

## LEGISLATING MARITAL RAPE IN NIGERIA: ISSUES IN ISLAMIC AND CUSTOMARY LAW MARRIAGES

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### ABSTRACT

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#### **Keywords:**

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The paper focuses on an issue that concerns a marital rape and its legality in Nigeria. One of the primary objectives of international cooperation is to promote and enhance the welfare, wellbeing and security of citizens of state parties, thus, the emergence and coinage of the term marital rape as an offence by the international legal system architecture sought to define domestic justice and redefine marital relationships within the Lens of gender equality and the promotion, respect and fulfilment of women Human Rights, which was largely influenced by the international Human Rights Law. This paper seeks to appraise this term with a view to determine its application within the following parameters; the legal status of marriage in Nigeria? What type of marriage? What type of force would amount to rape? And in what circumstance? How can the prosecution prove rape against the husband/accuse? It is the view of this paper that the offence of marital rape will certainly remain a hollow

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expression as far as enforcement is concern. But the question to ask is, what are the Nigeria's commitments to relevant international instruments having signed and ratified them? The methodology adopted by the paper is doctrinal approach method wherein both primary and secondary sources of data were analysed, particularly the local laws and other relevant documents This paper finds that legislating marital rape is unrealistic and aggressive to husband conjugal rights, with regard to Islamic and customary law marriages being the predominant forms of marriage in Nigeria.

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## INTRODUCTION

The focus of the paper is to discuss marital rape and its legality in Nigeria. The advancement of women Human Rights and fundamental freedom has engaged the United Nations Organization since 1946 when the committee on the status on women was established and subsequently the promulgation of the international bills of Rights. This is an informal description of the concern issues such as Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR), and The International Covenant on Economic, Social, and Cultural Rights (ICESCR).

However the first women Human Rights treaty on the Convention on the Elimination of all forms of Discrimination against Women, (CEDAW), was adopted in 1979, while the first comprehensive instrument to declare against violence to women is the Declaration on the Elimination of Violence against Women, (DEVAW), Other regional instruments applicable to the theme of this paper is the Protocol to the African Convention on Human and Peoples' Rights on the Human Rights of Women, which was adopted by the second ordinary session of the general Assembly of the African Union on the 13 September 2000 and was entered into force on 25 November 2005. Worthy of mention is the fact that all of the above mentioned instruments are applicable to Nigeria.

Marital rape is specie of domestic violence and domestic violence has been recognised as a global pandemic which Nigeria is not an exception. Although Nigeria has just signed in to law the Violence against Person Prohibition Act 2015, the National Assembly passed it on 5<sup>th</sup> May 2015

and former President Jonathan Goodluck signed it on 21<sup>st</sup> may 2015. However, the Nigeria's pre-existing penal laws i.e. Criminal Code and Penal Code have elaborately and adequately contained provisions on Rape only and marriage has always be an exemption to the offence of rape. Nigeria adopted federal arrangement because of it heterogeneity and pluralism in 1954, pertinently to harmonise all contending interest within one political entity there were over 250 ethnic groups with over 500 languages, these were predominantly Hausa/Fulani in the North, Yoruba in the West and Igbos in the East. Nigeria being the creation of British colonial expedition has had contact with the Arabs about hundred years earlier, as a result Islam was introduced, this in addition to the indigenous customary law of the inhabitants. Consequently ethnic, legal and religious pluralism characterised the main feature of Nigeria till date. The operation of the plural legal system make the concomitant application of English law, side by side with customary law and Islamic law which has to a large extent confused the identity, rights and obligations of citizens inter-parties or within private domain, and not suitable for the development of Nigerian law. This paper seeks to interrogate the concept of marital or spousal rape within two opposing realities, the legality and legitimacy of marriages in Nigeria and the obligations of Nigeria under the concept of "Due Diligence." And apparently to argue that marital rape cannot be enforced in Nigeria and to wish otherwise is destroy marriages in Nigeria.

### **DEFINITIONS AND MEANING OF BASIC TERMINOLOGIES**

The paper will now discuss definitions and fundamental terms in relation to the subject matter for the purpose of discussion and understanding.

#### **Marriage**

Generally speaking, marriage is the act of marrying that confers status on a union of a man and woman, for some legal purposes, while according to Lord Penzance it is the voluntary union of one man and one woman to the exclusion of all others. But according to Mohammed Niaz, it is a union of husband and wife approved by the following agencies; religion, society, morality and Law. Accordingly Westermarck defined it as a relation of one or more men and one or more women recognized by the law and custom having some rights and duties in case of having children.

