

JUXTAPOSING HUSBAND'S RIGHT TO SEX FROM MARITAL RAPE: THE ISLAMIC LAW PERSPECTIVE

By

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ABSTRACT

Marriage is an institution that brings about love, joy, affection and sexual satisfaction to both husband and wife. One of the objectives of marriage is to promote procreation of human nature on the surface of the earth. This obviously stems from the lawful union between the married couples. In Islamic law, the term marriage is referred to as “*aqd al-nikah*” i.e. the formal contract which signifies the commitments and consent of both parties to abide by the terms, conditions and lawful stipulations of the agreement as contained in Shari’ah (Islamic law). Consent is one of the essentials of marriage contract under the Islamic *corpus juris*. Once parties have unequivocally consented to get married to one another, they should equally be bound by what they have consented to. As a matter of the religious injunction both husband and wife have similar and reciprocal rights and duties to one another. One of such rights is the right of sexual relationship. It is indeed an obligation on a wife to allow her husband have and fulfill his sexual desire, and *vise-versa*. However, such right and obligation can be derogated and/or waived in some circumstances enumerated by shari’ah itself. In light of this therefore, the paper examines the husband’s right to sex under the shari’ah with a view to analyzing the legal implication, scope and effects of “a marital consent” in Islamic marriage contract. In the end, the paper juxtaposes the position of shari’ah on the husband’s right to sex from the notion of marital rape. Finally, the paper recommends for the enactment of an Islamic Family Code in Muslims dominated communities, with emphasis on provisions of stringent physical punishment on the perpetrators as well as issues of compensation, forfeiture and apology to the victims of the violence should be made compulsory.

KEYWORDS: Rape, Marital Rape, Consent, Right to Sex, Islamic law

1. INTRODUCTION

There is no gainsaying the fact that rape is a greatest and grievous sexual assault against female creature. Nowadays, cases of rape are rampant in the world, especially in developing and under developed nations where human rights violations are reluctantly protected. The growing concern about the menace (rape) coupled with the contemporary human rights activism towards elimination against gender discrimination and domestic violence have been fueling a lot of controversies on the issue of marital rape. In Islam, it is a fact that by entering into a marriage agreement, the couples have by implication consented to have sexual relationship with one another; this has equally refuted the notion of non-consensual sexual relationship (rape) within a subsistence of marriage. In view of this, the paper, from the Islamic law perspective unravels the true meaning of rape, the nature of the offence and whether or not a man can commit rape against his

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wife; or whether or not the concept of implied consent theory has been recognized and applicable within the realm of Islamic law, especially in relation to contract of marriage. Finally, the paper examines whether a wife can impliedly retract or revoke the consent within a subsistence of marriage under Islamic law.

2. MARRIAGE AND SEXUAL RIGHTS OF THE SPOUSES UNDER ISLAMIC LAW

In Islam, the term marriage technically refer to as a contract between a man and a woman, in which each becomes “lawful” to the other. This contract manifests a kind of symbiotic relationship between them which brings about many blessings and tranquillity. To this end, the Almighty Allah has described the relationship as one which brings love, harmony, trust and compassion. In the most moving and eloquent terms, thus, He said: “And among His Signs is this, that He created for you mates from among yourselves, that you may dwell in tranquillity with them, and He has put love and mercy between your [hearts].”¹ The implication of marital relationship in Islam is not only that of spiritual relationship but also the contractual one. Each party is having some rights and duties over one another. For example, a true Muslim woman should devote herself to obedience and taking care of her house and husband. This has been confirmed by the Prophet (s.a.w) in a tradition: “No human being is permitted to prostrate to another, but if this were permitted I would have ordered wives to prostrate to their husbands, because of the greatness of the rights they have over them.”² In a related tradition he says: “If I were to order anyone to prostrate to anyone else, I would have ordered women to prostrate to their husbands.”³ The duty of obedience shall include submission to sexual relationship to her husband. This is because, Islam protects the sexual rights of both husband and wife, and to satisfy the sexual appetite of one's spouse is a legitimate objective of sexual relations and even of marriage itself. The right to sexual fulfilment belongs to both husband and wife, and it is a mistake to assume that only the husband has this privilege. The wife has as much right to expect her sexual needs to be fulfilled as the husband. As such, sexual relations are rights of both spouses.⁴ This right is compellable and enforceable by both spouses in the courts of law in case of any breach. However, there is a slight legal difference between the husband's and the wife's right to demand sex. The husband can demand sex through a court of law unless there is a genuine physical excuse or legal impediment. While in the case of the wife, even though it is religiously obligatory for the husband to fulfil her sexual needs, she has other options such as seeking for dissolution of marriage in case the husband refused to have sexual intercourse with her.⁵

