

Time for a new Definition of Rape in Nigeria

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Abstract

Rape is a very serious sexual assault both under Nigerian law and other jurisdictions. The reason is that the issue of sexual intercourse is strictly a personal thing and should be done on the volition of the individual that wish to indulge in it. In other words, consent is paramount in sexual intercourse. Thus, when carnal knowledge is undertaken without a person's consent, it amounts to a crime. The offence of rape is heinous because apart from constituting an invasion of the most intimate privacy of the victim, it usually has devastating effects on victims and their families respectively. In Nigeria, the Criminal and Penal Codes have made provisions for what constitutes rape. Under these laws for example, a woman cannot be guilty of rape. However, in light of the wide spectrum of the conception some jurisdictions, it would appear that the scope of rape under the Nigerian Jurisprudence is not comprehensive enough to include every act that constitutes rape in current globe conception. This article discusses the offence of rape as presently conceived under Nigerian law and advocates for a reform to make the concept be in consonance with the current global trend.

Introduction

Rape simply means the non-consensual sexual intercourse between a man and a woman. In the Nigerian context, it means the non-consensual sexual intercourse between a man and a woman who is not his wife.¹ The point which is central to the definition under Nigerian law is consent. Lack of consent suggests that a thing is taken by force. Indeed, rape has been associated with force and violence from time of old. It has been rooted as the act of taking something by force especially the seizure of property by violent means.² The sense of violence associated with rape in medieval time is captured in the works of Daniel Dofoe in 1706 wherein he was quoted as saying: "when kings their crowns without consent obtain, it's a mighty Rape, and not a Reign."³ The salient aspects of the definition of rape under Nigerian law which are not in consonance with the current global trend and which are discussed in this paper include the following. Definition is sexist: only a man can commit the offence of rape and rape can be committed on a female; rape can only be committed upon the penetration of the vagina and no other part of the female physiology, and a man cannot be guilty of rape upon his wife. These issues are discussed with a view to making a recommendation for an amendment of the relevant laws to bring them in line with the definition of the concept in other jurisdictions of the world.

Meaning of Rape under Nigerian Law

Rape which in medical parlance is defined as penile penetration of vulva⁴ is the most serious kind of sexual assault and is punishable with imprisonment for life with or without whipping.⁵ Rape simply means sexual intercourse with a girl or woman without the consent of the girl or woman.⁶ In Nigeria, a man commits rape if he has unlawful sexual intercourse with a woman who is not his wife and who, at the time of the intercourse, does not consent to it. These features of the offence of rape are encapsulated in two major statutes in Nigeria; the Criminal Code⁷ and the penal code.⁸ It is pertinent to state here that while the Criminal Code is applicable to the southern states of Nigeria, the Penal Code is applicable to the northern states. It is important to state also, as will

¹Section 357, Criminal Code, Cap. C. 38, Laws of the Federation of Nigeria, 2004. See also section 282 and 283 of the Penal Code, Cap. 89, Laws of Northern Nigeria, 1963.

²Mark Peters, "The History of the Word Rape", available at www.magazine.good.is/articles/the-history-of-the-word-rape (accessed on 28/5/2015)

³Randy Thomhill and Craig T Palmer, "A Natural History of Rape: Biological Bases of Sexual Coercion" available at: <http://books.google.com.ng/books?isbnt=0262700832> (accessed on 28/5/2015)

⁴J K Mason and A M Smith, *Law and Medical Ethics*, (London: Butterworth's, 1987) 22.

⁵C O Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria*, 2nd edn; Ibadan: Spectrum Books, 1980, 271.

⁶*Ogunbayo v The State* (2007)8 NWLR (Pt. 1035)157 at 178. See also *Posu v. The State* (2011)2 NWLR (Pt. 1234)393 at 414 and the heart-rending case of *Okoh v. Nigerian Army* (2013)1 NWLR (Pt. 1334)16 at 30 in which a military officer who was HIV positive forcefully had sexual intercourse with the complainant

⁷Cap. C. 38, Laws of the Federation of Nigeria, 2004 sections 357 and 358

⁸Cap. 89, Laws of Northern Nigeria, 1963, sections 282 and 283.

be shown in this paper, that though the two statutes define the offence in different terms, the definitions are of the same effect. They mean the same thing.

