

## **GENDER DISCRIMINATION IN THE NIGERIAN LAW OF RAPE: CONTEMPORARY PERSPECTIVES**

**BY**

**Abubakar Adamu Garkuwa\*, Nasiru Balan Malam\*\* and  
Linda Malchit Daze\*\*\***

### **Abstract**

This work was motivated by the need for adequate legislation on the subject of rape in Nigeria. It focused on the law of rape in Nigeria and how the law of rape discriminates men by not covering instances of male rape. The work analyzed and juxtaposed the contemporary perspective of the law of rape in Nigeria vis a vis other jurisdictions. The article aimed at examining how Nigerian law of rape is gender specific in nature. The specific objectives are to examine the definition of rape in the Nigerian penal laws, to examine the contemporary position of the law of rape in other jurisdictions and to identify and analyze why the Nigerian law of rape as contained in both the Criminal Code and Penal Code is gender bias. The study adopted the doctrinal approach of legal research as well as the analytical and comparative research types. The main sources of information for this study were the various statutes, textbooks, article, which were critically analyzed and compared as contained in the work. The study found that our penal laws on rape are archaic and do not reflect the current reality of sexual orientation of the contemporary world. The study also found that other jurisdictions have since widened the scope of their law of rape thereby accommodating the possibility of male rape and other modes of committing rape aside the vaginal penetration. Based on the above findings, the study

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\* LLM,BL, Lecturer , Department of Public Law ,Faculty Of Law, Misau Campus, Bauchi State Unive

Gadua

\*\* LLM,BL Principal Lecturer, School of General Studies, Abubakar Tatari Ali Polytechnic Bauchi, Ba State

\*\*\* LLM,BLLecturer, Plateau State Polytechnic Barkin Ladi

recommended that: the Nigerian penal laws on rape should be amended to recognize both male and female as assailants and victims of rape respectively, Stiffer penalty should be imports into our laws in order to serve as deterrence, the victims of rape should be adequately compensated and sensitization of citizens against the constrain perspective on rape and the male folk in particular on the need to report cases of rape.

### **1.1 Introduction**

Rape is a social problem which is both emotionally entangling and scientifically elusive with the society's perception influenced strongly by a puzzling mixture of prejudice, credence and voyeuristic curiosity. It is one of the most heinous crimes against human body that deserve severe punishment. Until recently, most if not all statutes narrowly defined rape as gender specific offence with the male person as always the aggressor/ assailant and the female folk as the victims of the act.

The incessant menace of rape cases in the modern time is certainly worrisome to the society and organizations, hence the modification of the traditional definition of rape. This paper examines the definition and elements of rape in Nigeria, the contemporary view of rape in other jurisdictions like the USA, UK, South Australia, International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for Former Yugoslavia (ICTY), Gender Discrimination in rape and concludes by proffering recommendations which will eradicate the injustice occasioned by the current limitations of our penal laws on rape as well as place Nigeria on the same footing with advanced societies.

### **1.2 Definition of Rape**

There has been academic gymnastic on the meaning of rape among scholars and activists. It is therefore instructive to examine the statutory provisions on rape.

Section 357 of the Criminal Code<sup>1</sup> provides:

Any person who has unlawful carnal knowledge of a woman or girl without her consent or 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 rape.

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<sup>1</sup> Cap. C 38. LFN 2004. Applicable to southern part of Nigeria.

In a not too different formulation, section 282 of the Penal Code<sup>2</sup> provides:

A man is said to commit rape, who, save in the case referred to in subsection (2) 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 hurt.
- (d) With her consent when the man knows that he is not her husband and that her consent is giving because she believes he is another man to whom she is or believes herself to be lawfully married.
- (e) With or without her consent, when she is under 14 years of age or of unsound mind.

It is appropriate to consider section 1(1) of the Sexual Offences Act, 1976 of England<sup>3</sup> (Because that is where our law derives inspiration and guidance). It provides:

...a man commits rape if –

- (a) He has unlawful sexual intercourse with a woman who at a time of the intercourse does not consent to it and
- (b) At the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

From the above statutory definitions of rape, it is clear that the crime of rape is gender bias and discriminatory in the sense that only a man can commit the offence of rape. Although section 357 of the Criminal Code opens with a common noun “a person”, the clause “by impersonating her husband” used in the section leaves no one in doubt that only a man can commit the offence of rape in the said section.

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<sup>2</sup> Cap. P3 LFN, 2004. Applicable to the northern part of Nigeria.

