
SPOUSAL RAPE IN NIGERIA: THE POSITION OF INTERNATIONAL,
REGIONAL AND DOMESTIC LAWS IN THE PROTECTION OF
WOMEN'S SEXUAL RIGHTS

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ABSTRACT

Violence Against Women (VAW) stands as one of the major human rights violation in Nigeria. Spousal Rape, one of the most prevalent and grievous form of VAW is however not recognised as a crime in Nigeria infact under the country's criminal code, Section 357 defines rape as non-consensual sex committed outside of wedlock, thereby exempting rape within marriage from the scope of criminal acts, this is the same position attainable under the penal code. All over the world, many countries including African countries have enacted laws to criminalise the act so that perpetrators can be duly prosecuted and sentenced if found guilty. Ironically, several international and regional human rights instruments ratified by Nigeria have recognised it as a human rights violation that infringes upon women's fundamental human rights. This paper examines these human rights instruments and further discusses the several rights violated by Spousal Rape. The intent is to advocate for the protection of the fundamental rights of women in the country by exposing the dire need for a quick review of existing legislation on sexual offences to include spousal rape as part of the broader project of ending gendered violence. A qualitative approach will be used in carrying out this research, references shall be made to case laws, statutes and conventions relevant to this subject. Books, journals, internet sources, thesis materials, newspaper and reports will also be consulted.

Keywords: Spousal or Marital Rape, Fundamental Human Rights, Violence against Women, Nigeria, International Law

1. INTRODUCTION

Spousal rape otherwise called Marital Rape is sex without the approval of the victim where the perpetrator is the victim's significant other or partner, it is regarded as a form of Intimate Partner Violence (IPV) where one spouse usually makes an effort to enforce dominance and control over the other². Virtually all existing international laws have explicitly demanded that states criminalize marital rape as it violates a range of fundamental

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² Emmanuel Obidinma and another, 'Spousal Rape in Nigeria: An Aberration', *International Journal of African and Asian Studies, An International Peer-reviewed Journal*, [2015] 13.

human rights and has severe heart-wrenching effects on its victims. The United Nations High Commissioner for Human Rights (UNHCHR) in December 1993, published the Declaration on the Elimination of Violence Against Women (DEVAW) where it explicitly stated in its Article 2 that marital rape is a human rights violation and a menace that needs to be curtailed.³ Similarly, the Beijing Declaration and Platform for Action defines violence against women as physical, sexual and psychological violence that occurs in the family, including marital rape⁴.

1.1 An Overview of the Concept of Spousal Rape

Before the 19th century, the idea of spousal rape was not envisioned, it was accepted and ignored by the law. Women were regarded as part of a man's material possession. Married women were regarded as property belonging to their husbands. Marriage was therefore seen as a union where a husband had full and total control over his wife's life; unhindered access to her body was his right, she was simply his property⁵. In 1707, Lord Chief Justice John Holt of England described the act of a man having sexual intercourse with another man's wife as "*the highest invasion of property*"⁶. Non-consensual sexual intercourse was regarded as a way by which a man protected his "*property*" and a medium of exercising and maintaining dominance and control over his wife. It was thus regarded as impossible for a man to be guilty of raping his wife.⁷

Carol Pateman an acclaimed political theorist in buttressing this claim defined marriage as a sexual contract whereby a man asserts his freedom and male dominance while the rights of the woman are subjugated.⁸To Sir

³ Declaration on the Elimination of Violence Against Women ,1993 A/RES/48/104 available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx> (Retrieved 10/05/2020)

⁴ Beijing Declaration and Platform for Action, 1995, para. 113, p. 48 available at https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf (Retrieved 10/05/2020).

⁵ Lord Chief Justice Sir M Hale The history of the plea of the crown (1847) 629.

⁶ SH Pillsbury, *Judging Evil: Rethinking the Law of Murder and Maris laughter*, available at: [http://books.google.com/?id=OPLYXR2xOnOC&printsec=frontcover#v=onepage\\$q4f=false](http://books.google.com/?id=OPLYXR2xOnOC&printsec=frontcover#v=onepage$q4f=false) ISBN 9780814766804 (accessed on 6/2/2021)

⁷ *ibid*

⁸ Carole Pateman , *The sexual contract*, (Stanford University Press, Washington DC, 1988), 154 -189.

