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1.0 INTRODUCTION

Rape or sexual abuse is commonly viewed in the context of stranger rape. It simply implies intercourse committed without a person's consent and/ or against a person's will. It is usually violent. However, rape can and do occur between married couples. Husbands have continually raped their wives under the guise that sexual intercourse is part of marriage. This is because some countries permit or even subtly encourage husbands to rape their wives as a result of the marital exemption to the crime of rape. However, there is a growing trend that the marital exemption to the meaning of rape is unjust and has no place in a civilized society, especially with the hues and cries on fundamental human rights.

The paper attempts an analysis of rape within marriage, especially as a violation of the rights of women who as wives are almost always the victim of marital rape. Also, perspectives on the two dominant religions in Nigeria will be analysed. Recommendations will be made at the end of the paper on why Nigeria should have the growing list of countries that have criminalized marital rape.

1.1 HUMAN RIGHTS

The conception of 'rights' owe its antecedents to the school of social contractarians which found its earliest advocates in the writings of John Locke¹. Locke imagined an actual social contract between individuals and the state at the setting up of civil society in which citizens in order to secure the protection of their property handed over certain powers to the government in return for the guarantee of certain rights to lives, liberties and estates.

Thus, Locke introduced the idea that the overriding purpose of the state is the security and protection of its citizen's basic liberties.²

However, human rights as we have it today is a collective struggle by freedom loving people to put an end to or minimize arbitrary use of powers by kings, lords e.t.c. of those days. For example, in Italy, Innocent II initiated an inquisition which tried some offences like blasphemy and heresy.³ The ecclesiastical courts which tried these offences were practically an instrument of coercion, duress and vendetta by the king. The punishments were brutal and inhuman which inevitably led to rebellion by the people. In England, barons rebelled against King John which eventually led to the formulation of the first written constitution in modern times known as the magna carta¹²¹⁵.⁴

Human rights have since found expression in several documents of universal application.⁵

In Nigeria, prior independence in 1960, a commission of enquiry set up by the colonial government headed by Sir Henry Willink recommended the inclusion of some rights in the constitution of the country. These recommendations were accepted and included in the first independent constitution of Nigeria. Subsequent constitutions in Nigeria have since provided for human rights known as fundamental human rights.⁶ Right to family life is a fundamental right in the constitution of Nigeria and in it is embedded right to family life.

1.2 HUMAN RIGHTS, MARRIAGE AND SEXUAL RELATIONS

Marriage is commonly defined as a union of a man and woman⁷. However in view of economic development, most countries now define marriage in gender neutral terms as a union between two people

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¹ John Locke *The Second Treatise of Government* 1968

² Helen Fenwick *Civil Liberties* 2nd edition. (Cavendish Publishing Limited, London) 1998 page 4

³ Odinkalu C.O *Human Right Law & Practice*, Vol 1 no2 (Nigeria Civil Liberties Organisation) 1991, p.150

⁴ Bradley W.W *Constitutional and Administrative Law* 10th edition (Longman Group FE limited) Hong Kong p.93

⁵ Examples are the Universal Declaration of Human Rights 1948, United Nations Human Rights Treaties in Africa 1996

⁶ See cap IV 1999 constitution of the Federal Republic of Nigeria

⁷ E.I Nwogugu *Family Law in Nigeria* (Heinemann Educational Books (Nigeria) Limited) Ibadan 1990 pg xxvii

⁸ On September 7, 2007 by a vote of 22-15, the California State Senate approved the Religious Freedom & Civil Protection Act extending civil marriage to gay and lesbian couples. The legislatures of Netherlands in 2001 and Belgium in 2003 extended marriages to same sex couples.

of the reasons for this is that the meaning of marriage has been complicated by the existence of hermaphrodites and pseudo hermaphrodites. Secondly, the advancement in medicine through cosmetic surgery has made sex change possible, and homosexual marriages are being recognized across the world.⁹

For the purpose of this paper, marriage in the context of a union between a man and a woman will be examined since the purview of the paper is on women's right.

