

LEGAL CONCEPT OF MARITAL RAPE: THE PERSPECTIVES WITHIN WEST-AFRICAN CUSTOMARY LAWS

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ABSTRACT

Laws recognizing marital rape have increasingly becoming an area of interest that attracts attention in many jurisdictions, particularly in the developed countries of the world. This appears to be a landmark achievement to the human rights advocates particularly the feminists. Paradoxically, it has not attracted same acceptability in developing countries, most especially the African countries. This is partly due to the possibility of it been at variance with the subsisting belief and customary practices that remain an integral source of their laws. There is likelihood of such act to constitute a serious setback to the natural concept and philosophy of African's concept of marriage and mutual rules that guides co-existence of man and a woman known as marriage. Resolving questions that are hinged on certain Africans believe such as whether a man can be found criminally culpable of raping his wife becomes issues to be resolved. While searching for a convergent point within the seemingly ideological and cultural ideological perspectives is also vital for the protection of the mundane rights. By using doctrinal method of research and with focus on West African Countries as case study, this paper found that marital rape is not only alien to most African cultures but may also remain impracticable within the socio-cultural settings. Consequently, a lot still required to be done, in term of creation of awareness, education and concerted efforts to reach out to sub conscious level of citizenry otherwise sustaining crime of spousal rape within the African legal philosophy will likely be a mirage.

Keywords: Marital Rape; African belief and International legal instruments

INTRODUCTION

The issue of marital rape has increasingly becoming an area of interest. This area of law has attracted attention in many jurisdictions, particularly in the developed countries of the world. The rise in interest might be unconnected with the growth of feminist movement across the globe. Thus, the increase interest in this area and its growth in term of awareness appears to be a landmark achievement to the human rights advocates, particularly the feminists.

Paradoxically, it has not attracted same acceptability in developing countries, most especially the African countries. This is partly due to the possibility of it been at variance with the subsisting belief and customary practices that remain an integral source of laws in these jurisdictions. The likelihood of such been a serious setback to the natural concept and philosophy of African's concept of marriage and mutual rules that guides co-existence of man and a woman known as marriage. Resolving questions that are hinged on certain Africans believe such as whether a man can be found criminally culpable of raping his wife becomes issues to be resolved.

While searching for a convergent point with regards to the protection of the mundane rights, the seemingly ideological and cultural ideological perspectives also appears to be vital and have become necessary factors to be considered in this circumstance. For instance, the issue of rape itself is treated with certain dispositions that suppress the functionality of law in a traditional African society. Thus, a report of rape to the appropriate authority to seek redress is usually considered to be a shameful act which becomes difficult to express due to the seemingly (social) stigma. Consequently, it becomes very rare for an African girl or woman to report cases of rape unless in an exceptional circumstance. This believe or act or whatever name it is called, has so much encouraged the perpetrators of the act to continue to do their "thing" in which ever way they planned it.

Marital rape laws, is shred with several myth, belief, and cultural influences in a typical African setting just like the issue of bigamy under matrimonial clauses. This indeed is contrary to the developments in the western world whose cultures appears to accommodate the courage to report such incident. A significant factor is the advancement in technology, education, economy, security and others. With this development, the issue of marital rape become prominent such that it is becoming difficult for actual and proper advancement in other fields without taken cognizance of advancement in law (legal reform). This is belief to have make, rape and other sexual offences laws to improve significantly and by extension the development of marital rape.

Therefore, while the development appears to be a landmark achievement in the developed countries, such may not have been achieved in African, particularly among the Western African people. Invariably, with the background of cultural influences,

customary and native laws in the West African countries, the questions that become necessary to be answered are as follows: Can a man Rape his wife? What is marital rape in the context of Customary law on marriage? Can any action constitute rape when the acts involve husband and wife? When women are forced to have sexual relations with their husbands, can it be said to be part of their marital duties or does the use of force have long-term negative consequences for the marriage? Answer to these questions are germane and might also be necessary to comply with the international best practices as required under the United Nations Declaration on the elimination of violence against women.

The Development of the Concept of Marital Rape

Marital rape is synonymous with spousal rape. It consists of two words of which the former symbolizes a contract within two parties, which falls within the realm of civil and personal law. The latter presupposes a criminal act which is deemed to be committed against the State and within which there are instruments set up by the law for the enforcement such act. It therefore becomes necessary to understand the concept of rape for proper perception of marital rape.

