MENTAL ELEMENT OF RAPE

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1.1 INTRODUCTION

What is the requisite mental element of the offence of rape is not a settled point of law. Analysis in this paper has highlighted this fact. The theoretical framework of this paper is aimed at depicting the essential constituents of the offence of rape under Nigerian law and under English law. Salient points on how to establish the offence of rape under these laws are thoroughly examined. This is done by contrasting and comparing relevant provisions.

There are two kinds of assault in criminal law - common assault and indecent assault. Rape is an aggravated form of indecent assault. Rape is a heinous offence next to homicide. The offence will be analysed by examining the provisions of the Criminal Code and the Penal Code and the English Sexual Offences Act, 1956. The aim here is to identify the elements of the offence under these penal statutes.

1.2 DEFINITION

Rape may be defined, as sexual penetration of a woman against her will. It has been argued that reforms have extended the definition to include any bodily orifice.[1] Section 259 of the Criminal Code defined the term as follows:

Any person who has unlawful canal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat 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 is guilty of an offence which is called rape.

The offence is also defined by Section 282 of the Penal Code as follows:

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[1] The Encyclopedia America – International Edition, Vol. 23, Crolie Incorporated, (1988) P. 185

(1) A man is said to commit rape who has ... sexual intercourse with a woman in any of the following circumstances:
   a) Against her will;
   b) Without her consent;
   c) With her consent when her consent has been obtained by putting her in fear of death or of hurt;
   d) With her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believe herself to be lawfully married;
   e) With or without her consent if she is under fourteen years of age or of unsound mind;

(2) Sexual intercourse by a man with his wife is not rape if she has attained puberty.

In English law the Criminal Justice and Public Order Act 1994 amended the definition of rape and substituted the following section 1 into the Sexual Offence Act, 1956.

1. It is an offence for a man to rape a woman or another man.
2. A man commits rape if-

a) He has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
b) At the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.

3. A man commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.

Prior to amendment, the Sexual Offences Act 1956, merely talks about the crime of rape, as "It is an offence to rape a woman".
By then the mental element of rape was governed by common law, in which rape was defined as "Unlawful sexual intercourse with a woman without her consent by force, fear or fraud".[2]

[2] Curzon, L.B.: Criminal Law (McDonald and Evans; Estovry, Plymouth, England, 1987), (Fifth edition), p.185.

2.0 THE MENTAL ELEMENT AND ACTUS REUS UNDER BOTH CODES

2.1 INTERCOURSE WITHOUT HER CONSENT:

Under the two Nigerian Codes, the actus reus consists of having carnal knowledge or sexual intercourse with a woman "without her consent". This is also the first mental element under the English law. However, the Penal Code recognizes that there may be "consent" which was obtained "against the will" of the victim. The argument here is that the essence of felony of rape is the absence of real consent to sexual intercourse on the part of the woman or girl with whom it is affected.[3] In the past, emphasis was on the element of force or fear of bodily harm.[4]

But the phrase "against her will" used in the Penal Code, presupposes that in certain situations, it is not necessary for the prosecution to prove that the consent was obtained by force. Thus, the question in this context is whether the absence of consent is due to actual force or fear or to the deception of the accused e.g. unconsciousness or feeble mindedness of the victim.[5]

It is therefore rape to have intercourse while the woman is unconscious and therefore not able to give withhold her consent.[6] Situations like this arouse in the English cases of Camplin and Fletcher.[7] The emphasis in these authorities is that in a charge of rape, it is not necessary for the Crown to prove that the woman positively dissented. What is required is that she did not assent. So, in Camplin a conviction was upheld where the accused had intercourse with a woman whom he had rendered insensible by giving her liquor in order to excite her. In Mayers[8], the accused had intercourse with a woman who was asleep.