It is perhaps appropriate to note that the two major statutes prescribing offences in Nigeria do not directly define the offence of rape. They merely describe the ingredients of the offence, facts which the prosecution must prove beyond reasonable doubt in order to secure conviction. In this vein, section 357 of the Criminal Code⁹ provides that:

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

Similarly, section 282 of the Penal Code¹⁰ on the offence of rape, provides that:

A man is said to commit rape who, save where he had sexual intercourse with his wife, 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 hurts
- (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 believes herself to be lawfully married;
- (e) with or without her consent, when she is under 14(fourteen) years of age of unsound mind.

These two statutes are virtually the same in their provisions on rape. The only difference between them is in the choice of words. It is therefore a difference without distinction. For the purpose of this paper, both provisions are discussed as if they are one.

The first point to be noted from the above provisions is that in Nigeria, a woman cannot commit the offence of rape upon a man.¹¹ This is so because the statutes provide that the offence can only be committed upon a woman or girl.¹² In other words, only a woman can be a victim of rape. This is the result achieved if the principle of interpretation of statute; *expression uniusest exclusion alterius* is applied.¹³ This aspect of the offence in Nigeria is not in consonance with the trend in other jurisdictions wherein it is possible for a woman to be guilty of rape under the definition of that offence. This is discussed in detail in a subsequent section of this paper.

The second point to be noted from the definition of the offence in Nigeria is that a man cannot be guilty of rape upon his wife. This is the main thrust of this paper and it is discussed later. This is the purport of the statutes in Nigeria.¹⁴ Section 6 of the Criminal Code defines unlawful carnal knowledge” as carnal connection which takes place otherwise than between husband and wife.” That is to say, that a man cannot have an unlawful sexual intercourse with his wife. He cannot rape his wife.

The notion that a husband cannot be guilty of rape upon his wife is predicated on the then generally accepted view of the common law. It was based on a theory articulated by Mathew Hale, Chief Justice in England in the 18th century who wrote in 1736 that:

⁹ Ibid.

¹⁰ Ibid.

¹¹ It should be noted however that pursuant to section 7 of the Criminal Code in Nigeria, where a woman is incapable of committing rape, she can be found guilty of the same offence for aiding, counselling or procuring the commission of the offence as in *R v. Cogan and Leak* (1975) Crim. L.R. 584

¹² C.O. Okonkwo, op.cit.

¹³ “Rape Under Nigerian Law: Time for a Review”, available at <http://saymalcolm.wordpress.com/2012/07/25/rape-under-nigerian-law-time-for-a-review/> (accessed on 8/6/2015).

¹⁴ Both the Criminal Code and the Penal Code.

...the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract.¹⁵

In a long line of judicial authorities, the courts in Nigeria have applied the law on rape as contained in the statutes referred to above and have held that rape is the act of sexual intercourse committed by a man with a woman who is not his wife and without the woman's consent.¹⁶ In *Posu v The State*¹⁷ the Supreme Court enumerated the ingredients of the offence of rape when it held that in a charge of rape or unlawful carnal knowledge of a woman without her consent, it is the duty of the prosecution to prove the following ingredients beyond reasonable doubt:

- (a) that the accused had sexual intercourse with the prosecutrix;
- (b) that the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation;
- (c) that the prosecutrix was not the wife of the accused;
- (d) that the accused had the *mens rea*, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not;
- (e) that there was penetration.