Criminal code in most jurisdictions in West Africa defined rape in a similar vein. In Nigeria, rape is defined “as any man who has unlawful sexual intercourse with a woman or a girl, without her consent, is guilty of the offence of rape and liable to imprisonment for life.”¹ Rape is also defined as “the crime of forcing somebody to have sex with you especially using violence”.²

The offence is committed “whenever, a woman or girl does not consent to sexual intercourse or if she submits to the act by reason of force, impersonation, threat or intimidation of any kind, fear of harm or false or fraudulent representation as to the nature of the act”.³ The law further states that sexual intercourse between a man and a woman who are married is not unlawful.⁴

Section 357⁵ provides that:

“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”.⁶

It should be noted that offence of rape is seeing and regarded as a serious offence that attracts capital punishment. Invariably once a prima facie case is established, it is not usually, a bail-able offence. In Nigeria, the offence of rape attracts attract life imprisonment with or without canning.

The definitions of rape as contained in Section 258(1) (3) of the Criminal Law of Lagos State 2011 and Section 357 with its attendant punishment in Section 358, Cap C38 of the Laws of Federation of Nigeria, 2004, look similar. However, where the Lagos Criminal Law talks about “sexual intercourse”, the laws of the Federation States “carnal knowledge”. What is important here, is the phrase “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...”

It follows, therefore, from the above definitions, non-consensual is the major ingredient of rape. Thus, for anyone to commit be guilty of rape, he must have had sexual intercourse with his victim, without consent or the consent obtained falsely and fraudulently.

In *R. v. Olugboja*,⁷ the defendant and the co-accused **L** met the complainant and **K** at a discotheque and offered to take them home, but instead of taking them home, the defendant drove them to **L**'s bungalow. They refused to go in and began walking away. The defendant went into the bungalow, but **L** followed the girls and raped the complainant in the car. The three of them returned to the bungalow where **L** dragged **K** into a bedroom. The defendant then told the complainant that he was going to have intercourse with her. She told him what happened in the car and asked him to leave her alone. He told her to take off her

¹ Section 258(1), Criminal Law of Lagos State, 2011.

² Oxford Advanced Learner's Dictionary, international Student's Edition, Oxford University Press, p. 1214

³ Subsection 92) Ibid

⁴ Subsection (3) Ibid

⁵ Cap 138, Laws of the Federation of Nigeria 2004

⁶ Section 358, Cap C38, Laws of the Federation of Nigeria 2004

⁷ (1881) 3 NWLR 585

trousers. She did and he had intercourse with her. The defendant, who admitted having sexual intercourse with the complainant, was charged with rape.

The judge directed the jury that, although the complainant neither screamed nor struggled as she had submitted to sexual intercourse without the defendant using force or making any threats or violence, they had to consider whether the complainant had consented to sexual intercourse. The defendant was convicted.

On appeal, the Court of Appeal, in dismissing the appeal, held that, since the amendment of Section 1 of the Sexual Offences Act 1956 by Section 1 of the Sexual Offences (Amendment) Act 1976, the offence of rape was having sexual intercourse against the woman's consent: that the offence was not limited to cases where sexual intercourse had taken place as a result of force, fear or fraud.

Also, in *R v. Howard*,⁸ a rape case, the Court of Criminal Appeal held that "it is desirable for this court to re-state the law, which is not subject to doubt. Upon a charge of carnal knowledge of a girl under sixteen, while such a girl is perfectly capable of consenting, and as everyone who tries these cases knows, frequently does consent to sexual intercourse, such consent affords no defence to the accused. Where, however, the charge is one of rape, it is necessary that the prosecution should prove that the girl or woman did not consent, and that the crime was committed against her will".

In the US Steubenville High School rape, in the state of Ohio, on August 11, 2012, a 16-year old Weirton, West Virginia girl, incapacitated by alcohol, was raped by two High School football players, quarterback Trent Mays and wide receiver Ma'lik Richmond. For a roughly six-hour period, the unconscious girl was taken by teenage boys from one party, photographed nude and semi-nude, assaulted in a car and taken to a basement where May tried to make her perform. On March 17, 2013, the boys were convicted of rape after the trial Judge found they had used their fingers to penetrate her vagina and that it was impossible for the impaired girl to have given consent⁹

In India, under Section 375 of the India Penal Code, which creates the offence of rape, the age of consent is set at 18, as sex with a girl under this age is considered rape, regardless of consent.