The Penal Code provision of having sexual intercourse with a woman "against her will" is in accord with modern legal thinking to the effect that it is possible for a woman to be raped, without the old common law definition of rape as having intercourse without consent by force, fear or

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[3] Radzinowicz, L: Sexual Offences – A Report of the Cambridge Department of Criminal Science (London: Macmillan & Co. Ltd., New, St. Martins Press, 1957), p. 325.
[4] Ibid
[5] Ibid
[6] Cross, Rupert at at-al: An Introduction to Criminal Law (London: Butterworth & Co., 1995) (Third Edition), P.278.
[7] (1845) Bell C.C. 89.
[8] (1959) Bell C.C. 89.

fraud. The Heilbron Committee and Smith and Hogan[9] favours this proposition. Thus in Olugboja,[10] the English Court of Appeal held that the parliament had adopted and incorporated in the Act the statement in the Heilbron report, so that:

...the question now is simply: at the time of sexual intercourse did the woman consent to it? It is not necessary for the prosecution to prove that what might otherwise appear to have been consent was in reality merely submission induced by force, fear or fraud, although one or more of these factors will no doubt be present in the majority of cases of rape.

In a recent case of Upaha v. State[11] the Court of Appeal stated what the prosecutrix mux prove to establish the offence of rape as follows:

i) The accused has sexual intercourse with the prosecutrix;
ii) That the act was unlawful, not being between husband and wife;
iii) That in giving the evidence of intercourse complete penetration is proved;
iv) That the accused had "MENS REA', that is, intention to have sexual intercourse with the prosecutrix without her consent ... or that the accused acted recklessly, or not.
v) The prosecution must adduce credible evidence to corroborate the complaint made by the prosecutrix.

2.2 CONSENT OBTAINED BY FORCE:

Under the Criminal Code, it is envisaged that the consent may be obtained "by force or by means of threat or intimidation of any kind, or by fear of harm" Under the Sexual Offences Act, the second mental element is "knowledge", that the woman did not consent, ad being "reckless" whether she consents.

The test under English Law is an objective mens rea. i.e. knowledge. The term "knowledge" for the purpose of criminal responsibility is defined under section 43 of the Penal Code, to wit "A person is presumed, unless the contrary is proved, to have knowledge of any material fact if such fact is a matter of common knowledge".

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[9] Smith, J.C. and Hogan, Brain: Criminal Law (Butterworths & Co., London, 1992) (7th edition), p.545

[10] (1981) 73 Cr. App. Rap. 344

[11] (2002) FWLR (Pt. 139) C.A., 1513.

This means that the circumstances, under which the intercourse took place, must be such that an ordinary person would be deemed to know that the woman did not consent. Therefore, a resultant sexual intercourse in that condition must be the product of a reckless act since a reckless person does not care a hoot about the consequences of his actions.[12] It is apparent that the recognition by the Criminal Code to the effect that consent may be as a result of "intimidation of any kind" is a bit wider. This means that consent could be obtained through threats of any kind, which may be in the nature of the victim suffering any injury to her person or reputation. In the Penal Code, the threats must be of "death" or "hurt". Under section 241 of the Penal Code, hurt is defined inter alia, as any act, which causes grievous bodily injury.

This seems to suggest that hurt as used in section 282(c) of the Penal Code, must be an injury likely to cause harm to the woman raped. But if section 241 of the Penal Code, is read together with section 31 of the Code, which states that the word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation, or property; it then means that the word "injury" construed as eiusdem generic with the word "hurt", the result will be that the hurt used under section 282(c) of the Penal Code, need not be of any bodily injury or grievous hurt.

Accordingly, it can be argued that the word "hurt" used in section 282(c) of the Penal Code is analogous with the words "intimidation of any kind" used in section 357 of the Criminal Code. It seems that under English Law, if the intercourse was based on mere remote threats or intimidation, the courts may sometimes consider it wise for the prosecution to proceed for the lesser offence, under section 2 of the Act of 1956, of procuring by threats or intimidation any woman to have unlawful sexual intercourse.[13]

In Olugboja,[14] the jury was directed that consent should be given its ordinary meaning and, that there is a difference between consent and submission. On this, Smith and Hogan[15] have suggested some examples:

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[12] Under section 2(b) of the Sexual Offence Act, 1956, the test is both objective and subjective. If the accused is deemed to know that the woman did not consent, this question is determined objectively. But if he was merely reckless whether she consented or not, it is a subjective test and, no consideration would be given whether a reasonable man in the accused's position would have known that the woman did not consent.