However, these definitions have not covered the situation in Nigeria, because there are two types of marriages in Nigeria, although this paper argues that there are three types of marriages in Nigeria which includes; statutory marriage, Islamic marriage, and customary marriage. Thus the above definitions have not consider both Islamic form of marriage and Customary form of marriage which are both valid, lawful and legitimate

union recognised by law in Nigeria. The law does not make express reference to Islamic marriage this however, is not an omission but the statute has classified Islamic law to be customary law. But this controversy has since been laid to rest by plethora of judicial decisions.

In consequence to the varying perception regarding the definition of marriage above and in consideration of the heterogeneous nature of Nigeria and in view of its plural legal system, the types of marriage should be discussed essentially to determine its binding implication with reference to validity and underlining purpose. Of course marriage is universally recognised as a social institution between man and woman that sanctify sexual intercourse and breed legitimate children.

### **Rape**

The generic term of rape is “**Raptus**” which means violent theft of either person or property, it can also be used to refer to woman abduction or sexual molestation. It should be pointed out that the definition of rape in both Criminal Code and Penal Code is the same except of some semantic distinction. Rape is defined as unlawful sexual intercourse with a woman or girl without her consent, or where her consent is obtained, but it was obtained by force or by means of threats or intimidation or by fear or harm or by means of false or fraudulent representation of the nature of the act or in case of married woman by impersonating her husband, is guilty of rape.

Thus, while the Penal Code used the term “sexual intercourse” in its definition of rape, the Criminal Code uses the term “unlawful carnal knowledge” which means the same thing. But Penal Code provides some addition where the prosecutrix consented but she is under the age of fourteen or of unsound mind is still amount to rape. Under the Criminal Code it is punishable with life imprisonment and Penal Code provide for imprisonment which may extent to fourteen years.

However the violence against person prohibition Act has radically change the definition of rape by providing some new ingredients, thus rape is defined as where he or she penetrate the vagina or anus or mouth of another with any part of his or her body or anything else and the other person does not consent. Or where though consent was obtained but vitiated by force, fraud, threats, fear of harm, intimidation, or fraudulent misrepresentation as to the nature of the act, or where some substance or additives were used, or impersonating a spouse.

Thus, what used to constitute the offence of rape in the pre-existing statutes is not what it is now, whilst in the earlier laws, rape is only committed by a male organ slightly touch or penetrated the vagina. But the current position of the law is that, woman can commit the offence of rape, although it has to be by penetration it is not necessary to be by genitalia, even by anything else and that it can be a penetration in to mouth or anus.

It has maintained the position of consent and marital exemption, but consent could be vitiated if some substance used to influence it that is not voluntarily obtained. It could be said that this definition is largely influenced by feminist narratives.

### **Marital rape.**

This was created by the declaration for the elimination of all violence against women, in its definition of what constitute violence against women. This instrument did not defined the term marital rape, but marital rape otherwise known as spousal or intimate partner rape is a form of non-consensual sexual intercourse in which the perpetrator is victim spouse or intimate partner. It is also defined as a non-consensual act of violent perversion by a husband against his wife where she is physically and sexually abused; it could be referred to unwanted sexual intercourse by husband on his wife by force, threat or use of force or physical violence or when she was unable to give consent. Further, it could be the wife that might force the husband. This definition has comprehensively captures the essence and theme of this paper and for convenient is hereby adopted.

## **TYPES OF MARRIAGES IN NIGERIA**

There are three types of marriages in Nigeria; Statutory marriage, marriage under Islamic law, and customary law marriage. These are inherently different to each other in both form and substance.

### **Statutory marriage**

This type of marriage is provided for by marriage Act and Matrimonial causes Act. It is usually monogamous marriage between one man and one woman to the exclusion of all others, and shall come in to existence upon issuance of Registrar's certificate predicated on due notice and publication, or by special licence issued by the minister of internal affairs, and sometimes is referred to as Christian marriage. Thus, a Registrar of marriage is appointed by the President pursuant to his powers of creating a marriage district for each Registrar so appointed to manage, equally important is the fact that no age limit is provided by the act but where one of the parties to the propose marriage is under 21 years then parental consent must be obtained. It is very significant to emphasise that once the Registrar's certificate is obtained the marriage must be celebrated within three months otherwise the intended marriage becomes void. But marriage may be celebrated in the marriage registry, or in a church duly licensed or in any other place as indicated in the special license.

