.[37]

CAN A HUSBAND RAPE HIS WIFE?

A examination of Section 6 of the Criminal Code which defines unlawful carnal knowledge as carnal connection that take place otherwise than between husband and wife, will reveal that a husband cannot, as a general rule, be guilty of rape on his wife. There is a similar provision under section 282 of the Penal Code which makes the attainment of puberty by the wife the limiting age.[38] This general rule has been justified by Sir Mathew Hale in the seventeenth century. In his own words:

> *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*.[39]

In the Nigerian context where polygamy is prevalent, this rule may not be practicable. However, since the law also recognizes polygamy, it is submitted that the reference to husband and wife in section 6 is not restricted only to parties to a monogamous marriage.

There are exceptions to the general rule that a husband cannot be guilty of raping his wife. He may be found guilty of raping his wife in the following instances:[40]

(a) **Decree of judicial separation**. In Clarke,[41] it was held that where a competent court has ordered a decree of judicial separation, the wife is no longer bound to cohabit with the husband.

(b) **Where there is a divorce nisi**. In R v. O' Brien,[42] Park J. held that a decree nisi of divorce effectively ended a marriage and so it was possible for the husband to rape his wife.

(c) Also, where an injunction has been granted against a husband from molesting his wife or where he has given an undertaking to the court not to do so, a similar situation will apply.[43]

Even though 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.[44] Sexual intercourse even in marriage is a mutual agreement between a husband and his wife. The mere fact that both of them are married should not be an open invitation to unreasonable sexual intercourse. For example, a wife may refuse to have sexual intercourse with her husband because he has been guilty of a matrimonial offence that she does not want to condone or when her husband has contracted a venereal disease or AIDS. The presumption of raping his wife save in the instances mentioned above is another means of subjugating our women and making them to be chattels of their husbands once they elect to enter into marriage with them. This may then be regarded as another example of male chauvinism.[45]

---

[32] Section 357 of the Criminal Code. See also Section 39 of the Penal Code which is *impari materia* with section 282 by stipulating invalid consent.

[33] (1975)2 W.L.R., 913.

[34] See Section 25 and Section 45 of the Criminal Code and Penal Code respectively.

[35] Supra

[36] (1982) Q.B. 320 CA.

[37] *State v. Lain* (1972) UILR 503: See Section 210 of the Evidence Act, Cap 112, Vol. VII, Laws of the Federation of Nigeria, 1990.

[38] Under the former, any person who has unlawful carnal knowledge of a woman or girl is guilty of rape. According to the latter, "a man is said to commit rape.

[39] Smith J.C., Hogan B: *Criminal Law*, 5" ed. (1983), London, Butterworths; (1983) P. 405

[40] Blackstone: To have and to hold: The Marital Rape Exception and the fourteenth Amendment, 99 *Harvard Law Report* 1986, P. 1255.

[41] Clarke (1949) 2 ALL E. R. 443. See also Miller (1954) 2 Q.B. 282.

[42] (1974) 3 ALL E. 663.

[43] Steele (1977) 65 Cr. App. Rep 22, (1977) Crim L. R. 290.

[44] *Alawusa v. Odusote* (1941)7 WACA 140. S

[45] Olusoga Olopade' The Law Of Rape In Nigeria- A Revisit' in Ogungbe M.O.(Ed) *Nigerian Law :Contemporary Issues* op.cit, p.227. In his Article, Olusoga listed the following countries Norway, Sweden, Denmark, Iceland, Finland and the Faroe Island. See also Section 347 and section 325 of the Codes of Queensland and Australia respectively. See also the Criminal Codes of the states of New York, Oregon, Vermont, Kansas, Florida etc. in the United States of America. Also, in New South Wales and New Zealand, as some of the countries where a man can be found guilty of raping his wife.