According to some Muslim scholars, the spouses rights of sex is not negotiable when it comes to sustainability of marriage. To this end, it was narrated in a hadith related by Ibn Jarir that he was informed by the one whom he trust that 'Umar ibn al-Khattab while on patrol, heard a woman singing in form of poetry:

"This night stretches out and is dark, and that I am without a companion
to be intimate with has made me sleepless. Were it not for the fear of
Allah like unto Whom there is none, the sides of this couch would have

¹ Qur'an 30:21

² Reported by Ahmad and al-Bazzar; the men of its isnad are rijal al-sahih. See Majma' al-Zawa'id, 9:4, *Bab haqq al-zawwj 'ala'l-mar'ah*

³ A hasan sahih hadith, narrated by Tirmidhi, 2:314, in *Abwab a-rida'*, 10

⁴ *Badii 'i al-Sanii 'I* 2:331

⁵ See: *Radd al-Mu'Jtiir* 3:4

been moving." The Khalifah Umar said, "What is wrong with you?" She said, "You sent my husband on an expedition some months ago, and I stay long for him." He said, "Do you intend to do wrong?" She said, "I seek the refuge of Allah!" He said, "So restrain yourself, for it is only a matter of the message being delivered to him.". Immediately thereafter, Umar quickly sent a message to him (to return back home). Then he went to [his daughter] Hafsat and said, "I want to ask you about a matter which concerns me, so dispel it for me. How long can a woman remain without her husband?" She lowered her head and was shy. He said, 'Truly Allah is not shy of the truth.' So she gestured with her hand indicating three months, and if that is not possible, then four months. Hence as a result, Umar declared that armies must not be kept on service for more than four months."⁶

Husband's right of sex is a wife's obligations and vice versa. To this end, the spouses should not allow themselves to be deprived of such pleasure, neither should they allow any influence to render this right valueless. As husband and wife, they should always make themselves desirable to each other i.e to be attractive, responsive, comfort and cooperative to each other at all times.⁷

3. RAPE AND THE MARITAL RAPE: JUXTAPOSING THE TWO

Rape, generally is a gender discriminatory offence which can only be committed by a male upon a female.⁸ Rape which is the gravest form of sexual assault is defined as an unlawful and non-consensual carnal knowledge of a girl or woman by a man.⁹ In some jurisdictions, the offence is punishable with life imprisonment with or without whipping. In Nigeria for instance, the offence of rape is contained in the Criminal and Penal Codes.¹⁰ According to the Criminal Code:

"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 or harm, or by means of false or fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of rape."¹¹

In order to prove the offence of rape, certain ingredients shall be put in place, such as penetration of male organ inside the female organ;¹² rupturing of the hymen;¹³ and lack of consent. In view of this therefore, any sexual intercourse committed against the real consent or will of a female will amount to rape. Hence, a consent obtained by means of force, threat, fear, harm, deceit, intimidation, false or fraudulent representation as to nature of the act or by impersonation of the husband of a married woman is not a real

⁶ *Tiinkh al-Khulafii* P: 161-162

⁷ Right of Husband and wife in Islam, available at <http://www.zawaj.com/rights-of-the-husband-and-wife-in-islam/>, accessed on 23/05/2015 see also Centre for the Study of Political Islam Bill Warner, *Shari'ah Law for the Non-Muslim*, CSPI, LLC: USA, 2010, available at www.cspipublishing.com, at 16

⁸ Ochem Charles Emeka and C.T. Emejuru, "An Appraisal of the Jurisprudence of Spousal Rape in Nigeria", *Donnish Journal of Law and Conflict Resolution*, vol.1 (1) (2005), at 001

⁹ Ibid at 002-009

¹⁰ These are the primary codes regulating criminal offences in Nigeria. The Criminal Code is applicable in the Southern part of the country while the Penal Code applies in the Northern part.

¹¹ Section 357 of the Criminal Code, Cap C 38, LFN, hereinafter referred to as "the CC"

¹² A slightest touch of the female *labia minora* by the penis is a sufficient proof of penetration

¹³ This may not include emission of seminal fluid as was held in some judicial decisions

consent because it is unlawfully obtained. This is also one of the implications of provision of the law in the Penal Code of Nigeria, which stipulates that a person may still be convicted of rape committed against a girl who is below the age of 14 or a *non-compos mentis* despite her consent.¹⁴ This is because, the consent is deemed to have been given or submitted by a person of weak intellect or who is too young to understand the nature of the act.¹⁵

Another ingredient of rape is that the accused must be capable of committing the offence (rape).¹⁶ The Criminal Code has made it clear to the effect that only a person who is capable of committing rape is said to have been committed same. The Code stipulates the age of capability in which a person must attain before he would be presumed as capable. To this end, the Code provides that a male person under the age of 12 years is *doli incapax*, that is to say, he is presumed to be incapable of having carnal knowledge.¹⁷ This presumption of the law is an irrebuttable one and cannot even be rebutted by showing that the boy has reached puberty despite his age. It follows that from this, he cannot be guilty of the offence of rape.¹⁸ So going by the provisions of the law under the two codes as to what constitutes rape and the ingredients, one may conclude that not all cases of rape is capable of securing a conviction in the court of law. It is one thing for an offence to fulfil the ingredients of rape and is another thing to convict and punish the offender. An offence of rape can be committed by a person who under the presumption of law is incapable of committing the offence but in the factual sense couple with some indications of physical features may be capable of having carnal knowledge. In fact, this is the irony of some laws sometimes.