A marriage essentially is like an ordinary contract with rights and obligations on both parties.¹⁰ However, unlike ordinary contracts, the parties can not of their own fix the detailed terms of their contract for example, the parties to a marriage cannot of their own will dissolve it.¹¹ Besides, capacity to marry is not to be equated with the general capacity to make a contract and some unique formalities are required in the case of a marriage.¹²

Sexual intercourse is generally regarded by many cultures as a conjugal right.¹³ The Quran 55-6 says:

'...And lawful for you are chaste believing women and chaste women from among those who are given the book before you when you give them their mahar, contracting valid marriage and not committing fornication...'

The bible¹⁴ provides:

'... needless, to avoid fornication, let everyman have his own wife and let every woman have her own husband...'

In fact, in statutory marriages, failure to consummate a marriage either as a result of incapacity or willful refusal is a ground for declaring a marriage to be voidable.¹⁵ It has been stated that failure to consummate, whether it be because the respondent is unable or unwilling to have sexual intercourse, deprives the marriage of what is normally regarded as one of its essential purposes.¹⁶

This is probably fuelled by the conservative conception of marriage purpose as child bearing further strengthen the presumption that sexual intercourse as a conjugal right. Sexual intercourse is in fact one of the effects of marriage¹⁷ and the duty to have mutual sexual intercourse does not terminate with the consummation of marriage, it continues to be effective throughout the duration of the marriage.

2.1 MARITAL RAPE

It is practically impossible to discuss rape¹⁸ within the context of marriage without discussing domestic violence. This is because marital rape is a form of domestic violence.

The term violence is often used in two senses. In its narrower meaning, it describes the use or threat of physical force against a victim in the form of assault or battery. But in the context of family, there is also a wider meaning which extends to abuse beyond the more typical instances of physical assault to include any form of physical, SEXUAL or psychological molestation or harassment which has a serious detrimental effect upon the health and well being of the victim, albeit that there is no violence involved in the sense of physical force.¹⁹

According to Edwards²⁰:

'Domestic violence characteristically includes acts of physical and mental cruelty progressing from a slap or a shove to the more extreme like strangulation, attempted murder and murder. The prefix domestic serves to neutralize the full horror, viciousness and habituation of violence.'

No doubt marital rape comes within the ambit of domestic violence as evident from the meaning of domestic violence given. The violence stems from lack of consent and not necessarily the sexual act itself.

So why would a husband rape his wife. Some of the likely causes of marital rape are highlighted below.

⁹ Corbett v. Corbett (1971) p.83

¹⁰ It is immaterial the type of marriage, whether the marriage is a civil marriage or customary marriage; although in customary marriages the rules creating rights and obligations are uncertain and undeveloped.

¹¹ Moss v. Moss (1897) p.263, 267

¹² L.B Curzon *Family Law* 2nd edition (Cavendish Publishing Limited) Great Britain 1997 p.16

¹³ <http://en.wikipedia.org/wiki/spousal-rape>

¹⁴ 1 Corinthians 7-2, Holy bible Today's King James Version Bible First Ltd, Great Britain, 2002

¹⁵ Section 12(a) (b) Matrimonial Causes Act 1973

¹⁶ S.M Cretney *Principles of Family Law* (Sweet & Maxwell) London 1984 p.70

¹⁷ Nwogugu op.cit pg 63

¹⁸ Also referred to as sexual abuse in this paper

¹⁹ Law Commission Working Paper No 207 Domestic Violence & The Occupation of the Family Home (1992), London HMSO

²⁰ Edwards *Sex, Gender and the Legal Process* (Blackstone Press) London, 1996 p.180

PATHOLOGICAL CAUSES:

This is as a result of the husband being mentally ill or disturbed. This could be partly as a result of alcohol or substance abuse. It can also be traced to childhood. Parents behave differently towards their sons and daughters. This behaviour and the expectations they have of the child imprints a distinct pattern of behaviour in the child.²¹ The male child is usually revered especially in Africa and a man is brought up indulged, spoilt child incapable of taking care of himself but at the same time is aggressive and seeks to be in control.²² This kind of man sees forced sexual activity as another form of control.

SOCIAL CAUSES:

Can also be linked with the expectations of both the male and female created by the society as a whole. The fact that the society is patriarchal by nature and the traditional stereotyping of the male as the dominant partner and the female the subservient. Any threat to this order will most likely lead to violence. The pressure that, now more and more women are taking up employment, earning more money than their spouses, the resultant effect is that these men will seek supremacy at home to compensate for their battered ego and loss of esteem; this may result in abuse of any form (sexual abuse inclusive) in order to reassert the dominance of the male. For example, Sigmund Freud, the famed psychologist's perception of women as a mutilated male therefore inferior to men is probably influenced by his upbringing in a traditional Jewish middle class family.