[13] Radzinowicz, L. op.cit. P. 323

[14] (1981) 73 Cr. App. Rep. 344

[15] Smith and Hogan, op.cit, p.445

A person submits when he or she yields, or gives in, to pressure of some kind. A woman may reluctantly submit to sexual intercourse only because her fiancé threatens that he will break off the engagement if she does not. Such a case is very far removed from rape but it seems to be one of submission. At the other extreme, a woman may submit because the man is holding a knife at her throat. This is plainly rape ... Submission may be induced by a promise...

The dictum of Coleridge in R. v. Day[16] seems to be more illuminating:
There is different between consent and submission, every consent involves a submission but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description, was not consenting, on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no mean be taken to be consent as will justify the prisoner in point of law.

In Olugboja (supra), it was reported that reference was made to an unreported case in which Winn J. held that "a constable had no case to answer where he induced the complainant to sexual intercourse by threatening to report her for an offence".

In Wellard[17] the accused was convicted and sentenced to six months imprisonment by masquerading as a security man and inducing a girl to consent by threatening to report to her parents and the police that she had been seen having intercourse in a public place. In Flatcher[18], the accused/appellant had intercourse with a girl of thirteen years of week intellect, it was held that the jury was rightly told that he was guilty if they are satisfied that the girl was incapable of giving consent or exercising any judgment on the matter.

2.3 CONSENT OBTAINED BY MEANS OF FALSE AND FRAUDULENT REPRESENTATION

The Criminal Code recognizes that consent may be obtained by "means of false and fraudulent representation as to the nature of the act". The Penal Code has no equivalent provision. It is an offense under section 3 of the Sexual Offences Act 1956 "for a person to procure a woman, by false

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[16] (1941) 9 C & P. 722 at 7224
[17] (1941) 9 C. & P. 722 at 724.
[18] (1869) Bell C.C 63

pretences or representations, to have sexual intercourse in any part of the world".

Thus, where a person fraudulent deceives a woman as to the nature of the transaction, that would be rape. On this, Aguda and Okagbue[19] argued that fraud vitiates consent if it relates to a fundamental fact. In Flattery[20], the accused was convicted where the victim submitted to intercourse with him under the impression that he was performing a surgical operation. The Court of Criminal Appeal in Williams,[21] which was substantially the same facts as in Flattery. Said that such conduct is indictable as rape.

2.4 INTERCOURSE BASED ON BELIEF IN MARRIAGE

Under both Codes, inducing sexual intercourse with woman, after making her to belief that she is lawfully married to the man is rape. By virtue of section 1 (2) of the Sexual Offences Act, 1956, it is rape for "a man who induces a woman to have sexual intercourse with him by impersonating her husband commits rape".

This provision seems to have overruled the decision in Barrow,[22] where the Court for Crown Cases Reserved held that the woman's consent to sexual intercourse was a defense even though she was deceived into thinking that the accused was her husband. In Dee,[23] the Court for Crown Cases Reserved upheld the impersonators conviction. It has also been suggested that the conduct would still be rape, if a person obtains consent by impersonating some person other than the husband.[24] It has also been argued:

> *Consent given by a woman to sexual intercourse by the accused on the mistake induced by him that he is her husband will not be consent and the intercourse will amount to rape. But on the other hand, if the woman consent to the intercourse with the particular*

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[19] Aguda, T. Akinola and Okagbue, Isabella: Principles of Criminal Liability in Nigerian Law (Heinemann Educational Books Nigerian Plc: Ibadan-Nigeria, 1990) (2nd edition), p.253