On when the offence of rape is complete, the Court of Appeal, adopting the decision of the Supreme Court in *Ogunbayo v. The State*¹⁸ and other cases, held that:

The essential ingredients of the offence of rape are penetration and lack of consent. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape.¹⁹

The foregoing is, in a nutshell, the crux of the offence of rape under Nigerian Law. Under the said law, it is crystal clear that only a man can commit the offence of rape just as it is also clear that a husband cannot be guilty of rape upon his own wife. What is left now is to examine the meaning of rape in other jurisdictions to see if the Nigerian position is in consonance with the rest of the world.

Proof of Unlawful Carnal Knowledge

In the Criminal Code, unlawful carnal knowledge is defined as carnal connection which takes place otherwise than between husband and wife²⁰. In a case of rape, it is therefore imperative that carnal knowledge must be proved and the rupture of the hymen or emission of semen is not necessary. The slightest penetration of the vagina suffices to constitute rape²¹. In other words, in the case of rape, the prosecution must prove carnal knowledge that is unlawful, and for it to be unlawful, it has to be between persons other than husband and wife. This takes us to the issue of capacity. From the definition of unlawful carnal knowledge, a husband cannot commit rape on his wife except on some occasions like when the marriage has been dissolved or in the case of a separation order by the court containing a clause that the wife is no longer bound to co-habit with the husband.

¹⁵ D Finkelhor and K Yilo, *License to Rape: Sexual Abuse of Wives* at 2; New York, The Free Press, 1985, 24. See also J E Hasday, "California Law Review Vol. 88(5) October 2000 available at: http://Chicagounbound.uchicago.edu/journal_articles (accessed on 6/6/2015) and the views of J C Smith B Hogan, *Smith and Hogan Criminal Law*, 5thedn, London: Butterworth, 1983, 405-407.

¹⁶ See the cases of *Okoyomon v. The State* (1973)1 Sc 21; *Upahar v. The State* (2003)6 NWLR (Pt. 816)230 and *Ogunbayo v. The State* (2007)8 NWLR (Pt. 1035)157.

¹⁷ (2011)2 NWLR (Pt. 1234)393 at 416-417.

¹⁸ *supra*

¹⁹ *Okoh v Nigerian Army* *supra* at 30-31. See also *Jegede v The State* (2001)14 NWLR (Pt. 733)264 and C Arinze-umoni and O. Ikpeze, "Rape in Matrimony. Entrenched Global Disaster and Underdevelopment of Women: Nigeria in Focus" available at www.Csus.edu/hhs/capcr/docs/.../papers/c%20arinze-umobi.doc (accessed on 26/5/2015) wherein the authors emphasized that the hallmark of the offence of rape is the absence of consent by the victim to the sexual intercourse.

²⁰ Section 6

²¹ See *Okoh v. Nigerian Army* *supra* and *Ogunbayo v. The State* *supra*

The case in point here is *R v. Clarke*²² this means that under the principle; a man lacks the capacity to rape his wife. The Penal Code provides that sexual intercourse by a man with his own wife does not amount to rape if she has attained the age of puberty. Thus, it presupposes that if she has not attained puberty, rape can be said to be committed. The question that remains to be answered is, 'what then is the age of puberty'?

Similarly, a male person under the age of 12 lacks the capacity of having carnal knowledge under the Criminal Code. What this means is that a boy within that age bracket cannot be guilty of rape or attempted rape.²³

Proof of Consent

Under Nigerian law, any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act, is guilty of the offence of rape.²⁴ When considering a case of rape, absence of consent is a basic requirement. In other words, the prosecution has to prove carnal knowledge of a girl or a woman without her consent. It is also a requirement that consent obtained by fraud, force or by threat, intimidation or fear of any harm amounts to no consent. The question always is: Did the woman or girl willingly agree to the sexual intercourse at the time it took place. In *Popoola v The State*²⁵ in deciding whether lack of consent is an essential ingredient of the offence of rape, the court held that:

Rape is unlawful carnal knowledge of a girl or woman without her consent, by force, fear or fraud, and it is an essential ingredient of that offence that the intercourse must be without the woman's consent. In other words, a man will be said to have committed rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and at the time, he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it. Even when consent is obtained by force or 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, the offence can be committed.