THE FEMINIST EXPLANATION:

Is closely linked with the social factors as it is believed to be linked with the society's patriarchal system. A learned author²⁴ says:

Women in this model have historically been seen as chattel, unable to manage their own affairs without the strong leadership of an authoritarian family patriarch. The patriarch traditionally had the right to enforce male standards of accepted feminine behaviour in whatever means necessary including force.²⁵

Secondly, is women's psychological makeup as a result of upbringing where they are brought up to regard sex as a marital duty owed the husband.

RELIGIOUS CAUSES: The influence of religion on marital rape is that some religious injunctions indirectly encourage the continuous perpetration of the assault.

The prophet of Islam Muhammed (S.A.W) is reported to have said:

'The lawful thing which is most distasteful to Allah is talaq i.e man to terminate the marriage contract.'

Also the traditional African society views divorce with disdain and generally is seen as a sign of weakness. The women are therefore trapped in a dehumanising and sad union to avoid the stigma associated with divorce.²⁶

Another link which religion has with marital rape is that the women are faced with fear of inability to succeed as a single parent and therefore would rather turn to God for 'help' rather than voice their protest. Women are therefore committed to making the relationship work at all cost.

POVERTY/ LOW EDUCATION: are twin evils bedeviling women especially in developing or underdeveloped countries, they leave women with very little sexual autonomy. Besides, the fewer the resources at her disposal, the less able the wife is to seek outside help.

1.0 CONSEQUENCES OF MARITAL RAPE

The consequences of marital rape can be both physical and psychological. It is easy to see the physical effects like bruises and scars but the psychological effects poses the greater danger and is often masked.

²¹ Derek Llewellyn Jones *Everywoman* (Spectrum Books Limited) Ibadan 1998 pg 19

²² Grayford *Wife Battering: a preliminary survey of 100 cases* (1975) British Medical Journal pages 194-97

²³ *ibid* pg 1

²⁴ Buzawa & Buzawa *Domestic Violence: The criminal Justice Response* (Sage Publications) Newbury Park C.A (1990) pg 18

²⁵ Ambali pg.109

²⁶ A lot of biblical injunctions discourage divorce.

may in the long run result in serious mental breakdown. In the case of *Stubbings & Ory v United Kingdom*²⁷ decided by the European Court of Human Rights, it was established that there was a causal link between the sexual assaults suffered by the applicant and the subsequent mental health problems of schizophrenia, paranoia, agoraphobia and depression which led her to attempt suicide. The greatest hazard of marital rape in the view of this writer is the fact that its psychological effects are hidden which makes it easy for the victim to continue to endure rather than seek help, and Post Exposure Prophylaxis is not provided to such women. No wonder marital rape is regarded as 'the silent violence'. It has been described as the most extreme and distressing experience through which a spouse asserts total power and control over the victims, achieve maximum humiliation and destroy their very soul.²⁸

3.1 JUSTIFICATION FOR THE MARITAL EXEMPTION TO THE CRIME OF RAPE.

For centuries, it was believed²⁹ that it was impossible for a husband to rape his wife. In fact as late as mid- twentieth century, there was no country that viewed a husband's having forceful sex with his wife as a crime. This assertion was justified with the following theories.

{a} the implied consent theory: this theory finds its basis under contract law. The husband could not rape his wife because by their marriage contract, the wife had given up herself to the husband and the matrimonial consent was irrevocable during the subsistence of the marriage. This presumption in favour of sexual access by the husband to the wife is historically known as conjugal debt. The implication is that the wife owes sex to her husband.³⁰

The problem with this theory is that assuming the wife breaches the contractual duty of giving the husband sex, what is the remedy for breach of contract? Must the husband resort to self help?

Another problem to this theory is why should the law presume that there will be sex in marriage and not the opposite presumption that there will be no sex unless and until the parties agree otherwise. Alternatively, the presumption that there will only be sex at the whims of the wife.