## **Marriage under Islamic Law**

Under Islamic law marriage is a sacred institution based on the spiritual nature of love and affection which is beyond the imperatives of contractual relationship between two individual. There are elaborate injunctions regarding marriage in Islam which have fortified marriage in its entire ramification. The Glorious Qur'an exhorts Muslim in the following verses;

“(Then) marry of the women, who seem good to you”. And  
“Lawful unto you are all beyond those mentioned, so that ye seek them with your wealth in honest wedlock, not debauchery”.

In the same vein the messenger of Allah (peace and blessings of Allah be upon him) declared, “When a man has got married he has made his religion half perfect, Then let him fear Allah for the remaining half”.

Thus in Islam marriage is obligatory only to he/she that cannot restrain him/herself from temptation of adultery, accordingly marriage in Islam is subjected to three fundamental principles and profoundly guided by some preliminaries, and these principles are:

- 1) Marriage guardian (wali),
- 2) Legality of marriage between the prospective couple, and
- 3) The formal statement of offer and acceptance.

While the preliminaries include; Age of marriage which in Islam is the attainment of puberty, free consent of the couple especially the lady, Mahr which is loosely translated to mean dower or dowry. Islam has therefore imposed some definite restrictions and limitations on the institution of marriage that it is regulated in considerable dimension. It is a solemn covenant not just between the parties, but with Allah (s.w.t).

## **CUSTOMARY LAW MARRIAGES**

Customs might be similar but not the same as there are more than 250 ethnic origins in Nigeria and each proudly lay claim to its custom and traditions, a particular customary law is always limited and applicable to a particular tribe or community. Thus our ensuing discourse will be predicated on the general and common customary practices. Customary marriages are potentially polygamous and essentially a union of man and woman for the duration of their lives but involve a wider association between two families or sets of families. One of the fundamental feature of customary law marriages is the payment of bride price otherwise called bride wealth and its payment is of considerable significance and wider and multiple implication, its sanctify and legitimised the marriage contract. It was also consider as compensation because giving away a daughter in

marriage is deemed a service loss to the family, and to other communities payment of bride price symbolises commodification and sale of daughters to the family of the groom.

### **PURPOSE AND OBJECTIVE OF MARRIAGE**

The primary aim of marriage flow from the foundation upon which the marriage is build, but there is a consensus by all the three types of marriage on one objective as the purpose and function of marriage which is the legalisation and sanctification of sexual intercourse between the husband and wife chiefly for procreation. Thus under customary law marriages once bride price is paid the husband expect from the wife perpetual obedience and servitude, the wife must obliged the husband's either excessive or liberal sexual demand and in whatever circumstances whatsoever, even against medical advice, if he demand it she must obliged. The woman have no excuse no matter reasonable it might be not to oblige the husband sexual demand and such refusal will result in to either beating or forceful sexual intercourse, accordingly the U.N report of 2006 reveals that one of the prevalent causes of HIV/ AIDs among married women in Guinea-Bissau and Uganda is the husband forceful sexual intercourse with their wives and when the wives demand safer sex by the use of condom or demand medical diagnostic they either got beating or be forced to have sex, the report further reveal that the wives cannot ask for divorce for fear of refund of bride price or stigmatisation as a result of cultural practices.

Marriages under Islamic law has elaborately imposed on the wife the duty to submit to her husband restricted sexual demand, these restrictions are when she is in the state of Ihram for hajj, when she's observing her monthly period (mensuration), when she's fasting the month of Ramadan or voluntary fasting with his consent, otherwise the husband has legitimate and unlimited access to sexual intercourse with his wife. Also after child birth till the stoppage of the blood, but more significantly it is prohibited for the husband to enjoy sexual intercourse with his wife through the anus. Apparently under Islamic and Customary law marriages conjugal rights is pertinently based on the duty of the parties to cohabit and essentially for sexual gratification and companionship, but interpreting this duty under statutory marriage the court observed that, cohabitation does not necessarily means the husband and wife living together physically under the same roof, but subject to the overriding circumstances of the parties.

### **WHAT AMOUNT TO MARITAL RAPE?**

Rape within marriage is committed when a husband uses force, threat of force or physical violence on his wife to enjoy sexual intercourse as a

result of wife refusal to consent to his sex demand. The law on non-consensual sex is essentially committed by penetration in to vagina, anus or mouth without consent or consent was vitiated by force, coercion, or intimidation, or where a substance is used to take away voluntariness. It could be inferred that the use of substance here indicates the administration of any liquid, powdered, or gaseous psychotropic substance or chemical which is capable of intoxicating, hallucinating, heavy drowsiness or rendering the person in to anaesthesia. It is very significant to emphasise that it still rape if a person either use his organ, any part of his body or anything else in penetrating either vagina, anus or mouth of another, Although the language of the statutes is gender neutral but favourable to women because the law does not envisage a situation where a woman take the hand of man and penetrate her vagina, the question is who is raped?