Definition of Marital Rape

Marital or spousal rape may therefore be defined as any forced or non-consensual sexual intercourse with the wife by her husband. It is any of situation within which the wife is sexually violated by her spouse. This definition has nevertheless, zero down the offence of rape to that which is committed against woman only. However, it is a considered view that in some exceptional circumstance a man could also be raped. Invariably, an appropriate definition would therefore any form of non-consensual sexual intercourse within spouses is a marital rape. Marital rape therefore, is "any unwanted sexual acts by a spouse or ex-spouse, committed without consent and/or against a person's will, obtained by force, or threat, intimidation, or when a person is unable to consent."¹⁰

In traditional African society, husband is the head of the family unit unlike in other Western Countries where equal marital rights exist, and agreements could be signed between husband and wife as to when to eat at home, when to cook, when to go out on site seeing, when to go on holidays, when to visit other families and be visited and even when and how to have sex. In traditional African society, these are not practicable. In actual fact, it is a considered view that, the copying of Western culture by the African people is leading to cultural imbalances, violating the customary beliefs and may also turns marital home upside down.

RAPE STATISTICS ACROSS THE WORLD

The issue of marital rape takes a little longer time before it is recognize in many part of the world, even in the developed jurisdictions. This is because the issue of marital "rape" is made to be complicated by the fact that forced sex may are not being considered as crime in marriage. For instance, in Pennsylvania's legal definition, a man cannot be held culpable of raping his spouse.¹¹

A person can only commit rape against a woman that is not his wife. The law on rape states as follows: "A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: (1) by forcible compulsion;

⁸ (1965) 3 All E R 684 CCA

⁹ Steubenville High School Rape Case – en.wikipedia-org/wikipedia/rape statistics

¹⁰ www.osisa.org/buwa/southafrica/maritalrape-south-africa

¹¹ Irene Hanson Frieze, "Investigating the Causes and Consequences of Marital Rape," *Signs: Journal of Women in Culture and Society* 8, no. 3 (1983): 532–53.

(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious; or (4) who is so mentally deranged or deficient that such person is incapable of consent."

According to Martins *et al*, the issue is yet to be given the much-deserved attention. They were of opinion that:

Historically, marital rape has not been recognized as a criminal act; only recently has marital rape become illegal in all 50 states. Marital rape is a serious societal issue that is experienced by 10% to 14% of all married women and 40% to 50% of battered women. Marriages in which marital rape occurs have significantly higher rates of non-sexual violence and marital dissatisfaction, as well as lower ratings of marital quality. Victims who resist marital rape often employ verbal means of resistance. However, most of marital rape victims are either unable or afraid to resist sexual aggression by their husbands. Victims of marital rape experience significant levels of posttraumatic stress disorder (PTSD), depression, gynaecological problems, and negative physical health symptoms. Victims of marital rape seek help from a variety of different resources. Seeking help from social service agencies and the law appears to be the most effective behaviours for ending marital rape. Stress inoculation therapy and cognitive processing therapy are promising treatments for victims of marital rape.¹²

Furthermore, laws in twenty-nine states specifically state that a man cannot be prosecuted for raping his wife. Thus, spousal/marital rape has not been recognized as a criminal act in many jurisdictions; However, there are still certain statistics on rape and sexual assault available in most case in some advanced countries. This trend has however on the increase. It is becoming more common and now extended to many countries of the world. It should be noted however, that countries that have criminalize marital rape are still less in number compare to where it is regarded as non-criminal.

For instance, in one of the UN reports on women, (the UN Women's 2011 report), out of 179 countries for which data was available, 52 had amended their legislation to explicitly make marital rape a criminal offence. While the remaining countries include those that make an exception for marital rape in their rape laws, as well as those where no such exception exists and where, therefore, the spouse can be prosecuted under the general rape laws.

On the issue of statistics, there are notable peculiarities that serves as constraints. These are particularly in term of inconsistency in the following: the definitions of rape; different rates or reporting; recording, prosecution and conviction for rape. This no doubts creates controversial statistical disparities and lead to accusations that many rape statistics are unreliable or misleading. However, the rate and level of rape of some countries across the globe are provided below:

United Kingdom

The sexual Offences Act 2003 (for England and Wales), the Sexual offences (Scotland) Act 2009 and the Sexual Offences (Northern Ireland) Order 2008 are relevant legislations in the United Kingdom. As at June 2015, the police recorded 95,482 sexual offences in England and Wales. The figure for rape is 31,621 and other sexual offences recorded 63,861 cases. This is on the high side since the introduction of the National Crime Recording Standard in 2002/2003¹³

The United States

According to a 2013 United States Department of Justice document *Criminal Victimization in the United States*, there were overall 173,310 victims of rape or sexual assault or 0.1% of US population aged 12 or older. The statistics further showed that female student victims who were completely raped recorded about 10,273 cases while attempted rape accounted for 7,864. Sexual assault and threat of rape or sexual assault recorded 9,714 and 3,488 cases respectively.