{b} the unity of persons theory: this theory does not recognise the wife as a separate being from the husband and therefore is not capable of being raped by the husband. This theory stems from the fact that when two people marry, they become one. So the being of a woman is incorporated into that of her husband such that the existence of a woman is effectively suspended during marriage therefore, marital rape is impossible because a man is not capable of raping himself.³¹

A major criticism of this theory is that this argument is conservative that the being of the wife is submerged into that of the husband because the wife do not for legal purposes lose their separate identity upon marriage.³² Married women are not barred from owning property, voting and being voted for, incorporating company e.t.c

{c} the property theory: this theory believes that by marriage, the wife becomes the property of the husband. Therefore, the husband could not rape his wife because he is only making use of his property.³³

{d} marital preservation theory: this theory believes permitting allegations of rape would cause unrest and discord in a marriage and prevent reconciliation. That the delicate fabric of human relationship would be jeopardized by the threat of rape and recognizing crimes within a marriage would allow for state intrusion in the privacy of marriage which is largely frowned at.³⁴

The problem with this theory is that if criminalizing marital rape will make it difficult for the parties to reconcile, but reconciling to what? More non consensual intercourse? It is the view of this writer that marital reconciliation is not a sufficient reason to immunize the husband, sir even divorced couples reconcile.

Apart from the three theories highlighted above, other reasons usually adduced for the perpetuation of marital exemption includes evidential difficulty. When a married couple engages in sexual activity regularly

²⁷ Case 36-37/ 1995/542-543/628-629

²⁸ Gillian Mezey while discussing the result of his study in a paper titled Characteristics of Women Who Kill at St Georges Hospital Medical School, October 1995.

²⁹ And still believed in countries like Nigeria

³⁰ James A Brundage *Law, Sex and Christian Society in Medieval Europe* (Chicago, University of Chicago Press) 1987. P.241-2

³¹ <http://www.accessmylibrary.com/article-1Gi-147874789> accessed on 8/2/2010 11:39AM

³² Kate Burgess - Jackson *Rape: A Philosophical Investigation* (Dartmouth Publishing Company Ltd) England 1996 p113

³³ *ibid*

³⁴ <http://www.accessmylibrary.com/article-1Gi-147874789> accessed on 8/2/2010 11:39AM

could be difficult to prove that one particular instance out of many was without consent. Another example is a vengeful wife may claim rape to blackmail her husband in a divorce proceeding. Over time as the agitation for equal rights for women extended into criminal law, the marital exemption began to fade away.

3.2 CRIMINALISING MARITAL RAPE IN NIGERIA.

In most countries, there is the marital exemption to the crime of rape³⁵ as rape is mostly viewed in the context of stranger rape. However, because of the gravity of the consequence of marital rape and some of the reasons below, it is concise that the marital exemption be removed.

1. Marital rape is a human right violation:

Marital rape violates the fundamental right of women guaranteed in the constitution of Nigeria at section 34 as follows:

'every individual is entitled to respect for the dignity of his person, and accordingly –

(a) No person shall be subjected to torture or to inhuman or degrading treatment....'

As Justice Kayode Eso J.S.C. as he then was held in *Ransome Kuti v. A.G.F.*³⁶ on fundamental rights: 'It is a right which stands above ordinary law of the land and which in fact is antecedent to the society itself...it is a primary condition to a civilized society'

The act of rape no doubt violates the right to dignity of human person as it is highly degrading and reduces the woman in the eyes of her rapist and in her own eyes. The consequences of rape are both physical and psychological with grave traumatic effect on the victim. A stranger rape as devastating as it is a one-time occurrence. Marital rape however, involves a series of devastating occurrences often spanning years. When a woman is raped by her husband, she has to live with her rapist! What more can be dehumanizing?

Secondly, a number of international conventions also guarantee right to dignity. Article 1 of the American Convention on Human Rights 1969 required a state to guarantee the honour and dignity of individuals within the framework of the broader right to privacy and sexual abuse implies a deliberate outrage to a woman's dignity.³⁷

In December, 1993, the United Nations Human Rights Commissioner for Human Rights published the U.N General Assembly Resolution 48/104 on the elimination of violence against women. It defines violence against women to include marital rape. However, this is not fully recognised by all member states.³⁸

2. A vivid appraisal of marital rape shows that it is a form of discrimination against women. One of the major themes of human rights jurisprudence concerns the treatment of all citizens with equal concern and respect. Women through sexual abuse or rape are being discriminated against and physically and psychologically abused. It is a form of discrimination for a woman to be prevented from challenging a wrong done to her simply because she is married.