SPOUSAL RAPE IN OTHER JURISDICTIONS

Historically, many cultures have the concept of spousal conjugal rights to sexual intercourse with each other. The proposition of Christian teachings influence on western culture need to be considered, in particular, Saint Paul's teaching:

> *Let the husband render to his wife the affection due her, and likewise also the wife to her husband. The wife does not have authority over her body, but the husband does. And likewise the husband does not have authority over his own body but the wife does. Do not deprive one another except with consent for a time, that you may give yourselves to fasting and prayers; and come together again so that Satan does not tempt you because of your lack of self control".*[46]

This biblical position was given recognition in the common law which was in force in North America and the British Commonwealth of Nations, where the very concept of marital rape was treated as an impossibility.[47] As stated earlier, this was illustrated most vividly by Sir Mathew Hale, in his 1736 classic legal treatise, where he wrote that such a rape could not be recognized since the wife, upon marriage cannot withhold consent to sexual intercourse.[48]

With the development of the concept of human rights, the belief of marital right to sexual intercourse is gradually becoming unpopular[49]. In December 1993, the United Nations High Commission for Human Rights published the Declaration on the Elimination of Violence against Women.[50] This establishes marital rape as a human right violation. This is not fully recognized by all UN member states. In 1997, United Nations Children Emergency Fund[51] reported that just 17 states criminalized marital rape.[52] In 2003, United Nations Development Fund for Women[53] reported that more than 50 states did so.[54] In 2006, the UN Secretary General found that marital rape may be prosecuted in at least 104 states. Of these, 32 states have made marital rape a specific criminal offence, while the remaining 74 states do not exempt marital rape from general rape provisions. Four states criminalize marital rape only when the spouses are judicially separated.[55]

The different rape statutes in the various states of the United States used to preclude spousal prosecution, including estranged or even legally separated couples.[56] In 1975, South Dakota removed this exemption.[57] By 1993, this was the case throughout the United States; however, 33 of the 50 US states regard spousal rape as a lesser crime.[58] The perpetrator may be charged with related crime such as assault, battery or spousal abuse.[59] In India, the Protection of Women from Domestic Violence Act 2005[60] created a civil remedy for victims, however, it did not criminalize marital rape[61]; jail is only available if a court order has been violated[62].

Taweekiet Meenakanit Thai legal scholar[63], voiced his opposition to legal reforms that made spousal rape in Thailand a crime. He said spousal rape will be difficult to effect since many Thai wives depend on their husbands and would not want to divorce them or put them in jail.[64] Some countries that have criminalized marital rape recently include: Turkey in 2005[65], Mauritius in 2007[66], Thailand in 2007[67] etcetera.

From the foregoing, it is glaring that marital exemption to the crime of rape is endangered. It is gradually becoming unpopular as human rights activists, women's rights protection organizations and social crusaders are poised to ensure all supposed anti-social behaviours, perceived human rights violation and flagrant abuse of women are outlawed. It must however be observed that, these may not have all encompassing global relevance because what may be perceived as human rights violation and an abuse of the right of women in advanced countries may just be a way of life for some people based on their belief systems which is a product of their sociological, cultural or religious affiliations. These probably are the reasons why Taweekiet Meenakanit, the Thai legal scholar voiced out his opposition to the legal reform in Thailand which criminalized spousal rape.[68]

In Nigeria for instance, the dominance of Christianity, Islam and African indigenous religion which have shaped the belief system of the people may make the pronouncement of any legal reform criminalizing marital sex without the consent of the woman, offensive to the ears. This may be the situation in many African countries where a woman is still seen as mere property of her husband, without any right of her own.

In England and Wales Marital rape exemption was abolished in 1991 by the House of Lords in its judicial capacity in the case of *R v. R.*[69] The exemption of a spouse from being prosecuted for rape committed upon his lawful wife had never been a rule of statute, having first been promulgated in 1736 in Hale's history of the crown, where he stated:

> *But the husband cannot be guilty of rape committed by himself upon his own 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*[70]*.*

---

46 *The Holy Bible*, I Corinthians 7: 3-5 New King James Version (NKJV)

47 Spousal Rape - Wikipedia: the free encyclopedia. Available at http://en.wikipedia.org/wikilspousal _rape_English, (last visited 22 November 2008).