Mathew Hale by accepting to be married to a man, a woman has given her mutual consent to belong to her husband and so cannot be raped.⁹

The opinions of these scholars are hinged on the principles of coverture which unites a husband and his wife by bestowing on a man absolute control over his spouse. As elaborated by scholars, “the laws of nature and divine revelation” crowns the husband as the head of the family whose duty is to love, cherish and protect the woman while the wife is obligated to love, honour and obey the man¹⁰. Legal writers such as Oliver L Barbour took the pain to emphasize that "a man cannot be guilty of forcing his wife into his embraces"¹¹ “In the words of Emilin McClain, “it is lawful for a husband to have carnal knowledge of his wife, and the fact that he uses force does not make him guilty of rape.”¹²

In the nineteenth century, some legal theorists began to emerge who were vehemently opposed to the concept of a man being at liberty to rape his wife simply because they were a marriage contract existing between them. For instance, Chester Vernier positioned himself in favour of equalising the rights of spouses and moving away from sexual inequality¹³ Similarly, Elizabeth Cady Stanton argued that women possess inherent individuality and independence and that the idea of a man owing the woman is unjust¹⁴

It wasn't until the later part of the 20th century that it became recognised as a crime most especially due to female activism. As of 2019, about 150 countries have outlawed marital rape, while some countries have it expressly banned in their laws, others make no distinction between rape by one's husband and rape perpetrated by anyone else.

In Africa the likes of South Africa have taken the lead by repealing the act and explicitly providing in its laws that a husband can be convicted for the rape of his wife.¹⁵ In all about 14 African countries have done the needful.

⁹ Mathew Hale, *The history of the plea of the crown*, (1st American Edition, 1847), vol. , 629.

¹⁰ Joel Prentiss Bishop, *Commentaries on the Law of Married Women*, (Kay & Brother, Philadelphia, 1871), 2.

¹¹ Oliver L Barbour, *The Magistrate's Criminal Law*, (Wm. & A. Gould & Co; Albany, 1841), 66.

¹² Emilin McClain, *A Treatise on the Criminal Law*, (Callaghan & co, Chicago, 1897), 207.

¹³ Robert L. Piper 'American Family Laws, Vol. III (Husband and Wife), by Chester G. Vernier' 20 Marquette Law Review, 1936, 205.

¹⁴ Elizabeth Cady Stanton, "Feminist as a thinker", (2007), 155 -170.

¹⁵ Prevention of Family Violence Act of 1993 (PFVA) and sec 5. 212 See Criminal Code of Ghana of 1960 (Ghana Criminal Code) art 42(g).

However, despite the widespread acceptance of the act as criminal, spousal rape is not an offence under the Nigerian law and no one can be prosecuted for it as it is unknown to law, and non-existent in any of its legislations.¹⁶ A man is deemed to have committed rape under Nigerian law if he has unlawful sexual intercourse with a woman who is not his wife and who, at the time of the intercourse, does not consent to it. The implication of this is that victims of this animalistic attitude can do nothing, they are bound to stay in such a marriage dreading every second as their inhumane husbands ravish them, destroying every thread of dignity they possess. Usually, women who are raped by their husbands are likely to be raped many times, up to 20 times or even more¹⁷

Statistics show that about 35% of women all over the world have been victims of either physical or sexual violence inflicted on them by their partners. These violated women have been proven to report the higher cases of HIV, abortion and even depression compared to women who have not.¹⁸ Researchers estimate that approximately 10-14% of married women are consistently raped by their husbands.¹⁹ Based on the findings of the largest U.S. study of violence against women to date, it is estimated that over 7 million women have been raped by their intimate partners in the United States.²⁰ In their study of Canadian women, Randall and Haskell found out that about 30% of these women who were sexually assaulted as adults were assaulted by their intimate partners²¹.

¹⁶ Criminal Code Cap C 38, Laws of the Federation of Nigeria, 2004 sections 357 and 358 and Penal Code Cap 89, Laws of Northern Nigeria, 1963, sections 282 and 283.

¹⁷ Raquel Kennedy Bergen, Elizabeth Barnhill 2006, Marital Rape: New Research and Directions available at <https://vawnet.org/material/marital-rape-new-research-and-directions> (Accessed on 07/06/2021)

¹⁸ UN WOMEN, “*Facts and Figures: Ending Violence against Women*” available at www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures (Accessed on 15/05/2020).

¹⁹ *ibid*

²⁰ M.P. Williams and others, “*Violence against women by intimate relationship partners*”. in C. M. Renzetti, J. L. Edleson, & R. K. Bergen (eds.), *Sourcebook on violence against women*, (Sage Publications, Inc. 2001), 143–178

²¹ Randall Melanie and others, *Sexual Violence in Women's Lives: Findings from the Women's Safety Project, a Community-Based Survey 1995* Available at <https://journals.sagepub.com/doi/10.1177/1077801295001001002> (Retrieved 11/02/2021).

1.2. The Situation in Nigeria

Since Marital Rape is not an offence in Nigeria it is quite difficult to obtain accurate statistics on sexual violence against women in the home. Notwithstanding Violence Against Women (VAW) is tagged as one of the topmost form of human rights crimes perpetrated in the country. Amid these, physical and sexual acts which are brutal are of grave concern particularly Intimate Partner Violence (IPV) which was recorded to have an alarming rate. This implies that women throughout the country experience a wide range of violations to their persons and dignity. The National Demographic and Health Survey in its 2018-2019 report claimed that 17% of women who were ever married were victims of rape by their husbands, another 16% of divorced or separated women experienced sexual violence by their husbands. There were also series of reported instances of women being slapped, punched, pushed and assaulted into having sex by their spouses.²²

Although there have been several attempts made by civil societies, non-governmental organisations and those involved in the academia to call the attention of the government to the loopholes existing within the Nigerian law relating to rape, these attempts have yielded no positive result.