[20] (1877) 2 ABD 410

[21] (1923) 1 K.B 340

[22] (1868) 11 Cox C.C 191

[23] (1984) 12 Cox C.C 579

[24] Smith and Hogan, op.cit. p. 456

man but under false belief induced by the man that he is not suffering from any disease, or under a false misrepresentation by the man that he is in a position to marry her, the fraud here will not vitiate the consent because the condition of the man in which the woman has been deceived is irrelevant for the purpose of the offense of rape, or assault for that matter.[25]

2.5 MARITAL RAPE

Under section 282 (2) of the Penal Code, there is no marital rape, provided that the woman has attained puberty. The Criminal Code has no equivalent provision. The objective underlying this sub-section seems to be two fold. First, is to prohibit the marriage of under-age girls, and secondly, is to exclude rape within the bonds of marriage.

What is the age of puberty may be gleaned from the provisions of the Children and Young Persons Act, the Criminal Code, Penal Code, and from Law Dictionary. Section 2 of the Children and Young Persons Law, CAP 32 Laws of the Federation and Lagos defined a child as a person who has attained fourteen years and is under the age of seventeen years. In Okon,[26] the Supreme Court of Nigeria relied on section 2 (1) of the Criminal Code and held that a child means any person who has not attainted the age of 14 years. Black's Law Dictionary[27] defines a juvenile as follows:

> *A young person who has not yet attained the age at which he or she should be treated as an adult for purpose of Criminal Law. In some states, the age is seventeen... a term which may be, though not commonly applied to a person who has not reached his or her legal majority for the purpose reached his or her legal majority for the purpose of contracting, marrying etc.*

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[25] Aguda and Okagbue, op.cit. 253-254
[26] (1988) ALL NLR 178
[27] Sixth Edition, p.897

Anyebe[28] contend that in the dim past when sexual virtue was at considerable premium, the age regarded as the age of puberty was usually high. He quoted Johnson, as having stated the age of puberty, in his monumental work, the history of the Yoruba's, at twenty-five. This, he argued was in the first decade of this century. Half a century, Elias put it at fourteen.[29] Both the Idoma and Tiv declarations put the marriageable age at twelve for girls[30] In English Law, the question whether a man would rape his wife, is to be considered by construing the purport of the word "unlawful sexual intercourse" used in the sexual offences act 1956. Viewed against this background, it can be argued that sexual intercourse between a husband and wife is not unlawful. In Chapman[31] the phrase "unlawful sexual intercourse," used in many sections of the Sexual Offences Act, was construed to mean "illicit", i.e outside the bond of marriage".[32]

This proposition presupposes that there could be no rape between a husband and wife, if there is a valid subsisting marriage between them. At Common Law it was felt that a wife could not retract the consent to intercourse, which she gave upon marriage. Smith and Hogan[33] are of the opinion that the following is an exception at common law of the husband's immunity. They postulated thus:

> *He could be convicted of rape where there had been a judicial separation a separation by formal agreement, a decree nisi of divorce or nullity, or an undertaking by the husband not to molest his wife if 'unlawful' was interpreted to mean 'outside marriage and not otherwise': these exception have been abolished, parliament would be unlikely to have intended that. But this is not conclusive. 'unlawful' could have been given to the qualified meaning, because it is arguable that this is the meaning to be given to it in the rest of the Act;*

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[28] Justice Anyebe, A.P: Customary Law: The War Without Arts (Fourth Dimension Publishers Enugu Nigerian, 1985), p. 50
[29] Ibid, p.51
[30] Ibid.
[31] (1959) 1 QR 100
[32] Smith and Hogan, op.cit, p.452
[33] Smith an Hogan, op.cit p.453

for example, the intercourse of a husband with his fifteen year old wife consent is not ":unlawful but it might be otherwise if they judicially separated.