For non-student victims who were completely raped recorded about 26,369 cases while attempted rape had 15,792 cases. Sexual assault and threat of rape or sexual assault in this category recorded 18,260 and 5,247 cases respectively. The percentage of women who experienced rape, at least, once in their life time so far is in the rape of 15-20% with different studies disagreeing with each other.¹⁴

¹² Elaine K Martin, Casey T Taft, and Patricia A Resick, "A Review of Marital Rape," *Aggression and Violent Behavior* 12, no. 3 (2007): 329-47.

¹³ www.ibtimes.co.uk/uk-rape

¹⁴ [en.m.wikipedia.org/wiki/Rape_in_the_United States](http://en.m.wikipedia.org/wiki/Rape_in_the_United_States)

Australia

The Bureau of Statistics, in its 1996 statistics¹⁵ on Australian women's safety survey conducted on about 6,300 women aged 18 and above, indicated that sexual assault was about 1.9 per cent in the previous 12 months. Known men accounted for over two-thirds of assailants, that is, about 68%. However, it was only 15% of the assault on woman that was reported to the police. Between 20011 and 2012 an estimated 51,200 (0.3%) Australians aged 18 years and over were victims of sexual assault.¹⁶ Out of this figure, only 30% was reported to the Police.

India

Rape cases in India have doubled between 1990 and 2008¹⁷. Penile and non-penile penetration in bodily orifices of a woman by a man, without the consent of the woman, constitutes the offence of rape under the Criminal Law (Amendment) Act 2013¹⁸. Under Section 375 of the Indian Penal Code, which creates the offence of rape, the age of consent is set at 18 years, as sex with a girl under this age is considered rape, regardless of consent. However, in practice, this law is rarely enforced and India has become a destination for child-sex tourism.

South Africa

In South Africa, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 is the active legislation. Despite the fact that this Act provides modern and progressive laws, that banned rape and other forms of sexual abuse, including sexual violence within marriage, South Africa remain a country where sexual violence is common. The country has some of the highest incidences of child and baby rape in the world with more than 67,000 cases of rape and sexual assaults against children reported in the year 2000¹⁹, with welfare groups believing that unreported incidents could be up to 10 times higher.

In 2001, a 9-month old baby was raped and likely lost consciousness as the pain was too much to bear. The same year, 9-month old baby was raped by six men, aged between 24 and 66, after the infant had been left unattended by her teenage mother. As if that was not enough, a 4-year old girl died after being raped by her own father. The dastard act continued when a 14-month old baby was raped by her two uncles. In February 2002, an 8-month infant was reportedly gang-raped by four men.²⁰ It is significant to note that major contributing factors for the escalation in child abuse is the widespread myth that having sex with a virgin will cure a man of AIDS.

Democratic Republic of Congo

In eastern Congo, the prevalence and intensity of rape and other sexual violence is described as the worst in the world. It is estimated that there are as many as 200,000 surviving rape victims living in the Democratic Republic of Congo today²¹. A new study²² says that more than 400,000 women are raped in the Democratic Republic of Congo annually.

A cursory study of the trend of marital rape will reveal the notorious fact that is major constraint of considering the act as a criminal activity. It is a settled principle of law that having carnal knowledge of a woman without her consent is a criminal act called rape. But Can we said of the same act when the marriage has set in Taken cognizance of the fact that sexual intercourse is one of the major thing that parties are consenting in the contractual agreement of marriage. It is therefore necessary to examine the meaning of marriage to grasp the philosophy behind the customary beliefs in the African set-up.

Definition of Statutory Marriage

Lord Penzance in *Hyde v Hyde*²³, defined statutory marriage as "the voluntary union for life of one man and one woman to the exclusion of all others." Looking at the word "voluntary" as contained in Lord Penzance definition above, it means "consent" of both parties to the marriage. This is further supported by Section 3(1)(d) of the Matrimonial Causes Act²⁴ which states that consent of either of the parties must not be a mistaken identity of the other party or as to the nature of the ceremony performed and that either party must be mentally capable of understanding the nature of the marriage contract. Where the above conditions are not met, the marriage is void.

¹⁵ en.wikipedia.org/wiki/rape-statistics

¹⁶ en.m.wikipedia.org/wiki/Rape_statistics

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ *Ibid*, P7

²⁰ *Ibid*, P7

²¹ *Ibid*, P3

²² *Ibid*, P3

²³ (1860) L. R. IPD 130

²⁴ Laws of the Federation of Nigeria 1990, Pg. 141

What is a Customary Marriage?