### **CAN A HUSBAND RAPE HIS WIFE?**

The law has always exempt the husband of a legitimate and legally binding and subsisting contract of marriage from the offence of rape, this position of law was based on considerable justification by the theory of unity of person; that upon marriage the husband and wife are one and same person and cannot be guilty upon himself, In addition, the implied consent theory postulates that due to matrimonial contract the wife has consented to sexual intercourse, the proprietary right theory further hold that the ownership of the wife belong to the husband and so he cannot be guilty over what he own. These theories were justified by Sir Mathew Hale when he observed;

“The husband cannot be guilty of rape committed by himself upon his wife, for by their natural matrimonial consent and contract the wife have given up herself in this kind in to her husband which she cannot retract.”

This position of law has radically changed as a result of increasing feminist advocacy for gender equality and some elaborate international and regional instruments, whereof in England Lord Keith observed;

“Marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband and that the proposition that by marriage a wife gives her irrevocable consent to sexual intercourse under all circumstances. . . . (is) quite unacceptable.”

The above judicial pronouncement heralded the equality principle in marriage and consequentially make husband criminally liable to the offence of rape. Accordingly the law reform commission in England in its



report recommend to the parliament the removal of marital exemption to the offence of rape:

“The removal of husband immunity is not creation of a new offence, it is a removal of a common law fiction which has become anachronistic and offensive. There is no immunity for husbands within the law of rape, they being subject to the same law as any other man who has intercourse with a woman without her consent.”

Thus a husband can be guilty of raping his wife became the law in Britain and gradually United Kingdom followed by the Nordic countries, France, United States, Spain, Germany, there are over Ninety six countries in the world that criminalises marital rape.

### **THE LAW ON MARITAL RAPE IN NIGERIA**

Although the Violence against Persons Prohibition Act, 2015 (VAAP) is only applicable to the Federal Capital Territory, Abuja therefore the pre-existing penal laws Criminal Code applicable to states in the Southern Nigeria and the Penal Code applicable to states in the Northern Nigeria still applies continuously as valid and subsisting laws respectively. The issue of territorial jurisdiction is constitutional, the federal government can only legislate on matters that are contained in the exclusive legislative list, thus, women and family rights are not within its ambit. However, it is arguable whether marital exemption is retained if the following words were given their literal meaning

“..... In the case of a married persons by impersonating his or her spouse”. Thus, giving these words their literal and logical interpretations therefore, it means that a situation where a third party fraudulently represent himself to be the husband or wife of the victim, as a result penetrate the vagina, anus or mouth of the victim is criminally liable for the offence of rape. The law therefore does not exculpate the husband in non-consensual sex, neither exonerate the wife if she inserts her finger or use anything or part of her body and penetrate the anus or mouth of her husband without his consent, or the consent is vitiated with fraud, threat of force or by administering any substance which take away voluntariness on the part of the husband.

Furthermore, assuming without conceding the above wordings under reference is marital exemption it can only exonerate the offender in rape, but where the above scenario play out he or she will be criminally liable for coercion, or fear of physical injury, or offensive conduct. Thus, criminally liable in other offences under the Act.

## ENFORCEABILITY OF MARITAL RAPE IN NIGERIA

There is no available statistic to determine the percentage of couples who contracted statutory marriages in Nigeria, but from the available literature many contracted validly acceptable marriage under law and custom of their ethnic origin, subsequently blessed the marriage in the church or contracted another in the marriage registry, consequently its two marriages over one couple. The reverse of this scenario is criminal, that is where couple married under the marriage Act and there after contracted another either between them or with third party while the statutory marriage is valid and subsisting is call “Bigamy” criminal and punishable. Accordingly, majority of marriages in Nigeria is either under Islamic law or customary law, a wife under customary law is a chattel and can be inherited by the husband family, the husband therefore exercises proprietary right over her. While under Islamic law the husband and wife are equal before the law but she is under the protection of husband.