48 Sir M. Hale, *History of the Plea of the Crown 1736*, cited in Spousal Rape — Wikipedia the free encyclopedia, *Ibid*

49 Atidoga D.F. 'The Jurisprudence of The Criminalization of Spousal Rape: Nigerian and English Laws in Perspective'. Vol. 1 *EBSU Journal of International Law And Judicial Review*, 2010 PP271-280.at 271.

50 UNICEF, The Progress of Nations 1997, p.48

51 Hereinafter referred to as UNICEF.

52 Ibid

53 Hereinafter referred to as UNIFEM.

54 UNIFEM, Not a Minute More: Ending Violence Against Women, 2003.

55 Atidoga D.F. 'The Jurisprudence of the Criminalization of Spousal Rape: Nigerian And English Laws In Perspective' Vol. 1 *EBSU Journal Of International Law And Judicial Review*, *op.cit* P. 273.

56 *Ibid*

57 *Ibid*

58 R.K Bergen, "Marital Rape" (WWW document) retrieved from the site of Applied Research Forum, National Electronic Network on Violence against Women, dated March 1999 last visited on June 22 2014.

59 *Ibid*

60 Passed in August 2005, entered into force in October 2006.

61 Huggler, "India Abolishes Husband's Right to Rape Wife" .*Independent* (London) October 27, 2006; See also South Asia Research Institute for Policy and Development, "India's Landmark Domestic Abuse Law Takes Effect" October 26, 2006.

62 Atidoga D.F. 'The Jurisprudence of the Criminalization of Spousal Rape: Nigerian And English Laws in Perspective' Op.cit 273.

63 *Ibid*.

64 "Anger over proposed change to Rape Laws". *The Nation Newspaper*, 14 February 2007.

65 Anti-Discrimination Committee takes up situation of women in Turkey, UN information service, 21 January 2005.

66 Rape and Sexual Offences Bill: Beyond the Illogical, Punitive Attitude. "*Express Newspaper*, 23 April, 2007.

67 AI.P, 'Thailand Outlaws Marital Rape", June 22, 2007, cited in Spousal Rape - Wikipedia encyclopedia, sup Ta, ite 8.

68 *Supra*,

69 (1992) 1 AC 599

70 Sir M. Hale, Op.cit.

The statement was not supported by any judicial authority but was believed to be a logical consequence of the laws of marriage and rape as historically understood.[71] Marriage gave conjugal rights to a spouse, and marriage could not be revoked except by private Act of Parliament - it therefore seems to follow that a spouse could not legally revoke consent to sexual intercourse.[72] The principle was repeated in East's Treatise of the Plea of the Crown in 1803 and in Archbold's Pleading and Evidence in Criminal Cases in 1922,[73] it was not until the decision in *R v Clarence*[74] that the question of exemption first arose in the English Court room. Clarence was determined on a different point, and there was no clear agreement between the nine judges on the status of the rule of exemption of spouse in the crime of rape[75].

The first attempted prosecution of a husband for the rape of his wife was in *R v. Clarke*.[76] Rather than try to argue directly against Hale's logic, the court held that, although the proposition may be sound, consent in this instance had been revoked by an existing order of court for non-cohabitation. It was the first of a number of cases in which the Court qualified the rule by delineated exemptions where the rule did not apply; notably in *R v. O'Brien*,[77] where the court held that the existence of a *decree nisi* has voided Hale's implied consent rule. Also in *R v. Steele*,[78] an undertaking by a husband to the Court not to molest his wife, was held to have nullified the exemption under Hale's rule. The existence of a formal separation agreement between a husband and wife also precludes the application of theimplied consent rule,[79] this therefore stripped the husband of his protective shield.