Nigeria has ratified several international and human rights laws geared towards protecting women from physical and sexual violence. International human rights instruments such as DEVAW, CEDAW and Universal Declaration of Human Rights (UDHR), which has gained a customary international law status and other instruments to which the country is a party to have legal frameworks set up for the protection of women's rights.

2. PROTECTION OF WOMEN UNDER INTERNATIONAL HUMAN RIGHTS FRAMEWORK

2.1 International Covenant on Civil and Political Rights (ICCPR)

Nigeria has ratified various human rights instruments that are essential for the protection of women's rights and invariably protection from marital rape. Some of these instruments expressly prohibit spousal rape while others have provisions that impliedly detest the act. One of such is the International Covenant on Civil and Political Rights on the (ICCPR).

²² Central Bureau of Statistics (CBS) [Nigeria], Ministry of Health [Nigeria] and ORC Macro, 2019, *Nigeria Demographic and Health Survey, Key Findings*, (Calverton, Maryland, USA, 2018), 14.

Nigeria ratified this international instrument on the 29th of July, 1993. Article 26 provides that;

“All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This means that all women have the right just as men to enjoy being protected by the law, without being discriminated upon. Article 7 also states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. The previous chapter has proven how torturous, cruel, degrading and inhumane marital rape can be as well as the severe impact it has on its victims, no woman should be exposed to such suffering. Article 9 further stipulates that “everyone has the right to liberty and security of person” This means that women possess the right to sexual autonomy and should not be forced into any sexual act without their consent.

The Human Rights Committee has requested all states who are party to this instrument to criminalize domestic violence, including marital rape, emphasising that it's not only the states duty to protect their citizens from having their rights violated but also to investigate violations when they occur and ensure that perpetrators are punished accordingly.²³

2.2. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

Nigeria ratified this instrument on the 29th of July, 1993. Article 12 of the ICESCR provides that states should “recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. Expounding on the provision of Article 12, the ICESCR committee stated that its main objective is to lessen the rate of maternal mortality by reducing women's health risks and protecting them from

²³ Concluding Observations of the Human Rights committee: United Republic of Tanzania (6/07/ 2020) CCPR/C/TZA/CO/4 at [10]. Available at <http://www2.ohchr.org/english/bodies/hrc/hrcs96.htm> 105

domestic violence²⁴. As enunciated in the previous chapter, marital rape has long lasting repercussions on the physical and mental health of its victims, and so is a violation of women's right to enjoy all round healthiness.

2.3. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The Convention on Elimination of All Forms of Discrimination against Women (CEDAW) was drafted in 1979 and enacted in 1981 as the first international treaty specifically focused on the human rights of women.²⁵ Nigeria ratified the CEDAW on the 13th of June, 1985. Its sole aim is to adopt measures geared towards eliminating discrimination against women in all forms. Article 1 defined discrimination against women as;

“... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”²⁶

Article 2 demands that all member states condemn discrimination against women in all its forms by adopting appropriate legislative measures and other viable means such as sanctions when necessary, if need be modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Although no provision under the CEDAW makes mention of marital rape, the CEDAW committee, a body created by the United Nations to monitor implementation of the instrument by state parties has adopted various recommendations which state in detail how the convention covers violence

²⁴OHCHR | *International Covenant on Economic, Social and Cultural Rights*. Ohchr.org. (1993). Accessed 30 Sept 2021

Retrieved 9 July 2020, from <https://www.ohchr.org/en/professionalinterest/>

²⁵ Luisa Blanchfield “*The U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Issues in the U.S. Ratification Debate*” Congressional Research Service Report for Congress June 28, 2011, 1, available online at <https://www.everycrsreport.com/files/.pdf> Accessed 30 Sept 2021

²⁶ Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)1981.

against women as well as how governments should approach its elimination.²⁷ The recommendation recognises that gender-based violence (GBV) is a form of discrimination against women that hinders the enjoyment of their fundamental human rights and freedoms.²⁸ Furthermore it specifies that discrimination, as defined in CEDAW relating to GBV should include physical, mental and sexual violence which conveniently covers rape whether within or outside marriage.

Article 16 specifically addresses discrimination within the confines of matrimony where it stipulates that men and women possess equal rights in matters relating to their marriage. Equal rights definitely includes the autonomy to decide when to have sexual intercourse, which should be a mutual agreement between both partners. Thus we can deduce that marital rape is prohibited under CEDAW albeit indirectly.

