

**A CASE FOR THE CRIMINALIZATION OF MARITAL RAPE IN NIGERIA: THE
LACUNA OF THE LAW WITH REGARDS TO IMPLIED CONSENT AND THE
ROLE OF EQUITY**

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Abstract

Marriage is a social contract and institution recognized by law and is a manner in which the smallest unit of the society the family starts in most cases. What is allowed at the smallest unit of society is not only a reflection of a society but is also pervasive in such society. Marital rape is a concept that brings about controversial points of views ranging from those who do not recognize it as something wrong to those who wish to see it criminalized. The constitution as the supreme law of Nigeria must take precedence over other sources of law in Nigeria. Marital rape is not only repugnant against natural justice, equity and good conscience but also a violation of the fundamental right to dignity of person. Customary and statutory provisions of law and case law cannot supersede the fundamental human right to dignity of person. This paper will use comparative study of England legal position on marital rape, different legal rationales, jurisprudence, and principles of law for the justification of the criminalization of marital rape.

Key Words: *Marital Rape, Implied Consent, Lacuna of the law, Equity and Criminalization*

DEFINITION OF MARITAL RAPE

Marital rape is the forced sexual intercourse by one's spouse on their partner. According to the UNESCWA marital rape is a "Non-consensual vaginal, anal or oral penetration of the body of another person where the penetration is of a sexual nature, with any bodily part or with an object, as well as to any other non-consensual acts of a sexual nature, by a spouse or ex-spouse or by a former or current partner with whom a victim of rape is or has been living in a partnership recognized by the national law."²³⁸

IMPLIED CONSENT AND THE LACUNA OF THE LAW

According to Cornell Law School LII, implied consent, compared to express consent, is the agreement given by a person's action or can be inferred from certain circumstances by any reasonable person. Implied consent is usually inferred from acceptance to marry that the spouse agrees to sexual relations with their partner. In the case of **R v Miller**²³⁹ it was held that a husband who had forceful sexual intercourse could not be said to have committed rape based on the rationale of implied consent granted by the wife through marriage. However, the problem becomes a situation in which a person forces their spouse into sexual intercourse which would without marriage be seemed to be the offence of rape.

This lacuna has created a cloak for persons to dehumanize and abuse their spouse in the name of the right to body of their partner by virtue of marriage. The punishment for assault prescribed in the Criminal and Penal Code are substantially less than the charge of rape. The Criminal Code prescribes the punishment of life imprisonment with or without canning in **section 358** while **the section 282 of the Penal Code** prescribes similar punishment for the offence of rape while the punishment for the offence of assault in the **Criminal Code in Section 351** is not even regarded as an offence but misdemeanor and its punishment is provided for one year imprisonment which is similar to the Penal Code.²⁴⁰ The fundamental human right of a person to dignity cannot be overthrown by the social contract of marriage. Even in the most pure sense of law does not entertain illegality. The law should not be used as a cloak to do wrong.

²³⁸ 1 "A Staggering One-in-Three Women, Experience Physical, Sexual Abuse" (UN News, November 24, 2019) <https://news.un.org/en/story/2019/11/1052041> accessed April 30, 2025.

²³⁹ (1954)2 Q.B 282

²⁴⁰ 1999 CFRN (as amended in 2018).

THE INDIGNITY AND EFFECT OF MARITAL RAPE

In Nigeria marital rape is a form of sexual violence that has been left without a legal recourse. Instead in the case where it occurs in the marital home the only recourse for the victim is a charge for assault. The lack of penalty against marital rape is encouraging sexual violence in marriages. Sexual violence involves elements of control, power, domination, and humiliation towards to the victim as is seen in the case of marital rape. This is particularly the case of men who deem their wives to be properties and subordinates instead of life partners who rape their wives to exert not for sexual pleasure but for dominance. It should be noted that Elizabeth Cady Stanton and Lucy Stone while lobbying against marital rape stated that “women’s right to control marital course is the core component of equality”²⁴¹. Rape is an indicator that domestic violence will likely escalate as numerous studies have shown in many cases before femicide usually within or around a month of the femicide there is a twist in the victimization pattern, such pattern include marital rape. The Nation Nigeria reported that a 30 year old man Alasa Day raped his new wife to death because she refused to give him sex for 20 days.²⁴² It also impacts mental and physical health negatively, halting victim's cognitive development. The UN Women’s Executive Director, Phumzile Mlambo-Ngcuka²⁴³ had this to say about the act that “Rape isn’t an isolated brief act. It damages flesh and reverberates in memory”. Section 34 (1)(a) of the 1999 CFRN (AS AMENDED) provides that no one should be subjected to inhumane treatment or torture.