However, there are some instances of a husband successfully relying on the exemption as a defence to the charge of rape in England and Wales. The first was R v. Miller,[80] where it was held that, the wife had not revoked her consent despite having presented a divorce petition. The decision in Miller was followed in *R v. Kowalski*[81] and *R v. Sharples*.[82] Notwithstanding, the husbands in *Miller and Kowaiski* were convicted for assault or indecent assault. *R v R*[83] in 1991 was the first occasion where the marital right exemption was appealed against, as far as the House of Lords, and it followed series of cases where the marital right exemption was upheld.[84] Lord Keith of Kinkel who read the lead judgment, stated that the contortions being performed in lower courts in order to evade the marital right exemption were indicative of the absurdity of the rule, and held, agreeing with the earlier judgment of the Court of Appeal in same case, that "the fiction of implied consent have no useful purpose to serve today in the law of rape" and that the marital right exemption was a "common law fiction" which had never been a true rule of English law. R's appeal was accordingly dismissed and he was convicted for rape of his wife.

From the foregoing analysis of the development of case laws on marital rape from Hale's history of the Crown implied consent theory of 1736 which exempted husbands from criminal liability for rape committed on their lawful wives, through series of decided cases, to the landmark decision of the House of Lords in *R v R*[85] it is very safe to state that, by judicial activism through the instrumentality of case laws, Hale's implied consent theory is now a thing of the past as husbands in England and Wales can rightfully be convicted of rape committed upon their wives. It must be observed that there is no express statutory provision under English law that clearly states that husbands could be convicted for any act of forceful sexual intercourse, perpetrated on their wives. The Sexual Offences Act 2003[86] did not make such express stipulation, neither does any of the English Sexual Offences Acts before it. The Act however provide as follows:

A person (A) commits an offence if:-

(a) he 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.[87]

A careful perusal of the above provision indicates that (i) there is no express stipulation prohibiting marital rape, (ii) there is equally no express statement permitting marital rape, (iii) A person 'A' commits rape if he intentionally penetrates the vagina, anus or mouth of a person 'B' without the consent of 'B'. thus, since there is no statement as to marital exception like in the Penal Code,[88] it could therefore be interpreted to cover a situation where the person 'A' who penetrates the vagina, anus or mouth of the person 'B' intentionally without the person 'B' consent may be the husband of 'B' when 'B' the wife is not consenting to the act. From the above deduction, it therefore follows that Section 1(1) of English Sexual Offences Act 2003, could be interpreted broadly to criminalize marital rape like the House of Lords' decision in *R v R*.[89]

SPOUSAL RAPE UNDER NIGERIAN LAW

Spousal or marital rape is not known to Nigerian Criminal Justice System. Our Penal laws had never been interpreted to see the act of non-consensual sexual intercourse by a husband upon his wife as rape. This stand position may be predicated on the cultural heritage of the Nigerian people and their religious affiliation. Even though the Constitution of the Federal Republic of Nigeria 1999, clearly states that, "the government of the Federation or of a State shall not adopt any religion as a state religion",[90] it must however be noted that Nigerian secularism is very fluid, because there seems to be

[71] Spousal Rape, - History of the Exemption in England and Wales - Wikipedia Encyclopedia, available at pJ/en.wikipedia.org/wiki/spousal rape (last visited 22 June 2014).
[72] *Ibid*
[73] *Ibid*
[74] (18l8 22 QRD 23)
[75] Atidoga D.F. 'The Jurisprudence of the Criminalization of Spousal Rape: Nigerian and English Laws in Perspective' Vol. 1 *EBSU Journal of International Law and Judicial Review*, *op.cit*. p. 273.
[76] (1949) 2 All ER 448
[77] (1974) 3 All ER 663
[78] (1976) 65 Cr. APP.R. 22
[79] R v. Roberts (1986) Crim.LR 188
[80] (1954) 2 Q.B 282
[81] (1988) 86 Cr. App. R 339
[82] (1990) Crim. LR 198
[83] *Supra*
[84] *Supra*
[85] *Supra*,
[86] The Sexual Offences Act 2003 came into force on 20th November 2003. The Act is to make new provisions for sexual offences, their prevention and protection of children from harm and from other sexual acts and for connected purposes in England and Wales.
[87] S. 1 (1); Sexual Offences Act 2003.
[88] S.282(2); See also, s.128(2) SPC
[89] Supra, see also Atidoga D.F. 'The Jurisprudence of the Criminalization Of Spousal Rape: Nigerian And English Laws In Perspective' Vol. 1 *EBSU Journal Of International Law And Judicial Review*, op.cit P. 279
[90] S.45 of the Constitution of the Federal Republic Of Nigeria 1999.