Similarly, in the Penal Code (PC), a man is said to have been committed rape if he has sexual intercourse with a female against her will; or without her consent; or with her consent when her consent has been obtained by putting her in fear of death or of hurt; or 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 believes herself to be lawfully married; or with or without her consent if she is under fourteen years of age or of unsound mind.¹⁹ However, the same provision, under subsection (2) of the PC has explicitly exclude non-consensual sexual intercourse committed by a man with his own wife provided she has attained puberty.²⁰ The implication of the subsection (2) is that a lawfully married husband will not be criminally liable for any act committed in contravention of the provision of subsection (1) (a)-(e) of same code; hence he cannot be said to have committed rape against his wife. This by implication also means that the Penal Code has, to some extent shun away from the concept of marital rape and as well, does not recognize same as an offence.²¹

Worthy of note however, is that the above exclusion shall only be enjoyed by husbands who may have non-consensual sexual intercourse with their wives who have attained the age of puberty. It can be argued even if the non-consensual sexual intercourse has occurred against a wife of under fourteen years, as the clause “or with or without her consent if she is under fourteen years of age or of unsound mind” in the sub section

¹⁴ Section 283 of the Penal Code

¹⁵ Ochem Charles Emeka and C.T. Emejuru, “An Appraisal of the Jurisprudence of Spousal Rape in Nigeria”, *Donnish Journal of Law and Conflict Resolution*, vol.1 (1) (2005), at 002-009

¹⁶ Section 30 of the CC

¹⁷ Ibid S. 30 CC

¹⁸ Ochem Charles Emeka and C.T. Emejuru, Op Cit

¹⁹ Section 282 (1) (a)- (e) of the PC

²⁰ Section 282 (2) of the PC

²¹ Ochem Charles Emeka and C.T. Emejuru, Op Cit

does not directly referring to married women. The proviso to the subsection, if literally interpreted shall indeed defeat the objective of the provision of the law which is set out to negate the concept of marital rape.

Equally too, the Criminal Code contemplates the exclusion of liability against husbands in having sexual intercourse with their legitimate wives. The Code, while defining the phrase "unlawful carnal knowledge" provides that it is a carnal connection that takes place otherwise than between husband and wife.²² To this effect, the exemption under the Criminal Code is wider than the marital exemption to the crime of rape provided for under Section 282(2) of the Penal Code. This is because the exemption provided under the Penal Code does not cover persons whose wives have not attained puberty. It may therefore be safe to state that marital exemption exists in full under the Criminal Code. This implies that a husband cannot, as a general rule, be guilty of rape on his own wife. It has also been justified by Sir Mathew Hale in the seventeenth century as follows: "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their natural matrimonial consent and contract the wife have given up herself in this kind into her husband which she cannot retract".²³ However, there are exceptions to the general rule that a husband cannot be guilty of raping his wife. He may be found guilty of raping his wife in the following circumstances: if a court of competent jurisdiction has ordered a decree of judicial separation, as she is no longer bound to cohabit with him; where there is a divorce nisi decreed; where an injunction has been granted against a husband from molesting his wife or on medical ground such as where a husband is contracted with a venereal disease; where a wife is not medically fit and does not have an ability to submit herself into any sexual relations due to ill-health.²⁴

In Islamic law on the other hand, a mere separation or divorce does in itself fall under the exceptions to the general rule. This is because, a woman is said to have been free from marital ties only if she is divorced irrevocably (*Talaq ghair al-rij'ee* or *talaq al ba'in*)²⁵ such as a divorce pronounced for the third time;²⁶ or if she has finished observing her stipulated waiting period (*Iddah*) for the first or second divorce. In this circumstance, she becomes an absolute divorcee (*Ba'in*) who can only be a legitimate wife to her husband after a fresh contract. This implies that under Islamic law a wife remains under the marital ties even if she has been observing *Iddah* provided that the divorce is revocable. Hence she is entitled to all her legal rights and liabilities (including sexual relationship).