The crux or paradox is that the other two marriages contracted under Islamic law and under customary law are independent, autonomous and largely regulated by an inherent legal system that elaborately determine its formation, subsistence and termination, and in like manner determine the rights of spouses thereto. Whereas this concept is alien to them, and to legislate the imposition or proposition is to do violence to their sanctity or legitimacy. This is not to say that the husband that engages in coercive or non-consensual sexual conduct will be liable in assault and the like, but the application of the term rape is contextually exceeding the acceptable limit of language to use in the determination of marital relationships.

## THE CONCEPT OF DUE DILIGENCE

Otherwise called state responsibility is the positive obligation imposed on states parties to ensure the implementation and application of all covenant rights in favour of individual or its citizens. The implication of the test of due diligence standard is once states parties have signed ratified an international or regional treaty it has moral and legal obligation to fully discharge it. This was demonstrated in the case of *Sani Abacha v Gani Fawahinmi* where the Supreme Court of Nigeria gave its construction and articulation of the provisions of section 12 of the Constitution of the Federal Republic of Nigeria and held inter alia that: An international treaty to which Nigeria is a signatory does not ipso facto become a law enforceable as such in Nigeria. Such a treaty would have the force of law and therefore justiceable only if the same has been enacted into law by the National Assembly. The court further held that while the Constitution has

primacy over treaties, treaties are of the same status with domestic legislation.

The question now is whether this positive obligation extends to violation of women's human rights within private sphere which Nigeria has signed, ratified and domesticated in its domestic laws? Of course is in the affirmative, the state has exclusive obligation toward protecting, promoting and fulfilling women's human rights either in the private or public domain. Indeed this is deemed 'core provision' that any reservation towards the entrenchment of dichotomy between private and public violations is unacceptable and contrary to the purposes and objectives of the treaty i.e, CEDAW and incompatible with international law. Conversely, Nigeria has therefore a binding obligation to promote, protect and fulfil women's human rights, and how to do that? Is to prevent, investigate, prosecute, punish and compensate the victim of violation of human rights where ever it may occur.

Although, in Nigeria all treaties international or regional are of persuasive consideration unless if constitutionally baptised, but the apparent conflict has seemingly established Nigeria's moral obligation to respect its binding international or regional commitments.

## FINDINGS

The finding of the paper reveals that in Nigeria, there exist three different sets of marriage and enforced. Currently, operated with a distinct identification and further finds that the word rape has different position, particularly in Nigeria because it has been identified by number of local laws existed and its application differs, for instance the recently enacted law by the Nigerian government on Violence against Person Prohibition Act 2015 (VAPP) which is only applicable in the Federal Capital Territory (FCT), Abuja, thus defines the limited jurisdiction applicable of the law whereas the remaining States in the Federation of Nigeria have a choice to either legislate on it or otherwise. Nothing can be further from the truth, rape is a criminal offence but it has a different position in the matrimonial platform, looking at the conventional practice and reference to our extant laws, rape is thus describe as where spouses engage in non-consensual sexual intercourse. As rape is considered to be non-consensual thereby involves violence, force and other means. Though the position of Islamic law does recognised marital rape and one factor in Nigeria is that in most of the Northern State, marriages under Islamic law is considered to some extent as customary marriage while in other southern part of the country apply customary marriage and English marriage independently. It has been found that the application of the concept of marital or spousal rape is impossible as far as Islamic and customary law marriages in Nigeria are concerned, but Nigeria has entered and undertook an international

commitment which she has a duty to discharge regardless of any domestic considerations. Therefore the paper recommends for the symmetrical and asymmetrical legislative competence applicable to Nigeria and further demonstrated the increasing need for constitutional reforms and amendments. Furthermore, there is also the need for the federal government to devolve more contents powers to states; the unitary disposition of the operations of government is undermining the effectiveness and efficiency of democratic principles. More concern issue is the discovery that the pre-existing criminal statutes still applies side by side the newly enacted law Violence against person (Prohibition) Act 2015 which has been identified to be insufficient in containing the enormity of the problem, and cannot regulate Islamic and customary law marriages.

### **CONCLUSION**

Legislating marital or spousal rape is an affront against marriages that are based of Islamic law and those based on customs and traditions of inhabitants of Nigeria. It is the view of this study that marriages that are contracted under Islamic law and those under customary law are independent and autonomous and are largely regulated by an institutional legal order, inherently self-determine and self-sustaining. Whereas those human rights treaties were accented to and ratified by representatives of Nation states on behalf of their respective governments, and not as representatives of Nigerian Muslims nor Native inhabitants. Furthermore, extending international treaties to regulate and determine the function, operation and application of these two marriages is exceedingly aggressive and interfering, thus, statutory marriages are creation of statutes it can then be amended by a treaty.

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