ample recognition of two religions by state practices.[91] Our laws are therefore more often than not enacted in line with the cultural heritage and religion of the Nigerian people, our laws of rape inclusive.

In most Nigerian cultures, a wife is seen as the legitimate property of her husband,[92] like all other inanimate properties, the husband is invested with powers to deal with her as he deems fit. This means that a husband cannot be questioned on the means or methods he may decide to have sex with his wife, and the wife, being his property she cannot refuse to consent to the act. In the event that the wife refuses to give consent to the act and the husband proceeds to have his way forcefully, her lack of consent will elicit no consequence.

Under Islamic religion, which is one of the major religions in Nigeria, a woman cannot refuse to have sex with her husband except on grounds of ill health.[93] It is said by one of the had its that, a woman who turns down the sexual advances of her husband remained cursed by all the angels of Allah through such period of refusal.[94] It should also be noted that in Islam, Zina which includes rape, is defined as "sexual intercourse between a man and a woman without the legal relationship of husband and wife existing between them".[95] By this, it is therefore deducible that, sexual relationship between a husband and a wife is lawful, and however performed it cannot be Zina.

Under Christian religion, which is predominantly practiced in Nigeria, the body of the wife belongs to her husband, as such, a wife is enjoined not to deny her husband the pleasure of her body. Saint Paul's teaching in the Bible is instructive on this.[96] Even though religious injunctions may not have stipulated sanction on defaulters, it however has the force of shaping the way of life and thinking of a people, which may impact on their secular laws.

It is important at this point to examine our laws individually and see their level of tolerance to the issue of spousal rape.

(a) Penal Code Law

The Penal Code provides as follows: 282 (1) A man is said to commit rape who, save in the case referred in (2), has sexual intercourse with a female 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 believes herself to be lawfully married;
(e) with or without her consent if she is under fourteen years of age or of unsound mind.[97]

(2) Sexual intercourse by a man with his own wife is not rape if she has attained puberty.[98]

The subject of consideration is the provision of Section 282(2)[99] which is an exception to provisions of subsection (1) (a)-(e) of same section. The implication is that any person who is within the provision of subsection (2) of Section 282 will not be criminally liable for any act committed in contravention of the provision of subsection (1) (a)-(e) of same section. It follows therefore that the provision of subsection (2) has created marital exemption for the crime of rape under the Penal Code. This impliedly means that a man under the Penal Code cannot be guilty of raping his wife.

However, it must be observed that Section 282(2) of the Penal Code has a qualification. It states: "Sexual intercourse by a man with his own wife is not rape if she has attained puberty". It may mean that the exemption will only be enjoyed by a man who has forceful sexual intercourse with his wife who has attained the age of puberty. It may therefore follow that, a man who has non-consensual sex with his wife who has not attained puberty may be guilty of rape within the wordings and simple interpretation of Section 282(2) of the Penal Code. By this clear and logical interpretation of the wordings of Section 282(2) of the Penal Code, it may mean that a man can be guilty of raping his wife, if the wife in question has not attained puberty. The writers are however not aware of any case where such interpretation is brought to bear. If such case is presented before our courts, to interpret the provision of Section 282(2) otherwise will amount to extraneous importation, which will certainly defeat the noble objective of codification.

It is instructive to observe that, by the provision of Section 282(2) of the Penal Code, a lot of men who marry very young girls especially in the northern part of Nigeria can safely be convicted of raping their child-wives. This may be so because most of the child-wives might not have attained the age of puberty.