In contrast, it is a different story in some jurisdictions such as UK which has a legal system derived from customs and conventions of the British. In that, consent of a lady is adjudged to be paramount at all times. It must be sought in all circumstances and all stages of marital life otherwise the act of the husband will amount to rape. Similarly, it does not matter whether the woman is a wife or separated wife, or prostitute or a woman who is morally bankrupt or one who used to have sexual intercourse with the accused on regular occasions in the past, as all these cannot avail him to imply consent. In such jurisdictions nothing is acceptable short of a complete and an explicit consent. In *R v Olugboja*,²⁷ the court held that the consent of a lady is paramount for her submission to

²² Section 6 of the Criminal Code

²³ Cited in Ochem Charles Emeka and C.T. Emejuru, "An Appraisal of the Jurisprudence of Spousal Rape in Nigeria", *Donnish Journal of Law and Conflict Resolution*, vol.1 (1) (2005), at 002-009

²⁴ Ochem Charles Emeka and C.T. Emejuru, Op Cit

²⁵ See Qur'an 2:229

²⁶ This is an irrevocable type of divorce which shall not be remedied unless the wife has thereafter, engaged in a lawful marriage to someone

²⁷ *R v. Olugboja* (1982) QB 320

sexual intercourse with a man; otherwise any consent obtained by fraud, or duress, or undue influence, or fear, or intimidation would amount to rape.²⁸ This implies that even if the woman happened to be his wife must give out her consent otherwise the act becomes rape. Similarly the concept of marital rape exemption was abolished in 1991 by the House of Lords in its judicial capacity in the case of *R v. R*,²⁹ where it was held that the concept of marital rape had never been a rule of statute and did not exist in English law, having first been promulgated in 1736 in Hale's history of the crown where His Lordships said: "But the husband cannot be guilty of rape committed by himself upon his own wife, for by their mutual matrimonial consent and contract the wife had given up herself in this kind unto her husband which she cannot retract."³⁰ Later after some time, by judicial activism through the instrumentality of case laws such as *R v. R*, the Hale's implied consent theory had also become the issue of the past as husbands in England and Wales can now rightfully be convicted of marital rape under both the provision of Sexual Offences Act, 2003.³¹ Although, the Act is not explicit about the prohibition of marital rape as it does not permit non-consensual sexual intercourse. However, inference was drawn from the generic nature of provision, to the effect that is tantamount to offence of rape if exist the key elements such as intention, lack of consent, penetration and lack of reasonable believe about the consent of the victim. Once these elements are established, the offence of rape is said to have been committed. It is immaterial whether it is committed within or outside the marriage wedlock.³²

In India, unlike rape, a marital rape has not been recognized explicitly as a crime in the law. Even though it can be inferred as domestic violence punishable under "The Protection of Women from Domestic Violence Act 2005. However, the Act did not criminalize marital rape but was purposely enacted to create a civil remedy for victims of domestic violence.³³ The issue is, can a mere non-consensual sexual inter course between husband and wife be considered as domestic violence taking into cognisance the existence of prior consent between them to be bound by all marital agreements (including sexual inter course)? Or is it not contrary to the principles of natural justice to tag a justified non-consensual sexual inter course domestic violence such as physical assaults, insults and slavery? These are all affirmative questions of facts. In contrast, there are some countries that have explicitly criminalized marital rape in recent years. These countries *inter alia* include: Turkey in 2005, Mauritius in 2007 and Thailand in 2007.³⁴

Islamic law which is one of the sources of the Nigeria legislation, does not recognized the notion of marital rape talk more of its criminalization. A Muslim woman cannot refuse to have sex with her husband except on grounds of ill health and other grounds stipulated by shari'ah. In fact, going by a tradition of the Prophet (s.a.w), once she turns down the sexual advances of her husband, she remained cursed by all the angels of

²⁸ Ibid, see also Ochem Charles Emeka and C.T. Emejuru, Op Cit

²⁹ *R v. R* (1991) UKHL 12 or *R v. R* (1991) WLR 767

³⁰ Ibid, see also Ochem Charles Emeka and C.T. Emejuru, Op Cit

³¹ The Act provides that a person commits an offence of rape if: he intentionally penetrates the vagina, anus or mouth of the victim with his penis; the victim does not consent to the penetration; and the rapist does not reasonably believe that other person consents.

³² Ochem Charles Emeka and C.T. Emejuru, Op Cit

³³ Ibid

³⁴ Ibid

Allah through such period of refusal.³⁵ It is also worthy of note that in Islam, the offence of rape forms part and parcel of fornication (*Zina*), which is defined as consensual sexual intercourse between a man and a woman without the existence of lawful marital relationship. By this, it is therefore deducible that, sexual relationship between a husband and a wife is lawful, and however performed it cannot be considered as *Zina* talk more of rape.³⁶ Similarly, in Christianity, it is said (in Saint Paul) that the body of the wife belongs to her husband, as such, a wife is enjoined not to deny her husband the pleasure of her body. Even though religious injunctions may not have stipulated sanction on defaulters, however, that does not equally justify the criminalization of the action of defaulters as rape in *strictu sensu*.