Elias, T. O., in his book, "The Nature of African Customary Law" had this to say: "*Under the ancient customary law, marriages were almost insoluble as it was looked upon as a permanent social and spiritual bond between men and woman on the one hand and their respective families on the other.*"²⁵

Thus, from time immemorial, and from generation to generation, African people are proud of their custom and before western civilization gradually crept into our system, Africans have always had their well-organized systems of life. It is in this light, that before a man gets married customarily, certain distinctive features must be in place.

These include, the capacity to marry, the age of the couple to be, their physical conditions, their consent to marry each other and their marital status (whether any one was previously married or in a subsisting marriage). In addition to the above, there are customary formalities before couples get married, such as, consent of families, marriage ceremonies, payment of dowries and handing over of the bride by her family to the family of the bridegroom.

Consummation of Marriage

By section 21 of the Matrimonial Cause Act²⁶, a respondent cannot be held to have willfully and persistently refused to consummate the marriage unless such refusal continues up till the date of hearing. It is an undisputable fact that this provision is designed to preserve the marriage and give it a chance to survive.

In Cecilia Mojisola Owobiyi V Francis Adekunle Owobiyi²⁷, the Petitioner seeks a declaration that the marriage celebrated between her and the respondent on 30 August 1960 at the Marriage Registry, Lagos, Nigeria be declared null and void. In the alternative and by way of supplementary petition, she prays that the said marriage be dissolved on the grounds of desertion by the respondent for a period of three years before the presentation of the petition.

The court held, per Taylor, C. J. (25 October 1965) that "I have no doubt on the evidence before me that as from 18 November 1960 the respondent has evinced an intention to desert the wife. This intention was clearly shown by his refusal to communicate any more with the wife in the last four years, and even on his arrival, by his refusal to see the wife or speak to her. She has made all attempts to "patch up" their marriage but has met with no cooperation from the respondent. I therefore, grant the wife a decree nisi and order the husband to pay costs assessed at 50 guineas inclusive of out-of-pocket expenses."

In African customary marriage, particularly in southwest Nigeria, husband and wife are expected to consummate the marriage the very night of the solemnization of such marriage. In fact, where the girl is a virgin, a piece of white cloth is used in cleaning her "virginity blood" after sex, the very night of marriage. This piece of white cloth is sent to the family of the bride with some traditional gifts expressing appreciation to the family of the bride for giving the bridegroom a decent wife. This piece of white cloth and gifts adds to the prestige of the bride's family in that village because their daughter had made them proud.

The purport of this is that under customary and native law sexual intercourse is a vital ingredient embedded in marriage. The preservation of it for the owner which is the husband by the woman who is keeping it in trust is enshrined in the native law, custom and practice in Africa. Would someone now be guilty of treating his property in the best form he prefers?

Can a Man Rape his Wife?

In traditional African society marriage is understood as an institution where a husband has control over his wife's life, including control over her sexuality. Marriage gave conjugal rights to a spouse and marriage could not be revoked except by an act of law either common or customary. It therefore, seems that a spouse could not legally revoke consent to sexual intercourse and if there is consent, there is no rape.

In our earlier definition of rape, both the criminal code,²⁸ and criminal law²⁹ emphasizes on consent. In other words, where a man forces a woman to have sex without her consent, it amounts to the offence or rape. But in marriage (solemnization between husband and wife) whether statutory or customary, consent is automatically obtained to consummate and continued consummation of the marriage. After all, in traditional African society, no woman sticks to her marriage and claim to enjoy the marriage without hot and constant sexual intercourse.

²⁵ CAP 220, A Toriola Oyemo; A Handbook on African Laws of Marriage, Inheritance and Succession, Jator Publishing Co; Nigeria, 199, P. 7

²⁶ Ibid, P. 7950

²⁷ (1965) 2 All MR, 2000

²⁸ Section 357 (Supra)

²⁹ Section 258(1) (Supra)

Marital Rape in Selected Jurisdictions

Nigeria

It is the position of law in Nigeria that any person who have 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/or fraudulent representation as to the nature of the fact, or in the case of married woman by personating her husband is guilty of an offence which is called rape.³⁰

The above provision of the law clearly indicates that, in Nigeria, a husband cannot rape his wife. The position of the law above is further buttressed by the provision of the Criminal Law of Lagos State, which states: "*sexual intercourse between a man and a woman who are married is not unlawful.*"³¹

Within the socio-cultural setting of Nigeria, once a woman voluntarily decides to be a wife to a man and all the necessary legal/traditional rites performed or even where co-habitation exists, and neighbours, friends and relatives call them husband and wife, such woman cannot and must not resist sexual intercourse by her husband except where she is extremely exhausted or indisposed. The issue of being indisposed is known and seen by her husband but the issue of exhaustiveness must be explained by the woman to enable her a soft landing otherwise it will turn to physical struggle and the husband will have his way. That is what the English man call marital rape.