<sup>3</sup> The Criminal Justice and Public Order Act, 1994 and the Sexual Offences Act, 2003 have amended this Act.

### 1.3 Elements of Rape in Nigeria

The elements of the offence of rape which can be gathered from the above provisions of the law are:

- (a) Unlawful carnal knowledge/sexual intercourse (Acts reus)
- (b) Against her will/without her consent (Mens rea)

The Penal Code listed instances when consent can be vitiated to wit:

- (i) where the consent is obtained by putting her in fear of death or hurt,
- (ii) where the consent is obtained by fraud, and
- (iii) where the victim is under 14 years of age or of unsound mind.<sup>4</sup> Going by the seen paragraphs, the liability is strict as consent is immaterial for the purpose of liability.

### 1.4 The Contemporary View of Rape

Many countries have since moved away from the traditional definition of rape by accepting a broader meaning that is in consonance with present realities. An examination of few of these countries is important.

#### 1.4.1 England

The United Kingdom enacted the Criminal Justice and Public Order Act, 1994<sup>5</sup> of England. Its section 142 amended section (1) of the preceding Act. It provides:

A man commits rape if:

- (a) He has sexual intercourse with a person (whether vagina or anal) who at the time of the intercourse does not consent to it. .

This Act has improved upon the repealed Act by making it possible for a man to commit rape by penetrating not only the vagina of a woman but even the anus of a person. This "person" could either be a male or a female.

The Sexual Offences Acts, 2003<sup>6</sup> of England provides:

A person (A) Commits an offence if:

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<sup>4</sup> S. 282 (1)(c), (d), (e) of the Penal Code.

<sup>5</sup> This Act repealed the Sexual Offence Act of 1976.

<sup>6</sup> This Act replaced the Criminal Justice and Public Order Act 1994 of England.

- (a) He intentionally penetrates the vagina, anus or mouth of another person (B) with his penis ,
- (b) (B) does not consent to the penetration, and (A) does not reasonably believe that (B) consent.

The combine effect of these two Acts is that both men and women are now recognized as potential victims of rape. However, the Acts fall short of recognizing women as possible assailants in rape and penetration by inanimate objects as rape.

#### 1.4.2 United States of America

It is apposite to state that the law on rape underwent a lot of reforms in the United States of America, after criticisms that there were antiquated. Horney and Siphon identified four common reform themes even though the nature of rape law reforms varied across jurisdictions in comprehensiveness. According to them:

- (1) Many states replaced the single crime rape with a series of offences graded by seriousness and with commensurate penalties. The traditional rape laws did not include attacks on male victims. The new crimes typically are gender neutral and include a range of sexual assaults on male.
- (2) A number of jurisdictions changed the consent standard by modifying or eliminating the requirement that the victim resist her attackers with earnest resistance. Reformers challenged these standards, arguing not only that resistance could lead to injury but also that the law should focus on the behavior of the offender rather than on that of the victim.
- (3) The third type of statutory reform was the elimination of the corroboration requirement
- (4) Most states enacted rape shield laws that placed restrictions on the introduction of evidence of the victim's prior sexual conduct.<sup>7</sup>

#### 1.4.3 South Australia

In South Australia, the 1976 Act made changes in the Criminal Law Consolidation Act of 1935 of South Australia. These changes made rape within marriage an offence and extended the definition of rape to include penetration of

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<sup>7</sup>Jinaka S.I., Abubakar A.G. et al, *The Crime of Rape Under International Criminal Law: Contemporary Perspective* (June, 2015) being a seminar paper presented in partial fulfillment of the requirement of the award of Master of Laws Degree at the Faculty of Law, University of Jos.

the anus of a man or woman without his or her consent. The current law includes penetration of other parts of the body and cover oral and anal rape. This is arguably the most expanded definition of rape there is. The Criminal Law Consolidation (Rape and Sexual Offences) Amended Act, 2008 of South Australia provides:

A person who has sexual intercourse with another person without consent of that other person:

- (a) Knowing that other person does not consent to sexual intercourse with him/her;
- (b) Being recklessly or indifferent as to whether that other person consents to sexual intercourse with him/her.
- (c) Continues with sexual intercourse when consent is withdrawn;

Shall (whether physical resistance is offered by that person) be guilty of rape.”<sup>8</sup>

In South Australia, sexual penetration can include any of the following:

- (i) Penetration of vagina, labia majora
- (ii) Cunnilingus (oral sex of the vagina)
- (iii) Fellatio (oral sex of the penis)
- (iv) Penetration of anus

Thus, it is clear that the law of rape in South Australia is gender neutral and wide enough to accommodate other sexual assaults not necessarily involving the vagina. It is also very important to note that this statute equally accommodates instances where consent which was validly given is withdrawn. This goes to show that an act which may have started off as mutually consensual could end up as a rape. The determining factor is the point at which consent is withdrawn.