2.4. The Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment (CAT)

Nigeria ratified this instrument on the 28th of June, 2001. The prohibition of torture constitutes a principle of *jus cogens* which means compelling law. It is a peremptory norm that cannot be subject to derogation due to the fundamental values it upholds. Rape was recognised for the very first time in 2007 by the Committee on Torture as a torturous act, thus offering women who are raped one of the greatest protection available under International Law²⁹. Torture is defined under CAT as any act that intentionally inflicts severe physical or mental pain and suffering.³⁰ Torture, cruel, degrading and inhuman treatment as defined in CAT can be suffered by anyone who is a victim of such treatment irrespective of any marital relationship she or he may have with the perpetrator.³¹

²⁷ Ibid. Article 17

²⁸ Article 19 General Recommendation of the CEDAW Committee, available at <https://www.ohchr.org/en/hrbodies/cedaw/pages/recommendations.aspx>

²⁹ Katharine Fortin 'Rape as torture: An evaluation of the Committee against Torture's attitude to sexual violence' [2008] 4(3) *Utrecht Law Review*, 1. Available <http://www.utrechtlawreview.org/publish/articles/000087/article.pdf> Accessed 30 Sept 2021

³⁰ UN General Assembly, *Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly*, 15 December 1989, A/RES/44/144, sect 1 art 1, available at: <https://www.refworld.org/docid/3b00efef7c.html> [accessed 20 July 2020].

³¹ UN Committee Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against torture) General Comment 3(19/7/2020) CAT/C/GC/3para 3

2.5 The Beijing Declaration and Platform for Action (BDPFA)

The Federal Republic of Nigeria was one of the 189 countries that adopted the Beijing Declaration and Platform for Action (BDPFA) at the Fourth World Conference on Women in September 1995 at Beijing China. The declaration aims at implementing strategies geared towards achieving greater equality and opportunity for women to realise their full potential and human rights. The instrument defines Violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”³² The Beijing platform for action also identifies marital rape as one form of VAW.³³

The Declaration demands that governments condemn violence against women and not refrain from using any custom, tradition or religion as an excuse for their failure to comply with the obligation to punish acts of violence against women³⁴. States are further admonished to enact and enforce domestic legislation that effectively suppresses violence against women,³⁵ they are also required to periodically review their legislation to ensure its constant effectiveness to curb violence against women³⁶

3. APPLICABLE REGIONAL INSTRUMENTS

3.1 African Charter on Human and Peoples’ Rights (ACHPR)

Nigeria ratified this instrument on the 22nd of July, 1983. Article 2 impliedly protects women from marital rape by asserting that everyone is entitled to enjoy rights and freedoms under the charter irrespective of their gender³⁷. rights such as the right to equal protection under the law³⁸ the right to personal integrity³⁹ and the right to dignity⁴⁰. States are enjoined to eliminate all acts of discrimination against women by ensuring that all their

³², *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, paragraph 113, available at: <https://www.refworld.org/docid/3dde04324.htm> 1 [accessed 20 July, 2020]

³³ Ibid, para 113(a)

³⁴ Ibid, para 124(a).

³⁵ Ibid, para 124(c) and 124(d)

³⁶ Ibid, para 124(d)

³⁷ African Charter on Human and Peoples’ Rights (ACHPR) art 2. Available at <https://www.achpr.org/legalinstruments/detail?id=49>

³⁸ ACHPR art 3

³⁹ ACHPR art 4

⁴⁰ ACHPR art 5

rights stipulated in several international declarations and conventions are duly protected.⁴¹

3.2 The African Protocol on the Rights of Women in Africa (APRWA)

This is a legally binding instrument that supplements the African Charter on Human and People's Rights (ACHPR).⁴² Nigeria ratified this instrument on the 16th of December, 2004. Article 1(f) of the Protocol defines discrimination against women as; "... any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life."

This can be interpreted to mean that any obstruction to the exercise of the fundamental human rights of women is regarded as an act of discrimination against them irrespective of their marital status. This Protocol mandates all state parties to fight all forms of discrimination against women through appropriate legislative and administrative measures.⁴³

Furthermore, violence against women is defined as "acts against women that could cause them physical, psychological and sexual harm."⁴⁴ States are required to employ all necessary measures geared towards safeguarding women from all acts of violence especially sexual violence⁴⁵. Member states are also enjoined to enact and enforce domestic laws to protect their women from all of shades of violence including rape irrespectively of whether it takes place privately or publicly.⁴⁶ It is worth noting that this the first instrument to implicitly demand for the criminalisation of marital rape by its member states by particularly focusing on rape that is committed within the private sphere⁴⁷.

⁴¹ Ibid art.18

⁴² Fran Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' [2009] *16 WASH. & LEE J.C.R. & SOC. JUS*, 11.

⁴³ Kaniye Ebeku 'A New Hope for African Women: Overview of Africa's Protocol on Women's Rights' [2004] ,13(3) *Nordic Journal of African Studies*, 266.