South Africa

In South Africa, where women were seen as the property of their husbands, marital rape is the least recognized of all forms of rape in spite of the fact that the country has laws that clearly make rape an offence. With about 18.8%³² of South African women admitting being subjected to marital/partner rape on one or more occasions, marital rape is definitely not a myth and is likely a way of life because it seldom stimulate public outrage as it ought to.

In *S. v Moipolai* (2004)³³, Judge Mogoeng, while discussing the complainant's visit to the home of the appellant's parents, stated that "she must have come knowing that this (sexual intercourse) was either likely to happen or was going to happen for sure and that she was, given the nature of their relationship, willing to take part in the intercourse". The real issue here is that for a judge of a court of law to have made such statement is an indication that he does not believe that marital rape can occur due to the nature of their relationship."

Similarly, in *S. v. Modise* (2007), Judge Gura stated that "the desire to make love to his wife must have overwhelmed him, hence, his somewhat violent behaviour...however, minimum force, so to speak, was resorted to in order to subdue the complainant's resistance. He went on to conclude that "this relationship of husband and wife should never be overlooked by any judicial officer."

However, Section 3(a) of the South African Criminal Law (Sentencing) Amendment Act³⁴ provided for minimum sentencing guidelines for rape, along with unsatisfactory and prohibited reasons for justifying a lesser offence. The section states that "when imposing a sentence in respect of the offence of rape, the following shall not constitute substantial and compelling circumstances justifying the imposition of lesser sentence: (i) the complainant's previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an accused person's cultural or religious beliefs about rape or (iv) any relationship between the accused person and the complainant prior to the offence being committed."

It is however, appears that, despite the provisions of the criminal law in respect of martial rape in the South Africa, the incident continue to grow at an alarming rate and it remains unabated.

Ghana

To have an insight of the thought and customary belief in Ghana, this statement summarises the customary view and belief: "*How can my wife tell me I have raped her?*" *Atsu Nutor, a carpenter, asked while sipping the locally prepared gin popularly known as Akpeteshe. "That would be the end of the marriage," his friend, Kwame Obi, also a carpenter, answered.*³⁵

Before the Domestic Violence Act³⁶ was passed in Ghana, the then Ghana's Minister for Women and Children's Affairs, Gladys Asmah, who is said to be under pressure from her colleagues, male members of the parliament, to scrap the bill says

³⁰ Section 357, Criminal Code, Cap C38, Laws of the Federation of Nigeria, 2004

³¹ Section 258(3), Criminal Law of Lagos State, 2011.

³² Op Cit P. 2

³³ Op Cit., P. 3

³⁴ 2007

³⁵ www.ipsnews.net/2007/07

that definitions of domestic violence emanating from other cultures, particularly Western, European and American notions, concepts and traditions may not necessarily be appropriate for Ghana's circumstances.

This she said, is a result of differences in culture especially with regards to the issue of marital rape in the proposed domestic violence bill. Asmah, who was speaking at a sensitization workshop on Domestic Violence organized by the International Federation of Women Lawyers (FIDA) stated further that:

what happens when a woman comes out publicly to say that she has been raped by her husband or that she has been forced into bed by her husband? She runs to the police, the man is arrested, charged and convicted and sentenced. The fundamental question would be: Can this woman return to her matrimonial home when her husband is in prison or heavily fined?" "My ministry believes that giving society, and for that matter, the people of Ghana the opportunity to consider other options will be welcomed because every traditional area may have its own ideas about what constitutes domestic violence and how to address it". She further asserted: "we are first and foremost Ghanaians and so we must first of all find home brewed solutions to our problems,"³⁷

It was further added that "each and every one of us have a head of family, he and the elders who contracted the marriage should be given the opportunity to settle the dispute."³⁸

A traditional ruler in Ghana's Central Region, Nana Kofi Abbeyquaye II, added his voice to the opposition of the marital rape law when he said Ghana's traditional law does not recognize anything like marital rape. "In our setting, once a woman consents to marriage, it means the man has sexual rights on her all the time. A woman who wants to continue her marriage has no right to deny her husband sex."³⁹ Despite public outcry in Ghana against criminalizing marital sex now termed marital rape, the Ghanaian Parliament went ahead to pass the Bill into law on 4th May, 2007.