In the meantime, it is settled that the law of rape applies within marriage exactly as outside it. The only difference is in the practical problem of proof.[34]

Thus at common law a husband cannot be convicted of rape as a principal of the first degree, of his wife. When the matter came up before the Court of Appeal in R vs Gibs[35], they ruled that marital rape is an offence and was upheld by the House of Lords.[36] Thus, under English law, the actus reus of the rape, is intercourse, whether vaginal or anal and absence of consent. The former definition of rape under the Sexual Offences Act that intercourse should be "unlawful" is no longer a requirement under the new definition of rape. This was taken to mean that the intercourse had to be outside the bonds of marriage and, according to Bloy[37] was the premise upon which the rule that a man could not rape his wife was built". This rule, following the House of Lords decision in R vs Gibs has dispensed with the old rule that a man cannot rape his wife , and the House of Lords in that case, hold that the word "unlawful' used in the Sexual Offences Act was "mere surplus age". Lord Keith went on to say 'the fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of word in the sub-section adds nothing".

3.1 SEXUAL INTERCOURSE

Under the Criminal Code, the phrase used is "unlawful carnal knowledge". The Penal Code and the Sexual Offence Act 1956, uses the phrase "sexual intercourse". Under both statues the actus reus for rape is penetration. The Penal Code explained this thus 'mere penetration is sufficient to constitute the sexual intercourse[38] necessary to the offence of rape". [39] In English Law, the term "Sexual Intercourse" was preferred to the phrase "carnal

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[34] Ibid
[35] (1991) 4 ALL E.R 481
[36] (Supa)
[37] Professor Bloy, Duncan: Lecture Notes-Criminal Law (Cavendish Publishing Ltd, London 1996) 2nd ed p. 316
[38] Ibid
[39] Explanation of section 282 of the Penal Code

knowledge" in the consolidation by the sexual offences act section 44 of the Sexual Offences Act provides some guidance as to meaning of the term:

> *Where on the trial of any offense under this act, it is necessary to prove sexual intercourse (whether natural or unnatural), it shall not be necessary to prove the completion of the intercourse by the emission of seed, but the intercourse shall be deemed compete upon proof of penetration only.*

By virtue of section 7(2) of the Sexual Offenses (amendment) act 1976, section 44, so far as it relates to natural intercourse,[40] applies for purpose of rape. Under section 44 rape is complete by the slightest penetration; and in Russen[41] it is not necessary to prove that the hymen was ruptured, no emission need by proved.[42] This position seem to differ with the decision of the former Northern Nigerian High Court in Ibo[43] where it was held that though the offense of rape is complete upon penetration, ejaculation and/ or the rapture of the victim's hymen are important by way of evidence. In that case evidence of penetration was rejected because the doctor who examined the girl did not specify that areas of private part was ruptured.[44] The complaint of the victim was that the accused "lied on me" the trial court refused to accept that as sufficient evidence of sexual intercourse.

In a recent case of Ogunbayo v The State[45] the Supreme Court stated when sexual interference is deemed complete as follows:

> *I will pause here to state that the important and essential of the offence of rape, is penetration. It is also settled that sexual*

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[40] O'sullivan (1981) Crim. L.R 406, held that-there is no such offence as rape per annum.

[41] (1977) 1 East P.C. 438; Hughes (1941) 9 C & P 752; Lines (184) 1 Cor & Kiv 393.

[42] R.V Marsden (1891) 2 Q.B 149 (1962) NNCN 30 See also The State v. Ojo (1980) 2 NCR. 391 at 395 and Jegede v. State (2001) 7 SCNJ 135 at 141 Belgore, JSC (as he then was) held that "emission is not a necessary requirement

[43] (1968) NMLR 8. See also the case of Upahar v. State (supra) wherein the Court of Appeal defined hymen as the piece of skin partly covering the vagina of a woman who ha never had sex.