Similarly, in *Akpan v The State*²⁶, the court held that 'rape is the unlawful carnal knowledge of a girl or woman without her consent. Thus, an essential ingredient of that offence is that the intercourse must be without the woman's consent. The law is such that even when consent was obtained by force or 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, the offence could be said to have been committed. The court further held that the prosecution must prove that the accused had carnal knowledge of a woman or girl despite her age without her consent. It then follows that to have carnal knowledge of a sleeping girl amounts to rape because while asleep, her consent would not have been obtained. Similarly, the court in *Ogunbayo's* case, in deciding whether or not a person who had carnal knowledge of a woman without her consent is guilty of rape, held that: the issue of consent is of extreme importance²⁷. In the case of *Idris Rabiu v The State*²⁸ the court defined rape as an "act of sexual intercourse committed when the woman's resistance is overcome by force or fear, or under other prohibitive conditions".²⁹

The underlying theme from the foregoing cases, it that consent is central to the offence of rape. Where there is consent from the woman or girl to the sexual intercourse, then the charge of rape must fail. But where there is absence of consent, and there is penetration of the vagina however slight the penetration, then the offence of rape is established. To succeed therefore, the prosecution must prove lack of consent on the part of the woman or girl.

Proof of penetration

Under the Criminal Code, rape is only committed upon penetration. According to the provisions of the

²²(1949)2 ALL ER 448. See also on this point *R v. Roberts* (1986) Crim L R 188, *R v. Steele* (1977)65 Cr App Rep 22 and *R v. O'Brien* (1974)3 ALL ER 63 where Parke J held that a decree nisi of divorce effectively terminated a marriage and it was possible thereafter for the husband to rape his wife.

²³Section 30, Criminal Code

²⁴ Section 357, Criminal Code

²⁵(2013)17 NWLR (Pt. 1382)96 at 123

²⁶ 2014 LPELR- 22740(CA)P. 47,Para A-B

²⁷Supra p. 19

²⁸*2005)7 NWLR (Pt. 925)491

²⁹ (2015) INCC 578 at 590

Code, ‘When the term ‘carnal knowledge’ is used in defining an offence , it is implied that the offence , so far as regards that element of it, is complete upon penetration.³⁰ In other words, there will be no rape without penetration. Penetration in the context of the offence of rape is when the Penis makes contact with the vagina. It need not be an in depth contact. Case Law is in great Proliferation that the slightest contact of the Penis with the vagina is sufficient penetration for the purpose of establishing rape. In *Posu v The State*³¹ It was held that the most important ingredient of the offence of rape is penetration. Its significance lies in the fact that penetration, with or without emission, is sufficient even where the hymen was not ruptured. The slightest penetration will be sufficient to constitute the act of sexual intercourse. Similarly, in *Rabiu v The State*³² the court reiterated the point that the essential and most important ingredient of the offence of rape is penetration and unless penetration is proved, the prosecution must fail.

Having considered the ingredients of rape under Nigerian Law, it can be deduced from that that it is only a man that can commit rape. Secondly, rape can be committed on a woman only, and that rape can only be committed by the penetration of the vagina by the man’s sex organ. Under these laws, it is not rape if the vagina is penetrated with an object or with any other part of the male body. Again, it is not rape if any other part of the female’s body, like the mouth or anus, is penetrated by the penis. It is in view of the foregoing features under Nigerian law that we now examine the definition of rape in other jurisdictions with a view to comparing it with the Nigerian position.

Rape in other Jurisdictions

Recent legislation on the subject of rape across the world demonstrates a continued departure from the traditional common law definition wherein rape can only be committed by a man upon a woman or girl. The recent legislation also provide that rape can be committed upon the penetration of the vagina, mouth or anus of the victim in contrast to the traditional definition wherein only the penetration of the vagina was sufficient to constitute the offence of rape.