⁴⁴ Op cit Article 2 (1)

⁴⁵ Ibid, article 3(4)

⁴⁶ Ibid, article 4(2)(a)

⁴⁷Op.cit. 22 at p.262

Under the APRWA, men and women are recognised as having equal rights even in marital relationships⁴⁸. Therefore if a man forces himself to have sexual intercourse with his wife without her consent, he infringes on her right to equality.

4. THE POSITION OF NIGERIAN DOMESTIC LAWS

4.1 The 1999 Constitution of the Federal Republic of Nigeria

This is the grundnorm in Nigeria, in other words it is the basic law upon which other laws and subsidiary legislation are based. Certain legal rights have been accorded to all citizens of the country irrespective of their standing in life. Legal rights are rights embodied with the full protection of law, a breach of which the victims are entitled to seek redress in the court of law⁴⁹. These amongst others include the right to life⁵⁰, right to the dignity of human person⁵¹, the right to personal liberty⁵², the right to fair hearing⁵³ particularly Section 42 (1) provides for the right to freedom from discrimination, it expressly prohibits the subjection of an individual to discrimination on account of his place of origin, sex, religion⁵⁴ The constitution doesn't expressly prohibit violence against women but kicks against discrimination on account of gender.

4.2 The Nigeria Criminal and Penal Code

These laws are the major statutes governing all issues of sexual abuse in Nigeria including rape. While the Criminal code is applicable to states in the South, the Penal code is operative in the Northern states. Rape is recognised as a crime punishable with life imprisonment with or without whipping⁵⁵. Unlawful carnal knowledge is one of the main ingredients of the offence of rape in Nigeria under both codes, it relates to the physical act (actus reus) of the offence. The actus reus of rape is basically the non-consensual sex. This is augmented in the case of *Adeoti v. State* where the

⁴⁸ APRWA, 11 July 2003 article 6. Article 8 also enshrines the principle that women and men are equal before the law and Article 9(1)(c) states that women are equal partners with men at all levels of development

⁴⁹ See generally Chapter IV on Fundamental Human Rights of the Constitution of Nigeria, 1999.

⁵⁰ See section 33.

⁵¹ Section 34

⁵² Section 35

⁵³ Section 36

⁵⁴ Section 42 (1) (b) prohibits the privileges or disadvantages to any citizen based on the same ground as mentioned above

⁵⁵ Olusoga Olopade '*The Law Of Rape In Nigeria- A Revisit*' in M O Ogunbe(ed.) Nigerian Law :Contemporary Issues[2003] Okada, college of law Igbinedion University, 227.

court held that ‘...the offence of rape is said to be consummated where a man has unlawful carnal knowledge of a woman or girl without her consent or against her will or with her will or consent if the consent is obtained by force or by means of threat or intimidation of any kind or by means of deceit, falsehood or fraudulent representation as to the nature of the act...’⁵⁶ The mens rea of rape also needs to be satisfied that is accused intention to have sexual intercourse with the victim without her consent. However marital rape is exempted as constituting an act of violence, infact both laws explicitly claim that it is impossible for a husband to rape his wife. The act of spousal rape is therefore unknown under both laws. It is pertinent to state that although the two statutes define the offence in different terms, the definitions are of the same effect. Section 357 of the Criminal Code Act,⁵⁷ defines rape as:

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

An evaluation of Section 6 of the Criminal Code Act which defines unlawful carnal knowledge as a carnal connection taking place between persons other than a man and his wife, reveals that as a general rule it is impossible for a husband to be accused of raping his spouse⁵⁸. Furthermore section 282 of the Penal Code⁵⁹ provides that:

A man is said to commit rape who, save where he had sexual intercourse with his wife, has sexual intercourse with a woman in any of the following circumstances:

- (a) against her will;
- (b) without her consent;
- (c) with her consent when her consent has been obtained by putting her in fear of death or of hurts

⁵⁶ [2009] All FWLR (pt.454) 1450.

⁵⁷ CAP 77, LFN 1990

⁵⁸ Sect 6 of the Criminal code Act, CAP 77, LFN 1990.

⁵⁹ Cap 89, Laws of Northern Nigeria, 1963, sections 282 and 283.

(d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; (e) with or without her consent, when she is under 14(fourteen) years of age of unsound mind.

This marital rape exemption is predicated on the common law notion that once a woman enters into a marriage contract with a man she has given her irrevocable consent to all acts of sexual intercourse including those in the future.⁶⁰

4.3 Violence Against Persons (Prohibition Act) 2015

For years, there had been several calls by different interest groups for a critical reform of Nigeria's penal and criminal codes to incorporate emerging acts classified as violence and abuse in the society. Hence the emergence of the Violence Against Persons (prohibition) Act, passed into law on the 28th of May 2015. The law was passed to eliminate all forms of violence, including physical, sexual, psychological, domestic, harmful traditional practices, prohibit discrimination against persons as well as punish offenders, offer compensation and protection for victims of violence.