#### **1.4.4 Rape under the International Criminal Tribunal for Rwanda (ICTR)**

The wars in Rwanda witnessed rape and other sexual assaults on massive scale.<sup>9</sup> Some women were forced to carry their pregnancies to term and give birth to unwanted children.<sup>10</sup> In other cases, some of the women were inflicted with

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<sup>8</sup> Student Project Information @ <[www.yarrowplace.sa.gov.au/booklet](http://www.yarrowplace.sa.gov.au/booklet)> accessed on 25<sup>th</sup> May, 2015.

<sup>9</sup> Joyner, C. C. *Enforcing Human Rights Standards in Former Yugoslavia: This case for an international War Crimes Tribunal*; Middle East Watch. A Victory turned sour Human Rights in Kuwait Sinco Liberia, Sept., 1991.

<sup>10</sup> Sacouta, S. *Rape in Wartime Redress in United States under the Alien Torts Claim Act* <[www.jama.com](http://www.jama.com)> accessed on 5<sup>th</sup> May 2015.

HIV/AIDs and other STDs. Jean Paul Akayesu the Bourgmestre (Mayor) of the Taba commune at the time of the crime alleged was committed was charged *inter alia* for genocide at the aftermath of the event. It was argued that he himself did not committed the offences but rather incited, facilitated and failed to prevent those offences committed by others or gave his implicit support. In convicting Akayesu the Tribunal defined rape as a: "physical invasion of sexual nature, committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of human body and may include acts which do not involve penetration or even physical contact..."<sup>11</sup>

The main points of significances of the decision for International Criminal Law include the trial chamber recognizing sexual violence as an integral part of genocide in Rwanda, and finding the accused guilty of genocide for crime that includes sexual violence, the chamber recognize rape and other form of sexual violence as independent crimes constituting crime against humanity.<sup>12</sup> This decision significantly magnified the offence of rape by recognizing it as a crime against humanity- a perspective long overdue.

#### **1.4.5 International Criminal Tribunal for Former Yugoslavia (ICTY) – The Case of Kunararovac and Vukovic**

In 1992 and early 1993, there was an armed conflict between the Bosnian Serbs and Bosnian Muslims in Foca. Kunarac was the leader of a reconnaissance group who was found guilty of eleven counts of crime which includes torture and rape as crimes against humanity,<sup>13</sup> while Vukovic was found guilty of the four counts. Two days, after the Foca indictment was issued, a headline on the front page of the New York Times declared: "For the first time, court defines rape as war crime", and asserted:

"This is a landmark indictment because it focuses exclusively on sexual assaults, without including any other charges. There is no precedent for this, it is a major legal significant because it illustrated the court's strategy to focus on gender related crimes and given them their proper place in the prosecution of crimes."<sup>14</sup>

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<sup>11</sup> Javaid, R, *International Human Right Law* (2<sup>nd</sup> ed. Longman).

<sup>12</sup> Akayesu's case was a landmark decision. The first international conviction for genocide, the first judgment to recognize rape and sexual violence as constituted act of genocide, and the first to advance a broad definition of rape as a physical invasion of a sexual nature freeing it from the mechanical description and required penetration of the vagina by the penis.

<sup>13</sup> Appeal Chamber of ICTY June, 2002 quoted in Jinaka (n 7)

<sup>14</sup> Simons. M. New York Times. June 28, 1996.

#### 1.4.6 Nigeria

Although both the Penal <sup>15</sup> and Criminal Codes<sup>16</sup> maintain the traditional definition of rape, the National Assembly seems to be proactive recently by expanding the scope of the offence of rape and for the first time recognizing male rape. By the enactment of Violence against Persons (Prohibition) Act, 2015,<sup>17</sup> Rape is defined in part 1, section 1 of the Act as:

A person commits the offence of rape if –

- (a) He or she intentionally penetrates the vagina, anus or mouths of another person with any other part of his or her body or anything else;
- (b) The other person does not consent to the penetration; or
- (c) The consent is obtained by force or 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 the use of any substance or additives capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.