[44] Chukkol, K.S: The Law of Crimes in Nigeria (Ahmadu Bello University Press Limited, Zaria. Nigeria 1988), p.187

[45] Ibid.

interference is deemed complete, upon proof of penetration of the penis into the virgina... Per Lord Caleridge, C.J that 'emission' is not necessary requirement... it is however, been held, that any, even the slightest penetration, will be sufficient to constitute the act of sexual intercourse. This is why, even where penetration was full, but of such a depth as to injure the hymen, it as been held to be sufficient to constitute the crime rape... thus proof of the rupture of the hymen is unnecessary to establish offence of rape.

Since penetration constitute essential ingredient or element of the offences of rape, it would be illogical or perverse, to convict an impotent person or rape. On this, it has been argued. "For males the word 'penetration' implies sexual potency of the rape accused, where the male organ (i.e the penis) cannot be erected at all there will be no such penetration per vagina to make him liable for rape

However, an impotent man may be guilty of attempted rape. The argument here, is that "since factual impossibility is not a bar to conviction for attempt, the man may be guilty of attempted rape"[46].

3.2 INTERCOURSE WITH UNDER AGE GIRLS

Under section 282 (1) (e) of the Penal Code, it is rape to have intercourse with a woman less than fourteen years of age. Her consent is immaterial. The age of the vitiates the consent. The Criminal Code has no equivalent provision. Under English law it was an offense under then Criminal Law Amendment Act, 1885, section 5 (1), which is now replaced by section 6(1) of the Act of 1956, and the consent of the girl is no defense to the accused is charged with this offense. On this, it has been argued that as the girl under the age of sixteen could not in law consent, the intercourse was necessarily without her consent, and accordingly rape.[47] This contention was sought to be proved as unrealistic and fallacious by the Court of Appeal in a judgment delivered by Humphreys j. in R v. Harling.[48]

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[46] (2007) Vol. 146 LRCN, 699-700

[47] Radzinowiez L. op.cit, p 322

[48] (1937) 26 Crim. App. R 127

> *... while a girl under the age of sixteen is perfectly capable of consenting and as everyone knows who tries these cases frequently does consent to an act of sexual intercourse with a man, the law has provided that such consent affords no defense to a man on a charge of carnal knowledge of a girl under sixteen; but there is no much provision as to the crime of rape. In every case 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.*

He concluded "it is not, therefore, true that a girl under the age of sixteen cannot consent to sexual intercourse, it is simply that in the case of certain offences, to including rape, her consent affords no defense to the accused,[49]

Smith and Hogan[50] admitted that it is also rape to have intercourse with a child too young to understand the nature of the act. Referring to Harling (supra) they postulated that there is no fixed age limit below which consent is impossible as a matter of law.[51] Thus, according to them, it is a question of fact in each case and that; it is misdirection to tell the jury that, as a matter of law, a child of six cannot consent. In Howard[52]"... to would be idle for anyone to suggest that a girl of that age had sufficient understanding and knowledge to device whether to consent or resist".

The dictum in Harling probably, cannot be the position in English Law, since the enactment of the Sexual Offences Act 1956. For instance, section 11 of the Act, protects girls under the age of sixteen from criminal responsibly. The argument here is that if a girl below sixteen is deemed to lack the capacity to form a mischievous disposition, by an analogy or extension, such girl should be deemed, to lack the capacity to appreciate the danger or consequences of sexual intercourse. The court of Appeal in Harling alluded to this fact to wit:

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[49] Radzinowiez L.ibid, pp 325-326
[50] Smith and Hogan, op.cit., p.456
[51] Ibid
[52] (1985) 3 All E.R 684, CCA

> *... it may well be that in many cases the prosecution would not need to prove much than the age of the girl, and upon satisfactory prove than the age of the girl was thirteen and half years, and the fact that she was a weakling, were enough to prove absence of consent"*[53]

The better view is that a girl under sixteen is incompetent to give valid consent to have sex with a man. In Nigeria, the age limit is fourteen.[54] Attempts to whittle this fixed age-limit down, is akin to exposing juvenile to sexual promiscuity, anchored on passing infatuation. To do that will account for earlier puberty and official sanction to earlier intercourse.