4. UNDERSTANDING THE CONCEPT OF RAPE IN ISLAMIC LAW

Unlike the conventional laws where the issue of rape has been coded explicitly as having unlawful carnal knowledge of a woman or a 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 impersonating her husband. In Islamic law there is no explicit stipulation on rape especially within the confine of the primary sources of sharia. However, Muslim scholars have conceptualized it based on interpretations of some provisions in the Quran and the Sunnah (the Tradition) of Prophet Muhammad (s.a.w). Some modern Muslim countries recognize rape through various legislation, the basis of which is founded on the customs and religious antecedents of their communities.³⁷

Rape under Islamic law remains abominable act of satan despite lack of an explicit provision in the primary sources of shari'ah on its criminalization. Unlike in the case of prohibition of *zina* (adultery or fornication),³⁸ rape has not been mentioned explicitly in the Qur'an and Sunnah. However, *Zina* has "the added meaning of non-consensual sex in the Quran and *fiqh*", and has thus been applied to many rape cases at the times. *Zina* is considered one of the greatest sins (*kaba'ir*) in Islam. It attracts punishment of hundred stripes, at least for unmarried persons, men and women alike.³⁹ The punishment for married persons is complicated by the fact that, although the *Qur'an* does not distinguish between adultery and fornication, several *hadith* have indicated that the punishment for adultery is stoning to death.⁴⁰ During the life time of the Prophet (s.a.w) a rapist was punished based on only the testimony of the victim. Wa'il Ibn Hujr reported that a woman publicly identified a man who had raped her. The people caught the man

³⁵ Sahih Al Bukhari, Hadith Np. 4794, in a hadith reported by al Bukhari, the Prophet (s.a.w) said: "if a man calls his wife to his bed and she refuses, and he spends the night angry with her, the angels will curse her until morning"

³⁶ Ochem Charles Emeka and C.T. Emejuru, Op Cit

³⁷ Eghosa Osa Ekhaton, "Women and the Law in Nigeria: A Reappraisal", *Journal of International Women's Studies* Vol. 16, No. 2 (January 2015), at 287-289

³⁸ Quran 17: 32 where the Almighty Allah reveals: "Do not approach *zina*, for it is an abomination and an evil way"

³⁹ Quran 24: 2, the Almighty Allah say: "the female fornicator and the male fornicator, flog them hundred stripes each..." See also Sahih al Bukhari, Book 82, Hadith No 818. In the Hadith, narrated by Zaid ibn Khalid Al Jihani, who said that : "I heard the Prophet (s.a.w) ordering that an unmarried person guilty of *Zina* be flogged one hundred dtripes and be exiled for one year..."

⁴⁰ Sahih al Bukhari, Book 83, Hadith No. 17. The Hadith was narrated by Abdullah that the Prophet (s.a.w) said: "the blood of a Muslim who confesses that none has the right to be worshiped but Allah and that I am His Apostle, cannot be shed except in three cases: in Qisas for murder, a married person who commits *zina* and the one who reverts from Islam (apostate) and leaves the Muslims "

and brought him to the Prophet (s.a.w). he told the woman to go, that she was not to be blamed, and ordered that the man be put to death.⁴¹ A closer look at the hadith suggests that the Prophet differentiated between consensual and non-consensual intercourse, though the term *zina* was used in the narration. The hadith illustrates how the Prophet punished a man who was confirmed to have raped, but did not punish the woman who was forced into the act. This implies that the woman too would have been punished in a like manner if she had admitted her willingness to commit the wrong

However, the concept of rape under Islamic law has been misunderstood by many. Some authors based their arguments solely on the facts that ‘Umar ibn al-Khattab, the second Islamic Caliph (*Khalifah*), offered a woman the option of marrying the man who raped her. When she refused, he had the man pay her a dowry as compensation. In another case, ‘Umar had a male slave whipped and exiled for raping a woman, but no compensation was ordered since the woman was not a virgin.⁴² Using these two scenarios, the schools of Islamic jurisprudence began recommending payment of compensation in rape cases and dealing with rape as a violation of property right, which is popularly known as *Ightisab* in Arabic. Furthermore, Abu Hanifa used ‘Umar’s precedents to allow for the commuting of the *hadd* punishment if the rapist marries the woman he violated because “the woman becomes the property of her husband through marriage in regards to his right to enjoy her.”⁴³ Although the Maliki, Shafi’i, and Hanbali schools disagreed with the Hanafi decision and maintained the *hudud* punishment for proven rape.⁴⁴