The law kicks against acts of violence against women such as female genital mutilation/circumcision. In this instance a person who performs female circumcision or genital mutilation or involves another to carry out such commits an offence and is liable on conviction to a term of imprisonment not exceeding 4 years or to a fine not exceeding N200,000.00 or both.⁶¹

Similarly, anyone who batters his or her spouse commits an offence and is liable on conviction to a term of imprisonment not exceeding 3 years or to a fine not exceeding N200,000.00 or both.⁶² There is no provision under this Act criminalising marital rape, it doesn't even mention it as a form of

⁶⁰ Per Hawkins J. in *R v. Clarence* [1889] 22 QBD 23, 51.

⁶¹ Section 9 Also states that , anyone who attempts to carry out the offence of female circumcision or genital mutilation also commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N100,000.00 or both. A person who also incites , aids or abets or counsels another to commit the offence of female circumcision or mutilation commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N100,000.00 or both.

⁶² Section 19

domestic violence. Furthermore the application of the law is limited to the Federal Capital Territory, Abuja⁶³ and only the High Court of the Federal Capital Territory Abuja empowered by an Act of Parliament has the jurisdiction to hear and grant any application brought under the Act.⁶⁴

5. THE DUE DILIGENCE STANDARD AND NIGERIA'S OBLIGATION

The due diligence standard stipulates that when states ratify legal instruments, they are bound to ensure that the rights stipulated therein are enforced. In the 1988 case of *Velásquez-Rodriguez v. Honduras*⁶⁵, the Inter-American Court of Human Rights emphasised that the due diligence standard is perhaps the most important resource in international law for marshalling state power through law to fight violence against women and protect its victims. Under international law, the due diligence standard establishes that a state is obliged to investigate, punish, prevent and provide remedies for human rights violations, regardless of whether the conducts are carried out by state or non-state actors.

As regards Violence Against Women, the due diligence standard was recognised during the Beijing Declaration and Platform for Action where it was stressed that member states in line with the stipulations of the declaration enact or reinforce sanctions that punish perpetrators and provide women with access to justice. Similarly states that are parties to the CEDAW Convention are required to adopt the principles of the Committee's General Recommendation on Violence against Women, thereby taking an oath of "*due diligence*" to protect women from all acts of violence⁶⁶. States are mandated to investigate and punish the perpetrators as well as provide some sort of compensation for the victims of gendered violence.⁶⁷ As regards marital rape, member states are obliged to carry out "effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, inter-alia, violence and abuse in the family, sexual assault..."

Although Nigeria has acceded to the international and regional human rights instruments that condemn violence against women, the regulation of the crime of rape has not been changed to include marital rape. Based on

⁶³ Section 47

⁶⁴ Section 27

⁶⁵ *Velasquez Rodriguez v. Honduras*, [July 29, 1988] Compensation, Judgment, Inter-Am. Ct.H.R.(ser.C)No.4, 176.

⁶⁶ General Recommendation 19 supranote 42, art.9.

⁶⁷ *Ibid* art.24(r)-(t)

the due diligence standard, there subsists a demand on the Nigerian government to implement the provisions of these laws, by taking legislative and other necessary measures required to combat all forms of discrimination against women. The country has an obligation to bring its laws in line with the requirements of such instruments. For instance CEDAW demands that its member states domesticate its provisions and also repeal all penal laws that contribute to discriminating women.⁶⁸ As previously mentioned, the Nigerian Criminal Laws have excluded marital rape from the kind of rape that is punishable by law, this means that the protection of women against rape does not extend to rape committed against them by their husbands. This is clearly a violation of their fundamental human rights as well as a prejudice against women based on their marital status.

6. LEGAL RIGHTS INFRINGED UPON BY SPOUSAL RAPE

Spousal rape has severe physical and psychological impacts on its victims. Likewise it infringes on certain legal rights which will be further discussed. Legal rights are rights clothed with the full protection of law, once violated or breached the aggrieved has the licence to seek redress in the court of law. It usually attracts some form of liability or punishment.

6.1 Right to Life

Intimate partner violence is recognized as one of the leading causes of death and suffering around the world. Acts of violence meted out by partners on their spouses has resulted in the loss of life of the victims. Marital rape has in several cases been connected to “marital murder” as husbands take the lives of their wives making several claims such as the need to uphold their honour or defend themselves or simply claim it was a mistake done in the heat of passion! Marital rape violates the right to life provided for under Section 33 of the 1999 constitution of the Federal Republic of Nigeria (FRN). It has distinct health concerns that harbor right to life implications such as fistulas, bladder infections, miscarriages and possible contraction of sexually transmitted diseases such as HIV⁶⁹.