4. THE MENS REA:

In English Law, the accused must know that the woman did not consent and being reckless whether she consents: This is referred to as "Cunningham recklessness" and "Caldwell/Lawrence recklessness". This means that in English Law, the mens rea of rape is an intention to have sexual intercourse with the victim, (i) knowing that the victim does not consent, or (ii) being aware that there is possibility that she does not consent. The first limb of the mens rea, i.e "knowing that the victim does not consent," apparently, refer to aggravated type of rape illustrated by Tumer[55] thus:

> *The ancient law began with the concept of carnal knowledge effected by direct and overpowering physical force beating down the victim's resistance; in such a situation there was clearly no consent by the woman and this came later to be regarded as the gist of the offence, so as to cover the case of the woman yielding (but not consenting) when faced with threats of such bodily injury to herself as she*

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[53] Radzinowiez, 1 . ibid, pp.325-236

[54] See section 282 (1) (a) of the Children and Young Persons Laws, CAP 32 Laws of the Federation and Lagos, a young person is a person who has not attained the age of 14 years and is under the age of 16 and being a federal law the age of a girl for the purpose of consent to intercourse should be 17.

[55] Turner, J.W.C: Kenny's Outlines of Criminal Law- (Cambridge : at the University Press, (1996) (Nineteenth Edition), P. 200

dared not resist. It was also realized that there could be a different situation where the woman's consent was not negatived, but was in fact vitiated by intimidation that is to say, where she had, as it were, been faced with a decision between two evils and had chosen hat one which seemed to her to be the lesser.

The second limb of the mens rea i.e "being aware that there is possibility that she does not consent," seem to refer to situations where there are no threats of physical bodily harm, but for some other reason there is no consent.[56] Situations like this usually occur between acquaintances .

In Nigeria, it seems that he appropriate mens rea for rape under the two Codes, is intention to have sexual intercourse with a woman against her will or without her consent, either knowing that she did not consent, or with her consent, when the consent was obtained by putting her in fear of hurt or death or intimidation, or through fraudulent misrepresentation. The only fraud that will vitiate consent under the two Codes is where the woman believes that the man obtaining her consent to intercourse is her husband. The mens rea is deceit and intention to have intercourse, with the knowledge that the woman would not have consented, if she were aware of the facts.

In all these instances, the consent is vitiated and any resultant intercourse is rape, for as argued by Aguda and Okagbue.[57] ".....the object of the law is to protect the woman from being ravished, or forced, as it were, into sexual intercourse to which she is not a willing party. Beyond that, the criminal law cannot and should not go".

5. CONCLUSION

What will constitute the actus reus of rape is wide but judges should be able to determine that act based on the fact of each case. In respect of marital rape, our opinion is that extending rape into the matrimony is not a good law. The position under the Nigerian Penal Code, which excludes marital rape , is preferred. For millennia, it has been recognized that one of the

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[56] Insensibility, impossibility, ignorance, unconsciousness through sleep or induced liquor and fraudulent misrepresentation.

[57] Aguda, Akinola and Okagbue, Isabelle: Principles of Criminal Liability in Nigerian Law (Heinemann Educational Books Nigeria Plc: Ibadan -Nigeria (second edition), p.258)

functions of law, is to protect the marriage institution from breaking down. The essence of marriage is to procreate and for the parties to it, to satisfy each other's sexual desire. It is to our mind absurd to now construe it as a heinous offence on the part of a spouse who in order to assert his conjugal rights arising from that consort used some "force" to satisfy that "natural" desire.

Thus in absence of any physical harm marital rape should be excluded. Even if as a result of the insistence of the husband to have sex any resultant harm at best should only be a ground for divorce, i.e where the act has become incessant that the wife cannot be reasonably expected to put up with.