The above four Sunni schools of Islamic jurisprudence also have different definitions of rape, with Malikis defining rape under *zina* as “sexual intercourse by a legally capable Muslim of a vagina to which he had no right (*mulk*).”⁴⁵ Hanafis defining *zina* as “sexual intercourse committed by a man in the genitals in other than his property (*mulk*).”⁴⁶ The Shafi’is and Hanbalis focused more on compensation for criminal acts, with the Shafi’is defining rape as “forcing the male organ or part of it into forbidden genitals of a male or female” and the Hanbalis defining it as “committing forbidden fornication.”⁴⁷ Thus, the Shafi’is and Hanbalis were more concerned with forbidden intercourse, reflecting a *zina*-oriented approach to the crime, while the Malikis and Hanafis emphasized sexual property rights under the crime of *ightisab*. Maliki *fiqh* also sometimes used the term *istikrah* to indicate the coercive nature of rape, in accordance with the current Western concept of sexual assault, though categorization of rape as *ightisab* was most common. In accordance with the association of rape with crimes of property seizure, Islamic law also sometimes classified rape as a form of *haraba*, usually translated as “highway robbery” but also interpreted as “any type of forcible assault upon the people involving some sort of taking of property.”⁴⁸

⁴¹ Available at <http://thoughtco.com/what-does-islamic-law-say-about-rape2004208>, accessed on 20/07/2017, see also Julie Norman, “Rape Law in Islamic Societies: Theory, Application and the Potential for Reform”, CSID Sixth Annual Conference, Democracy and Development: Challenges for the Islamic World, Washington, DC, April 22 - 23, 2005

⁴² Explained and Cited in Julie Norman, “Rape Law in Islamic Societies: Theory, Application and the Potential for Reform”, CSID Sixth Annual Conference, Democracy and Development: Challenges for the Islamic World, Washington, DC, April 22 - 23, 2005

⁴³ Julie Norman, Op Cit

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

The rape of women (*hath al 'arad*) was classified in this category by the Maliki judge Ibn Arabi as well as by Al-Dasuqi, a Maliki jurist, and Ibn Hazm, a Spanish Zahiri jurist. According to Quraishi, "this classification is logical, as the 'taking' is of the victim's property (the rape victim's sexual autonomy) by force". Another apparent categorization for crimes of rape was the law of *jirah*, or wounds, in which rape was seen as bodily harm. Because Islamic law designates ownership rights to each part of the body, as held by most of the schools Islamic law that where a woman is harmed through sexual intercourse, she is entitled to financial compensation for the harm. When this intercourse is non-consensual, the perpetrator must pay the basic compensation for harm under the law of *jirah* in addition to the *diyya*, or compensation for the crime. While the concept of paying *diyya* to rape victims acknowledged the coercive criminal nature of *ightisab* and *haraba* in the early centuries of Islam, reported punishments for rape from the time period indicate that the main concern for the crime was still associated with illicit sexual relations. Despite the classifications mentioned above, rape was still considered to be a form of *zina*. This dual notion of the criminality of rape did not necessarily have a negative consequence for rape victims initially, and indeed, it usually furthered justice by ensuring harsher punishments for rapists and acknowledging various levels of wrongdoing.⁴⁹ This could be achieved according to some scholars by further exploring ways in which modern Islamic legislation which could specifically define the crime of rape as a form of *hiraba*, and what combination of *hiraba* and *jirah* should apply and enforce in any given situation and society in order to bring the spirit of the Qur'anic verses honouring women.⁵⁰

5. IS THERE A MARITAL RAPE UNDER ISLAMIC LAW?

Although, in Islamic law, the concept of rape (non-consensual sexual intercourse) has been derived from the realm of consensual sexual intercourse i.e fornication or adultery (*zina*), which is a wrong committed outside wedlock. Marital rape on the other hand is said to have been perceived as non-consensual sexual intercourse committed by a husband against his wife. This perception depicts the defeat of objectives of marriage in Islam. It is as well, portrays the legitimacy of withdrawal or retrieval of consent after a marriage contract. Sexual relationship within the confine of marriage does not serve only as enjoyment but a medium of procreation and subsistence of humankind. To this end, Imam Ibn al-Jawzi (may Allah have mercy on him [r.a]) comments: "At times, sex results in producing offspring like unto the calibre of Imam Shafi'i and Imam Ahmad ibn Hanbal (may Allah have mercy on them [r.a]). Sex of this nature is superior to one thousand years of [voluntary] worship (*Nawafi*).” Hence, this demonstrates the significance of sex to married spouses to the extent that marriage cannot survive without it.⁵¹

In Islam, rape is a crime of *Zina*, which refers to extramarital or pre-marital sex. Within marriage there is no extramarital or premarital intercourse by definition. Therefore there can be no marital *zina*, no marital rape. However, *Zina* can also take different forms such as the one committed by eyes (*zina al- 'ayn*), the one committed with hands, and the one in question i.e that of genital organ (*zina al-farj*).⁵² Which means there can be *Zina* in lustful gazes, thoughts, or without full intercourse but no recognition is made