6.2 Right to Liberty and Security of Persons

Marital rape is a gross invasion of the physical and psychological security of the victim and infringes on the full and equal enjoyment of the right to liberty of women within their homes. This right is expressly provided for

⁶⁸ Ibid. Article 2g

⁶⁹ Rhonda Copelon, ‘Intimate Terror: Understanding Domestic Violence as Torture in Human Rights Of Women’ [1994] *National And International Perspectives* 116, 128.

in Articles 3 and 9 of the UDHR as well as in several regional instruments. Sexual violence in a matrimony leaves the victim under a continuous fear of a recurrence. Nigeria's failure to criminalise marital rape violates the right to liberty and security of persons provided for in its constitution and puts the woman in profoundly powerless situation where she continuously lives with a sense of vulnerability and loss of rights to both bodily and sexual integrity!

6.3 The Right not to be Subject to Torture or to Cruel, Inhuman, or Degrading Treatment or Punishment

This right fully encompasses freedom from sexual violence. Spousal rape fully satisfies all the elements of an act of torture as defined in Article 1 of the Convention Against Torture "(1) it inflicts severe pain and suffering,(2) it is for a prohibited purpose that includes coercion, intimidation, or discrimination, and (3) it is acquiesced to or condoned by a ... actor"⁷⁰. Marital rape is "intentionally inflicted" and is an act which can impose "severe pain and suffering," both physical and mental. The Committee Against Torture has identified women as a social group specifically at risk of torture by private actors in their homes.

6.4 Freedom from Discrimination

Freedom from discrimination is a right recognized by all the major human rights treaties. It is regarded as a *jus cogens* principle of customary international law. The CEDAW Committee in its general recommendations established that marital rape is a gender-based violence and "*is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men*"⁷¹In the case of *Maria da Penha v. Brazil*, the IACHR discovered that by allowing perpetrators of domestic violence to walk freely with no fear of being punished or prosecuted not only was Brazil complicit in the crime, but its failure to respond to domestic violence was evidence of gender discrimination.⁷²

Rashida Manjoo, Professor in the Department of Public Law, University of Cape Town, South Africa and the United Nations Special Rapporteur on violence against women frowned at the discriminatory treatment of

⁷⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; art. 1.

⁷¹ General Recommendation 19 article 6

⁷² *Maria Da Penha v. Brazil*, [2001] Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. 55-56.

spousal violence in many member states, she lamented on how even states who have criminalised the act simply regard it as a misdemeanour, reports of which are often treated with levity⁷³. According to her this is contrary to the dictates of the due diligence standard which requires that states impose “severe” and effective sanctions against spousal violence to prevent future occurrences⁷⁴.

6.5 Right to Equality

Marital rape infringes on women’s right to equality. There can be no real gender equality in a society that abrogates a woman’s right to give or refuse consent for sex in marriage! Since most cultures imply that marriage is a form of ongoing consent for sex, a woman can otherwise be regarded as a sexual property of her spouse. Laws that entrench gender inequality by making the husband the head of the household such as the case in Iran, Rwanda, Indonesia, Honduras, Gabon, United Arab Emirates amongst others increase the vulnerability of women to sexual assault within their homes⁷⁵. The laws even provide the husband with the right to inflict emotional and physical violence on her if she derails in carrying out her “*wifely duties*” this leaves the woman with no option but to succumb to the sexual cravings of her partner. Inequality in a marital relationship is one of the most important factors contributing to marital rape.

7. FACTORS THAT MIGHT HINDER THE CRIMINALIZATION OF SPOUSAL RAPE IN NIGERIA

A number of factors might stifle the efforts and advocacy towards criminalising spousal rape in Nigeria. Basically there are two major factors which influence and shape the criminal laws of the country and might affect the acceptance of the act as a crime. These factors will be discussed briefly.

- a) **Patriarchal Culture:** In Nigeria as in most African cultures, a woman is still viewed as the property of her husband, and just like all properties acquired the owner is free to do as he pleases to a large

⁷³ Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences), Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development’ [2013], para. 50, U.N. Doc. A/HRC/23/49 accessed 20 October 2021

⁷⁴ *ibid*

⁷⁵ The World Bank and IFC, Women, Business and the Law: Removing restrictions to enhance Gender Equality 16 tbl.2.2 (2013), <http://wbl.worldbank.org/~media/FPDKM/WBL/Documents/Reports/2014/Women-Business-and-the-Law2014-Key-Findings.pdf> accessed 20 October 2021

extent. This means that it is alien to question a man as to the methods or means of his sexual activity and the woman being a property cannot refuse to consent to the cravings of her master, and if she does, he can forcefully have his way with no consequences whatsoever. For instance, the Hausa and Fulani tradition in the Northern parts of the country where there exist the prevalence of child marriages, a man is allowed to forcefully consummate his marriage with his unwilling wife which often includes being beaten⁷⁶. This has made many women in the country especially the uneducated ones succumb to being battered and assaulted once they refuse sexual intercourse. The National Demographic and Health Survey (2018), showed that more women about 20% actually justify being beaten for refusal to lay with their husbands than the men which is 12%.