(b) Criminal Code Act

The Criminal Code Act provides as follows:

> *Any person who has unlawful carnal knowledge[100] of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman by personating her husband, is guilty of an offence which is called rape.[101]*

Unlike the provision of Section 282(2) of the Penal Code, the Criminal Code did not expressly mention the fact of marital exemption. In other words, the Criminal Code did not clearly mention that sexual intercourse by a man with his wife is not rape. However, the combine effect of the provisions of Section 357 and Section 6 of the Criminal Code may be of much

[91] According to Polusoga *op.cit*, the fact that we have National Mosque and Church at Abuja, the Federal Capital is indicative of state recognition of Christianity and Islam. The fact that in almost all public and states functions, prayers are offered in Islam and Christianity further raises question to the reality of Nigerian secularism. Public holidays on the days for religious festivities may be a tacit approval of the two religions as state religion. The proliferation of the Islamic Criminal Justice System (Sharia) in most Northern states puts Nigerian secularism to critical questioning.

[92] Chukkol, K.S. *The Law of Crime in Nigeria* (Zaria, A.B.U Press, 1988), p.193

[93] Khan, M.M. (Translation): Sahih-A1-Bukhari, Vol.7 p.93 cited in K.S. Chukkol, *Ibid* p.192

[94] *Ibid*

[95] Naseef, O. Encyclopedia of Seerah Vol.1 (London: The Muslim Schools Trust, 1982) p.772 cited in Y.Y Bambale, Crimes and Punishment under Islamic Law, (2nd ed). (Lagos: Malthouse Press, (2003), p.28.

[96] *Supra*

[97] *Supra*

[98] S. 282(1)(a)-(e) Penal Code.

[99] S.282(2) P.C

[100] *Ibid*

[101] S. 357 Criminal Code (hereinafter 'CC')

relevance in resolving whether there is marital exemption to the crime of rape under the Criminal Code or not. Section 6 of the Criminal Code provides as follows: 'unlawful carnal knowledge' means carnal connection which takes place otherwise than between husband and wife.

Since Section 357 of the Criminal Code defines rape as an unlawful carnal knowledge in the circumstances spelt out therein and section 6 of the same code defines unlawful carnal knowledge as the act of sexual intercourse that takes place otherwise than between husband and wife; it follows therefore that carnal connection between husband and wife is lawful, as such it cannot be rape.

By this, it means that the Criminal Code has provided marital exemption to the crime of rape. The exemption under the Criminal Code is wider than the marital exemption to the crime of rape provided for under Section 282(2) of the Penal Code. This is because the exemption provided under the Penal Code does not cover persons whose wives have not attained puberty. It may therefore be safe to state that marital exemption exist in full under the Criminal Code.

(c) Armed Forces Act[102]

The Armed Forces Act provides as follows:

A person subject to service law under this Act who has unlawful carnal knowledge[103] of a woman or girl without her consent or with her consent if obtained:-

(a) by force or by means of threat or intimidation of any kind; or
(b) by fear of harm; or
(c) by means of false and fraudulent representation as to the nature of the act; or
(d) in the case of a married woman by personating her husband.[104]

What we seek to do here is to examine the provision with magnifying lenses to determine whether marital exemption could be expressly or implied imputed into the provision. Like the provisions of the Criminal Code,[105] the Armed Forces Act[106] only punishes a person who has 'unlawful' carnal knowledge of a woman or girl. By the usage of the word 'unlawful', presupposes that there is a form of carnal knowledge that is lawful. The Criminal Code,[107] described unlawful carnal knowledge as carnal connection otherwise than between husband and wife. This impliedly means that carnal connection between husband and wife cannot be rape. As stated earlier, the combine effect of Section 357 and Section 6 of the Criminal Code by implication have created marital exemption to the crime of rape.