⁴⁹ Ibid

⁵⁰ Asifa Qureshi, A Review of "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive", Manisha Basnat: Feminijtihad, 2012, at 4-5

⁵¹ Muhammad Ibn Adam Al-Kawthari, *Islamic Guides to Sexual Relations*, Huma Press, UK, 2008, at 10-11

⁵² Musnad Imam Ahmad, Hadith No. 4258

on marital rape. The concept of marital rape emanated from the conventional laws which is much broader in perception than Islamic law (a divine law), that it refers to “a type of sexual assault usually involving sexual intercourse, which is initiated by one or more persons against another person without that person’s consent. The act may be carried out by physical force, coercion, abuse of authority or with a person who is incapable of valid consent, such as one who is unconscious, incapacitated, or below the legal age of consent. irrespective of whether a marriage subsist between the couples or not.”⁵³ However within Islam too there can be illegal intercourse or assault within marriage but not termed as marital rape. For instance intercourse during menses, during obligatory fast or intercourse which will harm the woman, due to illness, infection among others.⁵⁴

Marital rape is an unknown phenomenon under Islamic *corpus juris* due to the fact that the couples have already consented to satisfy each other sexually and such a consent is not retrievable within the subsistence of the marriage. Several Islamic legal verdicts (*fatawa*) have been issued either confirming the legality of spouses rights to sexual intercourse or debunking the concept of marital rape in Islam despite the fact that it is not permissible to force a wife in sexual intercourse, especially when there is a genuine cause for her denial. To this end, it has been stated in *Fatawa al Islamiyyah*: “It is not permissible for a husband to force his wife to do more than she is able to bear of intercourse. If she has an excuse such as being sick or unable to bear it, then she is not sinning if she refuses to have intercourse”.⁵⁵ In a civilized Islamic marriage, it is not an abominable act for a spouse to deny his or her partner sexual intercourse especially when there is a lawful justification for that. Muslim men and women say no to each other, neither are upset, more so, the husband who loves his wife and cares about her *akhirah* (the day hereafter) wouldn’t be angry with his wife if she somehow denies him sex, as he wouldn’t want the angels to curse her. Islam encourages tolerance and kindness all the time. The two shall be inculcated even within the marital life. As part of tolerance and kindness, a husband has to fear Allah with regard to his wife, and not make her do more than she is able to do. He should be kind to his wife and treat her in a reasonable manner. In the Prophet (s.a.w.) last sermon emphasised on good treatment of women, in his last days he wanted his Ummah to remember; “Fear Allah concerning women! Verily you have taken them on the security of Allah, and intercourse with them has been made lawful unto you by words of Allah.” and he (s.a.w.) also said The most perfect amongst the believers in faith is one who has the best manners and best of you are those who are best to their wives.”⁵⁶ Al-Bahooti maintained that a husband has the right to enjoy intimacy with his wife at any time provided that he does not distract her from obligatory religious duties or harm her. In that case he does not have the right to intimacy with her without her permission, because that is contrary to the idea of tolerance and kind treatment. So long as he does not distract her from that and does not

⁵³ Asifa Qureshi, Op cit

⁵⁴ There is no Marital Rape in Islam, available at <https://muslimahdirections.wordpress.com/2012/11/05/there-is-no-marital-rape-in-islam/>, accessed on 23/05/2015

⁵⁵ Al-Fataawa al-Islamiyyah, 3/145, 146

⁵⁶ There is no Marital Rape in Islam, available at <https://muslimahdirections.wordpress.com/2012/11/05/there-is-no-marital-rape-in-islam/>, accessed on 23/05/2015

harm her, then he has the right to intimacy.⁵⁷ Thus, a wife whose husband harms her by having intercourse with her too much can agree with her husband the number of times that she can bear. If he does more than that to the point that he harms her, she can refer the matter to the Qadi (sharia judge), and the Qadi can determine the number of times that the husband and wife should stick to. In the light of this, Shaykh ul-Islam Ibn Taymiyah (the renown sunni Muslim scholar) said: The husband should have intercourse with his wife according to what satisfies her, so long as that does not harm him physically or keep him from earning a living; it is not limited to four months. If they argue, then the judge should decide on the number of times, just as the judge should decide on the level of spending on a wife.⁵⁸