Article 18(3) of the African Charter on Human Peoples Rights provides that the state shall ensure the elimination of all forms of discrimination against women and also ensure the protection of the rights of the woman and child as stipulated in international declarations and conventions. Nigeria has adopted it through the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1983.³⁹

Equal treatment of all citizens does not mean that no differentiation between citizens may exist but that the inequality of treatment should not be based on factors which do not justify it especially attributes which an individual has no control over such as sex. People should not be granted immunity for their acts of denied justice, merely on the basis of their marital status.

The Nigerian constitution also guarantees right to freedom from discrimination on the grounds of gender.⁴⁰

3. It is oppressive and discriminating for the state to show no interest in protecting the wife from her husband. By immunizing the husband, the law perpetuates and reinforces sex based disparities in power.

³⁵ Nigeria inclusive

³⁶ (1985) 2 NSCC vol.16 p.879

³⁷ See Inter- American Commission on Human Rights in *Mejia Egocheaga & another v. Peru* case 10:970 Reported 5/96

³⁸ Examples include Nigeria, Sudan, Zambia and Afghanistan

³⁹ Now CapA9 Laws of the Federation on Nigeria 2004

⁴⁰ Section 42, 1999 Constitution of the Federal Republic of Nigeria

it is an offence against the person of the wife and so should be criminalized. In criminal jurisprudence, it is sufficient that sufficient harm is inflicted. Marital rape by its nature as a limitation on individual liberty requires a high probability of significant harm¹¹. Diana I. H. Russell said¹²:

'abundant evidence has been presented in this book that the consequences of wife rape are often very severe and that wife rape is not frequently accompanied by life threatening violence. In fact, wife rape appears the most traumatic form of rape by intimates, and factors cause wife rape to be more traumatic than rape by strangers and other non-intimates, for example, the sense of betrayal, the disillusionment, the fact that it frequently contaminates the entire marriage, and the additional fact that the wife rape is often repeated sometimes for years on end'

If stranger rape which as highlighted above causes lesser harm than marital rape is a crime, it is only logical that marital rape should be criminalized. The continuous marital exemption to the crime of rape allows a husband to violate his wife's bodily integrity. It allows him to impregnate her against her will in denial of her reproductive freedom and extinguishes her autonomy in one of the most personal and intimate of all human interactions.

2.0 CONCLUSION

From the above, it is apt that marital rape is a contemporary issue the world over. No other issue in the criminal law today, except capital punishment, has so captured the public imagination as marital rape. The effects of marital rape on the victim, the children of such marriages and the society as a whole is grave, even worse than that of stranger rape. Therefore, the marital exemption to rape has no place in a civilized society.

The marital rape exemption is a vehicle for the continued subordination of women in society; it assigns greater value to the husband's liberty than to a wife's security from sexual assault.

2.1 RECOMMENDATIONS

The Nigerian government should display the will to criminalizing marital rape. The reluctance or lack of the will to criminalise is in the view of this writer due to the society's reluctance to liberate women and give them some measure of freedom. The judiciary can follow the English judiciary by being more radical and progressive in its approach.

The country can alternatively adopt the American system by using the legislature to amend the appropriate laws. Pornography should be banned because it has been seen to cause some individual men to perpetrate rape, battery and sexual abuse. The harm caused by pornography is on the effect it has on men's view of women which strips women of credibility. It promotes the exploitation, objectification and degradation of women. Violent pornography promotes violence towards women. Although, it may be argued that banning pornography will violate the right to freedom of expression, but such limitation can be justified in an open and democratic society in public interest.

Also, religious leaders as agents of socialization should discourage the act by sensitizing the people on the dangers of marital rape.

The society as a whole should gear towards treating male and female children equally with less emphasis on gender disparity. Many problems of sexual discrimination will be reduced when the sex roles into which children are socialized become blurred.

¹¹ Keith Burgess Jackson (supra) p. 116

¹² Catherine A Mackinnon *Rape in Marriage in Towards a Feminist Theory of State*. (Harvard University Press) 1989 p. 117