From the above definition of rape, there is a sharp departure from the mechanical definition of rape maintained by the Penal Code and Criminal Code. This we can see in the following areas:

- (i) Both male and female persons can be assailants of rape under the new Act. This we can see from the opening sentence of the section “he or she intentionally penetrates...with any other part of his or her body or anything else”
- (ii) By the above definition any gender can be the victim of rape since the penetration does not necessarily have to be with a penis and through the vagina. The offence is complete by penetrating the anus or mouth of a person.<sup>18</sup>

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<sup>15</sup> See Section 282 of the Penal Code.

<sup>16</sup> See Section 357 of the Criminal Code.

<sup>17</sup> This Act only applies to Federal Capital Territory, Abuja at the moment but it may apply to any state that enacts same by its state Assembly.

<sup>18</sup> S. 1(b) of Violence Against Persons (Prohibition) Act, 2015.

- (iii) Unlike the Penal and Criminal Codes, rape can be committed by penetrating the mouth or anus of a person.
- (iv) Rape under this Act<sup>19</sup> can be committed with other objects, as used by the Act "...with any other part of his or her body or anything else;" (emphasis ours)
- (v) Consent can be vitiated if the victim submits under the influence of any substance or additive.

The innovations of this Act are commendable not only in expanding the definition of rape to bring it in line with the contemporary realities but also in awarding compensation to the victim(s) of the rape.<sup>20</sup>

### 1.5 Gender Discrimination in Nigerian Law of Rape

Although the Violence against Persons (Prohibition) Act, 2015 is gender neutral, the Penal Code<sup>21</sup> as well as the Criminal Code still maintains the narrow definition of rape, with male person as always the assailant and female as always the victims. This part of the paper will examine an aspect of society's perception of rape as a gender offence and critically consider if such perception can be not archaic and needing immediate legislative attention.

The traditionalists argue that women are generally weak and prone to rape due to their vulnerability and subjugated status. Despite this posture maintained by the traditionalist, it is clear that today, the status of women has changed considerably from what it was in the 1970's, 1980s and 1990s. A significant number of women are now powerful economically and politically and are capable of exerting similar power, authority and influence even more than some men in our society today. Thus, the argument that men are not raped simply because they "appear" to or are regarded as the stronger, more powerful and influential gender in the society totally lacks present vitality.

Also, with the change in sexual orientation thereby giving rise to the proliferation of homosexuals and lesbians, culminating into legalization of same sex marriage in many countries of the world, the line of distinction between sexes has waned and has almost disappeared<sup>22</sup>. Hence, there is need to amend our laws of rape to adjust to the current realities.

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<sup>19</sup>Ibid.

<sup>20</sup>Section 1(3). Ibid.

<sup>21</sup> Which apply in North and South respectively with the exception of FCT.

Going by present realities in our society which is apparently recognized in some advanced jurisdiction as seen above, it is also the submission of these writers that men too can be raped by women through a number of ways. For instance, a desperate woman can point a gun at a man and force him to have sex with her against his will; a woman can also use drug on her male victim or any addictive substance thereby influencing him to submit to her wish but against his consent; or pretend to be his wife, which he reasonably believes her.<sup>22</sup> Therefore if the law can protect women in any of the above instances, why not men?<sup>23</sup> The Leadership Newspaper of March 29, 2016 had this caption "MY WIFE ALWAYS TEARS MY BOXERS TO RAPE ME, MAN TELLS COURT," The paper reported that a retired soldier, Gafaru Rodoye told an Ighando customary court that his wife, Idiot always raped him, according to him, "my wife always raceme; she had turned all my boxers to rags to achieve her selfish aim"(sic). The petitioner in the case further told the court that his wife was in the habit of threatening his life through beating. This story directly conflicts the perspective of the traditionalist on rape and man power.

Some scholars argue that the law of rape should seek to protect the "woman's right to choose, whether, where and with whom to have sexual intercourse."<sup>24</sup> To these scholars, men do not merit the right to decide when and with whom to have sex. It is submitted that the time is ripe for the law to give priority consideration to what is being done rather than who is doing it. Indeed, some men are capable of exercising or do not even possess the over emphasized superior physical strength nor will physical strength make meaning when faced with an armed female assailant.<sup>25</sup>

The traditionalist argued that there is no instance of male rape or that such instances are so rare that it does not merit extending the law to cover male rape. It is submitted that no matter how rare male rape is, even if it is as rare as two (2) in every two hundred (200) reported cases, are men entitled to equal protection under the law? It is submitted that our rape law as it is, is discriminatory on account of sex and it can therefore be argued that it is unconstitutional.<sup>26</sup>

More so, if a male Nigerian can be sentenced for rape, we are in agreement with Odohoosu Imeh who argues that there is no reason why a female Nigerian

<sup>22</sup> As the case in Section 282 (d) Penal Code.