It is therefore conclusive to say that there is no mention of rape (*Zina-bil-Jabr*) in the Quran talk more of marital rape. This is deliberately omitted in the Quran on the understanding that it is one to be reprimanded by the community whether committed in public or not. Hence rape does not fall under the category of Zina. It is asserted that *Zina-bil-jabr* does not reflect the ideals of Islamic jurisprudence rather it is more on the lines and borrowed from the common law offence of rape.⁵⁹ A hypothetical question that one may likely ask is that where does rape find its roots in the Islamic jurisprudence then? Several jurists are of the view that it emanated from and developed through the following concepts, namely: Duress (*jabr*): this is reported that this principle was developed through a tradition of the Prophet Muhammad (s.a.w), where a woman once reported to the Prophet that she was compelled to commit adultery. He did not punish her but did prosecute the culprit. The focus of the Islamic jurisprudence is on duress as negating intent, which in effect leads to the acquittal of the victim. That is also the basis of classifying rape as a distinct crime from Zina under Islamic law, and as well equating same with the offence of *Hiraba* (High way robbery) crimes. Thus, the punishment of High way robbery as spell out in the Qur'an⁶⁰ shall be imposed on the offender. In addition, a compensation can also be recovered by the victim of rape under the principles of *jirah* (damage or injury or bodily harm under Islamic law of crimes and torts).⁶¹

6. CONCLUSION

Rape is recognized by all reasonable human creature as an unacceptable and barbaric conduct of behaviour. In Islam, rape is considered as a serious offence if committed by a human male gender upon a female gender. Thus, it has been understood as a non-consensual carnal knowledge or sexual assault against a girl or woman by a man. Many legislation in the world condemned and prohibit the act of rape in its entirety. However, some of such legislation do not explicitly mention about the prohibition of marital rape but attempts to draw inferences from other provisions of the law against sexual assault which made no distinction as to whether committed within or outside the lawful

⁵⁷ Kashf al Qinaa, vol. 5, at 189

⁵⁸ *Al-Ikhtiyaaraat al-Fiqhiyyah*, p. 246 cited also in Shaykh Muhammad Salih Al-Munajjid (General Supervisor), Islam Question and Answer, available at <http://islamqa.info/en/ref/9602>, accessed on 04/06/2015

⁵⁹ Asifa Qureshi, Op Cit at 8-9

⁶⁰ Qur'an 5: 33. The Almighty Allah reveals : "the Recompense of those of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off from the opposite sides or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the hereafter."

⁶¹ Asifa Qureshi, Op Cit at 11-13

wedlock. Some of the legislation instead of criminalizing marital rape have created a civil remedy for the victims. Islamic law which is one of the sources of the Nigeria legislation does not recognize the notion of marital rape for reason that an implied consent of couples cannot be revoked or retracted within the subsistence of marriage let alone a criminalization of sexual act committed by legally married couples. In fact according to Islamic law (shari'ah), a Muslim woman cannot refuse to have sex with her husband except on grounds recognized by shari'ah itself. It should also be noted however that Islam has condemned the act of rape as it forms part and parcel of fornication (zina) and even more grievous than zina that is committed consensually between a man and a woman outside the lawful wedlock. Similarly, other religions such as Christianity does not explicitly prescribe anything about the issue of marital rape let alone a stipulation of sanction on defaulters.

Generally, the perception about marital rape and subsequent condemnation is to counter issues of domestic violence in the society. Obviously, love, enjoyment and tranquillity are product and features of lawful marriage, hence, sexual relationship within the confine of marriage does not mean assault in Islamic law. Thus, Islam strikes a balance between couples' right to sex and marital rape. The former is embedded in the Qur'an and Sunnah of the Prophet (s,a,w) and can be actualized through the means of lawful union. Whereas, the latter is a abominable act of transgression which can be alleged to have been committed by husband without the consent of his wife or without any lawful justification; and is punishable by way of *Ta'zir* (discretionary punishment) as a mere sexual assault under the law. Based on the Islamic injunctions, right to sex therefore is exercisable in accordance with the principles of shari'a, and failure of which may constitute a sexual assault or domestic violence but not marital rape. However, if it is committed outside the lawful wedlock may constitute rape which is referred to as *zina bil jabr* (non-consensual illegal sexual intercourse); this is a situation where a female victim would be exonerated from any liability due to lack of consent. In as much as sexual intercourse of whatever kind is unlawful and punishable under the shari'ah if committed outside a lawful wedlock, rape does not have a prescribed punishment in the Qur'an and Sunnah. It is therefore, a trite principle under shari'ah that if there is no prescribed punishment for a wrong then *Ta'zir* (discretionary punishment) shall apply. In a circumstance such as rape therefore, the paper suggests that in addition to the *hadd* (prescribed) punishment of *zina*, a stringent *Ta'zir* should be applied against perpetrators of this evil so that it will serve as deterrence to others. In addition, the paper recommends for the enactment of an Islamic Family Code in Muslims dominated communities, so as to avert issues of sexual assaults and domestic violence against women within the Muslim communities. Where in the code, issues of compensation, forfeiture and apology to the victims of the violence should be made compulsory on the perpetrators in addition to any stringent physical punishment.