Section 2(1) of the Domestic Violence Act⁴⁰ provides that a domestic relationship means a family relationship, a relationship akin to a family relationship or a relationship in a domestic situation that exists or has existed between a complainant and a respondent and includes a relationship where the complainant (a) is or has been married to the respondent; (b) lives with the respondent in a relationship in the nature of a marriage even if they are not or were not married to each other or could not or cannot be married to each other.

A person in a domestic relationship shall not engage in domestic violence. A person in a domestic relationship who engages in domestic violence commits an offence and is liable on summary conclusion to a fine of not more than Five Hundred Penalty units or to a term of imprisonment of not more than two years or to both.⁴¹

United States

The history of marital rape laws in the United States is a long and complex one, that spans over several decades. The criminalization of marital rape in the United States started sometime in the mid – 1970s and by 1993, marital rape became a crime in all the 50 states under at least one section of the sexual offence codes. Although marital rape had become illegal in all the 50 states by 1993, there were significant differences between the way marital rape and other forms of rape were treated. Only in 17 states out of 50 were marital rape and other forms of rape treated the same.⁴² In other states, there were differences, such as shorter penalties, excluding situations where no violence is used, etc.

In Ohio, for instance, a rape that happens in marriage when the spouses are living together can only be charged under subsection A (2) of 2907.02 Rape, which states that: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force". By contrast, a person who is not married to the accused or who is married but living separate and apart can rely on many laws which deal with various forms of coercion. It is notable that subsection A (a) of 2907.02 Rape that deals with drugging someone "surreptitiously or by force, threat of force or deception" to coerce them into sex does not apply in marriage (except in case of separation).⁴³

³⁶ Act 732, May, 2007

³⁷ www.ips.news.net/2007/07

³⁸ Ibid.

³⁹ Op cit.

⁴⁰ Supra

⁴¹ Section 3, Ghana Domestic Violence Act 2007

⁴² [http://en.wikipedia.org/wiki/marital-rape-\(United-States-Law](http://en.wikipedia.org/wiki/marital-rape-(United-States-Law)

⁴³ [http://en.wikipedia.org/wiki/marital-rape-\(United-States-Law\)](http://en.wikipedia.org/wiki/marital-rape-(United-States-Law)

In Idaho, which remains one of the few states which has gender specific rape laws, a married woman can bring a charge of rape against her husband only under subsections (4) and (5) of 18-6101. Rape defined. Article 18-6107. Rape of spouse states: "No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in subsections (4) and (5) of section 18-6101. Idaho code. The subsections provide: A married woman can bring charges:

"(4) where she resists but her resistance is overcome by force or violence;

(5) where she is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm, accompanied by apparent power of execution or is unable to resist due to intoxicating, narcotic or aesthetic substance."⁴⁴

In Nevada, the law requires the use of force or threat of force. Article 200.373 states that: "If is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or threat of force"⁴⁵ This provision simply implies that if force or threat of thereof was not used, marriage can be a defence under Nevada law. Generally, the differences in the United States Law on marital rape, is an indication that the thinking (question) that can a man rape his legal wife, is not straight?

India

Marital rape is not an offence in India. Section 375 of the Indian Penal code (IPC) provides: "sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape".⁴⁶ However, the 172nd Law Commission Report had made the following recommendations among others for substantial change in the law with regard to rape:

1. "Rape" should be replaced with the term 'sexual assault'.
2. 'Sexual intercourse as contained in section 375 of the Indian Penal Code should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
3. In the light of *Sakish V Union of Indian and others* (2004 (5) SCC 518). 'Sexual assault' on any part of the body should be construed as rape.
4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
5. Marital rape: explanation (2) of section 375 of Indian Penal code should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376A was to be deleted.⁴⁷

It is to be legally noted that section 122 of the Indian Evidence Act prevent communication between husband and wife during marriage from being disclosed in a law court except when one married partner is being prosecuted for an offence against the other. Since marital rape is not an offence in India, any evidence adduced on marital rape is inadmissible, although relevant, unless it is a prosecution for battery, or some related physical or mental abuse under the provision of cruelty.⁴⁸

Austria, Switzerland and Spain

Marital rape was criminalized in Austria in 1989 and in 2004, it became a state offence. In other words, it can be prosecuted by the state in the absence of a complaint from the spouse, with the procedure being similar to stranger rape. In Switzerland, marital rape became a crime in 1992 and became a state offence in 2004. In Spain the Supreme Court ruled in 1992 that sex within marriage must be consensual and that sexuality in marriage must be understood in light of the principle of the freedom to make one's own decision with respect to sexual activity. In line with this, the Supreme Court upheld the conviction of a man who had been found guilty of raping his wife by a lower court.⁴⁹

UN Declaration on the Elimination of Violence against Women

The United Nations policy development with regard to violence against women was initially concentrated on violence against women in the family. The World Plan of Action adopted by the First World Conference on Women in Mexico in 1975 did not refer specifically to violence but drew attention to the need for the family to ensure dignity, equality and security of each of its members. The 1980 conference in Copenhagen, which marked the middle of the United Nations Decade for Women, adopted a resolution on "Battered Women and Violence in the Family" and referred to violence in the home in its final report.