<sup>23</sup> See also Philip Rumney, et al *Anglo – American Law Review*, Vol. 26 No. 2, (1997).

<sup>24</sup> Temkin, *Towards a Modern Law of Rape* (1982) 45 M.L.R pg. 399.

<sup>25</sup> Jinaka (n 7) 26

<sup>26</sup> The Rape Law is contrary to section 17(1) and Section 42(1)(a) of Constitution of the Federal Republic of Nigeria, 1999 (as amended). The latter section provides that, no citizens of Nigeria should suffer any form of discrimination on account of sex, religion etc, while the former section provides "The State Social order is founded on ideals of freedom equality and justice."

cannot also be sentence for the same offence.<sup>27</sup> Or is it not discriminating that when it happens to women, it is called rape but if it is to a man, it becomes sexual assault even when the circumstances is the same? It is equally worthy of note that sexual assault is equally traumatic irrespective of the gender of the victim and the gender of the assailant does not affect the offensive nature of the attack.

The court in *William v William*<sup>28</sup> reasoned that a male that suffered sexual assault or sexual attack, and yet obtained and sustain an erection indicates a consensual arousal which cannot support a complaint of rape or sexual assault on him. This reasoning is, with due respect to the imminent jurist, erroneous. It is submitted that even females during sexual assaults do have involuntary sexual response and that is why many male assailants claim that their female victims gave consent as they appear to enjoy and respond to the act of intercourse.

Finally, it was said that for the women, every act of submission due to fear of harm or threat of injury does not amount to consent in fact or in law, the same argument holds for and should be extended to male victims of rape.

## 1.6 Conclusion

The alarming rate at which the crime of rape is committed is worrisome not only to the Nigerian community but to the world at large. Further to this is the dynamic nature of the society, whereby sexual orientation has taken a different dimension with the dividing line between male and female diminishing. This resulted into legalization of same sex marriage in some countries of the world like USA and its agitation in many countries of the world. These have made many nations to be proactive by broadening the definition of rape and its ingredients in order to reflect the current realities. While the National Assembly, for the first time move with the world, with the recent enactment of the Violence Against Persons (Prohibition) Act, 2015, The Criminal Code and Penal Code still maintain the traditional definition of rape, which is not only gender discriminatory but unconstitutional and inconsistent with the current realities.

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<sup>27</sup> "Reviewing the Law of Rape" National Concord Newspaper (Nigeria), Wednesday October 24 1992, p 33

<sup>28</sup> (1960)2 ALL E.R. 463.

## **Findings**

In the course of this research, the researchers found that:

The Nigerian Penal Code and Criminal Code applicable in most states are not in tune with the current realities especially in view of the current sexual orientation of the contemporary world.

There exist cases of male rape, which are often not reported and such victims do not have remedy under the traditional definition of rape.

Most countries of the world have since widened the scope of their law of rape thereby accommodating gender neutrality in the offence of rape and also other modes of committing rape aside the vaginal penetration.

The enactment of the Violence against Persons (prohibition) Act by the national assembly is a positive development towards attaining gender neutrality in the offence of rape.

## **Recommendations**

In the light of the foregoing, we proffer the following recommendations:

In view of the fact that the Nigerian laws on rape are clearly long overdue for reform, the Penal Codes and the Criminal Code should be amended to recognize both male and females as the assailants and potential victims of rape or in the alternative the Violence Against Persons (prohibition) Act should be domesticated by all the states of the federation.

It is recommended that stiffer penalty should be provided for rape convicts, without giving room for discretion to the judges. This is in view of the prevalent cases of defilement of minors and inflicting the victims with HIV/AIDS disease.

That a provision similar to section 1(3) of Violence against Persons (Prohibition) Act, 2015 should be introduced into our Penal Code and Criminal Code. This compensation may alleviate the suffering of the victims of rape.

Since the traditionalist view on rape is the prevalent in the society, government should put positive effort and resources in sensitizing the society on male rape and encourage men to report any incident on rape as such does not deplete their manhood in any way.