Unfortunately, the Armed Forces Act,[108] even though very similar to the provisions of the Criminal Code does not have any provision similar to the provision of Section 6 of the Criminal Code which defined the phrase 'unlawful carnal knowledge'. The consequence therefore is that the meaning of the phrase must be discovered elsewhere. It is however suggested that the meaning of the phrase 'unlawful carnal knowledge' as defined in the Criminal Code should also be adopted in the interpretation of Section 77 of the Armed Forces Act.

(d) Sharia Penal Code Law[109]

The provision of the Sharia Penal Code[110] is very similar with the provision of the Penal Code Law[111] except for very minor variations. However, subsection (2) of Section 282[112] and Subsection (2) of Section 128[113] have very important differences which determine the degree of both codes' tolerance to marital rape. The Sharia Penal Code provides in section 128 as follows:

(1) A man is said to commit rape who, save in the case referred in subsection (2), has sexual intercourse 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 was given because she believes that he is another man to who she is or believes herself to be lawfully married;
   e. with or without her consent, when she is under fifteen years of age or of unsound mind".[114]

(2) Sexual intercourse by a man with his wife is not rape.[115]

The subject of assessment here is specifically the provision of Section 128(2) which stipulates that sexual intercourse by a man with his wife is not rape. This provision is a clear expression of the draftsman's intention to create total marital exemption to the crime of rape. The Sharia Penal Code unlike the Penal Code, does not have limitation to marital exemption. Under the Penal Code, a man is only exempted from criminal liability arising from the act of nonconsensual sexual intercourse committed upon his lawful wife, if such wife had attained the age of puberty.

Based on the foregoing assessment of our laws - the Criminal Code,[116] the Penal Code,[117] the Armed Forces Act,[118] and the Sharia Penal Code,[119] it is imperative to state that marital or spousal rape is alien to our criminal justice system, the position of Section 282(2) of the Penal Code which gives partial exemption notwithstanding. This is because the said section had never been interpreted as recognizing marital rape in our laws. It must be further stated that, the fact of attaining puberty in our time, is more often than not a condition necessary for a valid marriage. In the northern part of the country where child marriage is said to be prevalent, Islam which is the dominant religion may restrain the child-wife who

[102] Cap. A20 LFN 2004
[103] Emphasis mine
[104] S.77 Armed Forces Act (hereinafter 'AFA')
[105] S.357
[106] S.77
[107] S. 6
[108] S.77
[109] Zamfara State Sharia Penal Code Law, 2000, which was introduced by Gazette No.10, Vol.3 of 5t1 June 2000.
[110] S. 282
[111] S. 128
[112] Penal Code
[113] Sharia Penal Code (hereinafter 'SPC')
[114] S. 128(1) (i)-(v) S.P.C
[115] S. 128(2)S.P.C
[116] S. 375
[117] S. 282
[118] S. 77
[119] S. 128

must have been molested from complaining. However, it must be observed that, the Penal Code[120] ought to have been precise and clear like the Sharia Penal Code.[121]

CONCLUDING REMARKS

Marriage is the legal union of a man and a woman to the exclusion of all others. At marriage ceremonies, the couples are charged to love and cherish each other, in sickness and in health, for richer or for poorer, for better or for worse, till death do them part. One of the grounds for the dissolution of marriage, is the inability to consummate the marriage, consummation means having sexual intercourse. S.282 (2) of the **Penal Code** stipulates that sexual intercourse between a man and his wife is not rape. S. 357 of the **Criminal Code** defined rape as unlawful carnal knowledge of a woman or a girl without her consent, marriage is a lawful union, as such sexual intercourse with a lawful wife is not rape. S. 77 of the **Armed Forces Act**, only punishes a person who has unlawful carnal knowledge of a woman or a girl.

By the usage of the word unlawful presupposes that there is a form of carnal knowledge that is lawful, the **Criminal Code** described unlawful carnal knowledge as a carnal connection otherwise that between husband and wife. In the same vein, S.28(2) of the **Sharia Penal Code**, provided that sexual intercourse by a man and his wife is not rape.