- b) **Religion:** In Islam which is the faith practiced by about 53.5% of the Nigerian population especially by the Northerners stipulates that a woman has no right to refuse her husband's demand for sex except she is ill, it is claimed that a woman who refuses is cursed by all the angels of Allah.⁷⁷ Although no act of violence or use of force is expressly mentioned in the religion, the Quran berates husbands to smack their wives albeit lightly to ensure they are obedient. So a married man is following spiritual injunctions when he beats his partner for sex.⁷⁸ Similarly Christianity which is the other dominant religion practiced in Nigeria by about 45.9% of its population places strong emphasis on a wife's submission to her husband. It is believed that a woman's body belongs totally to her spouse and she should not deny him of its pleasures. Even though these factors do not expressly encourage violence they have shaped the way of thinking of the people and invariably influenced our criminal laws.

8. CONCLUSION

By its ratification Nigeria is bound to criminalise spousal rape, failure to do so is a dereliction of its duty to comply with international obligations and a breach of the due diligence standard concerning violence against women. This study has established the pertinent need to criminalise spousal rape in Nigeria as this demeaning deed is one of the most grievous

⁷⁶ Chidinma Ogba and Kayode Adetifa. "Marital Rape in Nigeria: Appraising the information so far." *Journal of Law, Policy and Globalization* 89 (2019): 190-196.

⁷⁷ Kharisu Sufiyan Chukkol The law of crimes in Nigeria,(Ahmadu Bello University,Zaria 1988).275

⁷⁸ Ochem Charles Emeka, CT Emejuru, *Donnish Journal of Law and Conflict Resolution* 2015, vol1 issue 1,1-9

acts of violence that can be meted out on women. It suffices to say that the spousal rape immunity or marital rape exemption in Nigeria is inhumane and an aberration to the rights of women in the country. The failure of the Nigerian legislature to incorporate marital rape under the Criminal code creates the impression that marital rape is legal, and this is inconsistent with the provisions of international human rights laws which the country is a party to.

There is a need for a critical review of our sexual offences laws .A woman's No should be respected as one and being a wife is not a license for a man to have unhindered access to sexual relations at will. There is an urgent demand that spousal rape be criminalised so the perpetrators can be adequately punished so that our Nigerian women can be assured that their fundamental human rights are duly protected.

9. RECOMMENDATIONS

It is requisite to amend the criminal laws in Nigeria to include this form of rape as one punishable by law as well as stipulate the exact punishment for offenders or violators, a cue should be taken from the mistakes made in the Ghanaian and South African laws. The exemption needs to be scraped off, this is a crucial first step to protect the victims of marital rape. Law is not static instead it evolves and should be administered to attend to the needs of the people, in this case, the need to curb VAW. Nigeria needs to assent to its commitments made to the previously discussed frameworks like the ICCPR, CEDAW amongst others.

Similarly the Nigeria judiciary can hasten the process of the criminalisation by passing rulings which will abolish the marital rape exemptions in its criminal laws. Take for instance it was the ruling in *R v R*(1991) that inculcated marital rape as a criminal act in the United Kingdom, according to Lord Keith , it was the duty of judges to remove the common law fiction so as to give rights to married women not to be subjected to such behaviour because they are joined to their partners by a contract of marriage. This was the precedent that led to the review of the Sexual Offences Act of 1956 and the inclusion of marital rape as a crime under the criminal laws in the United Kingdom.

Also the international law principle of “*pacta sunt servanda*”,⁷⁹ can also be adopted by the judges to ensure Nigeria complies with its obligations under International law, in this case its ratification of several international and regional treaties prohibiting sexual violence against women.

Criminalisation does not automatically solve this act of violence, efforts must be made to implement the law as well. The government is advised to constantly sensitize and train those within the legal community such as the judges, police officers, government prosecutors on the criminality of spousal rape and its gross violation of fundamental human rights.

Furthermore, given its serious effects, it is necessary that persons who come in contact with survivors of marital rape assist, for instance, advocates for violence against women (VAW) as well as rape crisis counsellors can assist survivors by offering valuable counselling sessions that will aid their healing process and also speak out for them using their platforms.

The victims should also be inspired to relay their experiences to the police force, it is advised that the government establish special units in the force vested with the responsibility to investigate and prosecute sexual offences particularly marital rape. This would give the victims the needed confidence to make complaints to the police.

It is also imperative that the government does its utmost best to abolish certain customs, traditions and practices that are discriminatory, cause harm to women and violate their fundamental human rights, for example, child/early marriage, abduction, female genital mutilation. They can achieve this through the outright prohibition of such practices and also by organising public education programmes especially for persons situated in rural areas.

⁷⁹ Vienna Convention on the Laws of Treaties [1969], The *pacta sunt servanda* principle means that every Treaty in force is binding upon the parties to it and must be performed by them in good faith.