44 Ibid

45 Ibid

46 Indian Law Journal, 2007 P. 1/ <http://www.indianLawjournal.com>. Vol. 2/issue 2/article by Pruyan

47 Indian Law Journal, 2007 P. 1/ <http://www.indianLawjournal.com>. Vol. 2/issue 2/article by pruyan

48 Indian Law Journal, 2007 P. 1/ <http://www.indianLawjournal.com>. Vol. 2/issue 2/article by pruyan

49 mhtml:file:/marital rape-wikipedia, the free encyclopedia 7/15/2013 p. 3 of 12.

At the 1985 Nairobi World conference, especially at its parallel non-governmental forum, violence against women truly emerged as a serious international concern. The forward-looking strategies adopted by the conference linked the promotion and maintenance of peace to the eradication of violence against women in both public and private spheres. The conference included violence as a major obstacle to the achievement of development, equality and peace, the three objectives of the Decade.

In 1985, the General Assembly adopted the first resolution on domestic violence based on a recommendation of the Commission on the Status of Women to the Economic and Social Council and the outcome of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offences.

The Declaration on the Elimination of Violence Against Women was adopted by the General Assembly in 1993. The declaration 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”.⁵⁰

It outlines steps that States and United Nations, its agencies and programmes, should take to address gender-based violence against women, and makes it clear that States should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination, and should exercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.

Problems in prosecuting Spousal Rape

There a lot of problems associated with prosecuting perpetrators of spousal rape, principal amongst them is the reluctance of the various legal systems to recognize it as a crime at all. However, criminalization has opened a new set of problems. For example, in the United Kingdom, such a category of rape was only recognized in 1991 by a House of Lords decision known simply as R V R.⁵¹

While most parties agreed with the House of Lords’ motive in taking the decision, there were many who believed the decision involved post facto criminalization, since the House of Lords were imprisoning spouses for doing what was once, according to the law, regarded as their right.

The second problem which arises is procedural. While the law in theory may hold no distinction between a spouse and any other person, in practice, when the case comes to court, there will be difficulties in proving that rape in fact took place. This is because in marriage, sexual relations are to be expected, and if the defense claims consent then the evidential burden is a very difficult burden for the prosecution to discharge.

Another problem which may be encountered in prosecuting spousal rape is the prevailing social norms that exist in certain cultures. As such, even if these countries enact adequate law, to please their western allies, in practice these laws are ignored as the act is not socially considered a crime. For example, in many parts of the world, where women have few rights, it is considered unthinkable for a woman to refuse her husband sex.

In concluding this part, one major problem need to be mentioned, that is, even in countries where marital rape is illegal, many people are not aware of the existing laws. In many cultures, traditional ideas about marriage are deeply rooted in the conscience of the population and few people know that forcing a spouse to have sex is illegal.

Conclusion

No matter one’s stand in the society, culture, colour or race, it is expected that one must appreciate the fact that there is fundamental problem in prosecuting marital rape offenders. First, where a husband is prosecuted, convicted and sentenced for having sex with his legal wife, living under the same roof, where will the wife be when the husband concludes the serving of his jail term? Secondly, in any culture, where spousal rape is promoted, the implication of this is that there are already two husbands in the same marriage and one day, one must leave for the other. Thirdly, marital rape will naturally and bring about, promote and institutionalize the “single-parent” syndrome-or at worst, the younger ones (male/female) will be avoiding marriages.

It is in this sense, that we are saying that marital rape is not only alien to African cultures but will also not work within some African traditional and socio-cultural settings. Preservation of culture, Customary and native law is therefore essential for the

⁵⁰ Mhtml:file://f:/ The United Nations Work on Violence Against Women.
⁵¹ (1991) ALL ER 481

growth and development of family law, which must be a necessary factor in the development of criminal law in Africa. The issue of marital rape may therefore remain unacceptable in the African context and must stand the so-called imported and imposed western cultures (in the name of the law) must be rejected. It is not only alien, but also a taboo to African man's existence.

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