In South Africa, the new legislation on rape, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007³³ repealed the common law offence of rape and replaced it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender.³⁴ The new law expanded the definition of rape which was previously limited only to vaginal sex to now include all non- consensual penetration of the vagina, mouth or anus of the victim. In the Act, sexual offences can be committed by both men and women and upon men and women respectively

The statute defines rape as follows:

Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.³⁵

“Sexual Penetration” is defined as:

Any act which causes penetration to any extent whatsoever by –

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person.³⁶

³⁰Section 6 of the criminal code

³¹(2011)3 NWLR (Pt. 1234)393

³²supra

³³Act No. 32 of 2007

³⁴“Laws regarding rape” available at <http://en.m.wikipedia.org/wiki> (accessed on 11/6/2015)

³⁵ Section 3, Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act NO. 32 of 2007)

³⁶ Ibid. see also “Judge extends definition of rape” available at <http://mobiiol.co.za/#!/article/> wherein a Pretoria High Court Judge ruled that the common law definition of rape was “archaic” and resulted in inadequate protection for victims of sodomy and discriminatory sentence holding that the common law imitation to vaginal penetration had become anachronistic and offensive. His ruling also brought “male rape” into ambit of rape. It should be noted that this ruling was made in 2006, a year before the amendment in 2007 which broadened the scope of the definition of rape in South Africa.

With regard to the offence of compelled rape, it provides as follows:

any person (A) who unlawfully and intentionally compels a third party (C) without the consent of C, to commit an act of sexual penetration with a complainant (B) without the consent of B, is guilty of the offence of compelled rape.³⁷

In order to better comprehend this definition, the ingredients which include unlawful intention, sexual penetration and lack of consent are discussed hereunder.

Consent under the Act was defined as voluntary or uncoerced agreement and further provided circumstances in respect of which the complainant does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in the above provisions to include, but not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of-
 - (i) the use of force or intimidation by A (the accused person) against B,C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B,C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by Fraudulent means, including where B is led to believe by A that-
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-
 - (i) asleep;
 - (ii) unconscious
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.³⁸

A complainant under this law means the alleged victim of a sexual offence which can be a woman, a man or a child.³⁹

It can be deduced from the law that in South Africa, for an act to amount to sexual penetration (rape) it does not have to be vaginal penetration only. It will be rape if the penetration of the mouth and any other part of the body including the anus is attained as envisaged under the law. Pursuant to the same law which

³⁷ Section 4

³⁸Section 1(2&3)

³⁹Section 1(1)

also makes provisions for marital rape, a man, a woman (or a child) can be raped by another woman or man.⁴⁰ This cures the gender bias and other limitations of the definition of rape in several other jurisdictions.

In Namibia, like in several other jurisdictions that adopted the traditional common law definition, rape was, until 2000, defined as the intentional unlawful intercourse with a woman without her consent. Under that legal regime, it was not possible for men to lay a charge of rape and for wives to lay a charge of rape against their husbands. This was principally because sexual intercourse between married persons was not considered, unlawful and was not proscribed by the law. The law of rape before 2000 was virtually the same with what it is in Nigeria today, and as such, rape was considered to have occurred only where the penis penetrated the vagina. This created a lot of problems in the prosecution of sexual offences and led to miscarriage of justice. The public outcry that followed it led to a reform of the law which culminated in the enactment of Namibia's Combating of Rape Act.⁴¹

According to the Act,

Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances-

- (a) commits or continues to commit a sexual act with another person: or
- (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape⁴²

Thus, the Act which expanded the scope of rape, defines it as the intentional commission of a sexual act under coercive circumstances. The ingredients of the offence of rape under the law include: intention, the sexual act and the existence of coercive circumstances. The Act defines "sexual act" to include the following:

- (a) the insertion of the penis into the vagina of another person, to even the slightest degree
- (b) the insertion of the penis into the mouth or anus of another person
- (c) the insertion of any other part of the body into the vagina or anus
- (d) the insertion of any part of the body of an animal into the vagina or anus
- (e) the insertion of any object into the vagina or anus (with an exception for the insertion of objects into the vagina or anus as part of normal medical procedures)
- (f) cunnilingus, which is oral stimulation of the female genitals
- (g) any other form of genital stimulation