MARITAL RAPE AND CUSTOMARY PROVISION

Nigeria is largely a patriarchal system which views women as chattel of their husband²⁴⁴. In Nigerian customary law marriage seems to grant a husband unrestricted access to their wives’

²⁴¹ Julie Bindel, “The Long Fight to Criminalise Rape in Marriage” Al Jazeera (June 15, 2021) <<https://www.aljazeera.com/features/2021/6/15/the-long-road-to-criminalising-rape-within-marriage>> accessed April 30, 2025.

²⁴² Abiolapaul, “Man Rapes Wife to Death 20 Days after Marriage in Jigawa” (The Nation Newspaper Community, April 30, 2020) <https://community.thenationonline.net/forum/man-rapes-wife-to-death-20-days-after-marriage-in-jigawa?xg_source=twitter> accessed April 30, 2025.

²⁴³ “A Staggering One-in-Three Women, Experience Physical, Sexual Abuse” (UN News, November 24, 2019) <<https://news.un.org/en/story/2019/11/1052041>> accessed April 30, 2025.

²⁴⁴ Adewale Taiwo and Oluwatoyin Akintola, *Introduction to Equity & Trusts In Nigeria* (Princeton & Associates Publishing Co Ltd 2016) 24.

body. This implied consent within marriage is deeply ingrained and effectively erases the notion of non-consensual sexual act within the marital context.

Marital Rape and Statutory Provision

In the previous English locus classicus case on marital rape of **R v Miller**²⁴⁵ it was held that a husband who had forceful sexual intercourse could not be said to have committed rape based on the rationale of implied consent granted by the wife through marriage. In **Ogbonnaya v State** the traditional position of the Nigerian courts on marital court shifted **Section 34 (1)(a) of the 1999 CFRN (as amended)** provides that no one should be subjected to inhumane treatment or torture. Furthermore, the **Violence Against Persons Prohibition (VAPP) Act 2015** does not exempts husbands from being charged with rape based on its definition of rape as it focuses on consent however it does not explicitly criminalizes marital rape. Therefore it dismantled the previous basis that marital rape is not a punishable offence. The VAPP also suffers from being applicable in all states in Nigeria as it has yet to be enacted in some states.

A CASE FOR THE CRIMINALIZATION OF MARITAL RAPE AND THE ROLE OF EQUITY

In the current English locus classicus case of **R v R**²⁴⁶, Lord Lane held that

“The idea that a wife consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objection is no longer acceptable.”

The rationale that marriage should be a license to rape a spouse is repugnant to natural justice, equity and good conscience. Equity will not suffer the law to be without a remedy. In the labour context the former master-servant relationship that existed was terminated and the relationship relaxed by statutory provisions like the **Labour Act and Factories Act** so that even though an employee has by virtue of an employment agreement agreed to render their service for a monetary consideration they are able to retain dignity and avoid abuse. Similar protections in the form of staunch punishment should be provided in the case of marital rape since it is to be a lifelong relationship. Equity can play an important role of making customary law that allows for marital law repugnant and therefore void and filling the LACUNA in the law with regards to marital law.

²⁴⁵ n 36

²⁴⁶ (1991) UKHL 14 4

CONCLUSION

Marriage cannot be a license to have forceful sexual relations with one's spouse. It is barbaric, and repugnant to natural justice, equity and good conscience. There must never be a contract that should always supersede any contract. Consent gotten should allowed to be withdrawn when needed. Criminalizing marital rape will allow spouse see the institution of marriage as safe rather than an unappealing sentence to licensed rape. There is an urgent need to create penal methods to curb the sexual violence called marital rape as it reflects poorly on the Nigerian society and tramples on the dignity of the victims.