Even though marital rape is fast becoming a crime in a lot of countries, it is not yet the law in Nigeria and some African countries. Even in those countries where spousal rape is criminalized, such cases are still not taken seriously. It is difficult to get prosecutors, judges and law enforcement systems to take marital rape seriously. Within domestic violence, sexual violence receives far less attention than it should. The victims do not want to testify because they do not want their husbands to go to jail.[122]

According to Atidoga,[123] in a research sponsored by the American National Institute for Justice and Centre for Disease Control and conducted by National Coalition against Domestic Violence in the mid 1990s suggested that marital rape accounts for 25% of all rapes, and that 1/3 or ½ of battered women are raped by their partners at least once.[124] The same study estimated that only 7.5% of the cases of wife rape were criminally prosecuted. One reason that principally contributes to low prosecution rate is that women sometimes do not view the attack as criminal offence.[125] Notwithstanding these statistics and the clamour by human rights agencies for the need to criminalize marital rape, it is imperative to state that in Africa, the fact that a woman cannot refuse to consent to sexual intercourse with her husband still holds sway. To hold otherwise, will be an affront on the dominance of an African man, and a diffusion of his culture and his civilization.

Conclusively, even at the risk of repetition, it is our view that, in most Nigerian cultures, a wife is seen as the legitimate property of her husband,[126] like all other inanimate properties, the husband is vested with powers to deal with her as he deems fit. This means that a husband cannot be questioned on the means or methods he may decide to have sex with his wife, and the wife, being his property cannot refuse to consent to the act. In the event the wife refuses to give consent to the act and the husband proceeds to have his way forcefully, her lack of consent will elicit no consequence.

Under Islamic religion, which is one of the major religions in Nigeria, a woman cannot refuse to have sex with her husband except on grounds of ill health.[127] It is said by one of the hadiths that, a woman who turns down the sexual advances of her husband remained cursed by all the angels of Allah through such period of refusal.[128] It should also be noted that in Islam, Zina which includes rape, is defined as "sexual intercourse between a man and a woman without the legal relationship of husband and wife existing between them".[129] By this, it is therefore deducible that, sexual relationship between a husband and a wife is lawful, and however performed it cannot be Zina.

Under Christian religion, which is predominantly practiced in Nigeria, the body of the wife belongs to her husband, as such; a wife is enjoined not to deny her husband the pleasure of her body. Saint Paul's teaching in the Bible is instructive on this.[130] Even though religious injunctions may not have stipulated sanction on defaulters, it however has the force of shaping the way of life and thinking of the people, which may impact on their secular laws.

From the foregoing, that fact remains that in Nigeria, a man cannot be guilty of the crime of rape against his wife, as the **Criminal** and **Penal Codes** stands today, the only way spousal rape can be criminalized in Nigeria, is to amend the **Penal and Criminal Codes**. Now that the national conference is ongoing, it is our suggestion that the advocates of the criminalization of spousal rape should send such proposal to the national conference. Until that it done and approved, a Nigerian man cannot be convicted of raping his wife.

120 S 282(2)
121 S. 128(2
122 S. McLaughlin, "Marital Rape Trouble Courts: Cases Aren't taken seriously Advocates say", available at http:J/www.marriage.about (Last visited 22 December 2008).
123 *Op.cit.*
124 *Ibid*
125 *Ibid*
126 K.S Chukkol, The Law of Crime in Nigeria (Zaria, A.B.U Press, 1988), p.193
127 M.M. Khan, (Translation): Sahih-A1-Bukhari, Vol.7 p.93 cited in K.S. Chukkol, *Ibid* p.192.
128 *Ibid*
129 Naseef, O. (1982). Encyclopedia of Seerah Vol.1 (London: The Muslim Schools Trust, 1982) p.772 cited in Bambale, T.T. *Crimes and Punishment under Islamic Law*, (2nd ed). (Lagos: Malthouse Press, (2003), p.28.