The Act also defines "coercive circumstances" to include force, threats of force, and other situations which enable one person to take unfair advantage of another. It includes but not limited to all of these circumstances

- a. physical force against the complainant or another person
- b. threats of physical force against the complainant or another person
- c. threats to cause harm other than bodily harm to the complainant or another person, in circumstances where it is not reasonable for the complainant to disregard the threats
- d. the complainant is under the age of 14 and the perpetrator is more than 3 years older
- e. the complainant is unlawfully detained

⁴⁰Aneschka Von Meck, "Rape-the new legal definition" available at <http://www.knysnatheald.com/news/News/General/14052/Rape-t> (accessed on 14/6/2015)

⁴¹No. 8 of 2000

⁴²Section 1(1)

- f. . the complainant is
- physically or mentally disabled
 - drunk or drugged
 - asleep and so cannot understand what is happening or is unable to communicate unwillingness
- g. the perpetrator pretends to be another person
- h. the perpetrator pretends that what is happening is not actually a sexual act.

The significance of the Combating of Rape Act in Namibia lies in the key changes it made to the law on rape. Amongst others,

- it re-defines rape in gender-neutral terms to reflect the fact that men and boys can be raped.
- It broadens the definition of rape to cover a range of “sexual acts”, including sexual intercourse, anal intercourse and oral contact with the genitals.
- It removes the emphasis on the victim’s absence of consent’, replacing it with an examination of the rapist’s use of force or coercion.
- It acknowledges the fact that rapes can occur within marriage.⁴³

The Combating of Rape Act, NO. 8 of Namibia has been applauded by scholars as one of the most progressive laws on rape in the world. One of the reasons for this is that implicit in the Act is a recognition that rape is not a sexual crime, but that it is a crime of violence and power which uses sex as a weapon to humiliate and destroy.⁴⁴

In England and Wales, rape is defined as follows:

- (1) A person (A) Commits an offence if –
- (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
 - (c) A does not reasonably believe that B consents.⁴⁵

Under this law, as in Nigeria, rape requires a penis to be inserted into a woman’s vagina, anus or mouth without her consent. As such, physically, a woman cannot rape a man. Only men can commit the offence of rape as a principal. A woman can legally rape a man if she acts as an accomplice in assisting a man to put his penis into another woman’s vagina, anus or mouth without her consent.⁴⁶ The major difference

⁴³Section 1(3) of the Act provides that: “No marriage or other relationship shall constitute a defence to a charge of rape under this Act”. See also Gender Research and Advocacy Project, Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act. 8 of 2000 Summary Report, (Windhoek. John Meinert Printing (pty) Ltd, 2011) P.13

⁴⁴Narnia Bohler-Muller, “Valuable lessons from Namibia on the combating of rape”, Southern African Journal of Criminal Justice, Vol. 14, No. 1, 2001, P. 74.

⁴⁵ Section 1, Sexual Offences Act 2003 (England).

⁴⁶ Bastian Lloyd Morris, “Is the Law on Rape Sexiest?” available at www.blmsolicitors.co.uk/2014/03/is-the-law-on-rape-

between this definition and that under Nigerian law is that it includes the penetration of the anus and mouth of the victim. Otherwise, they are the same.

Under the English law, whether a belief is reasonable is determined having regard to all the circumstances including any steps A has taken to ascertain whether B consents.⁴⁷ A person found guilty of rape is liable to imprisonment for life.⁴⁸ The provisions of this Act came under analysis in the case of *R v. Corran & Ors.*⁴⁹ At page 1 of the report, the Court of Appeal (Criminal Division) had this to say:

historically the offence of rape has consisted of intentional penetration of a woman's vagina by a man's penis without her consent, knowing that she did not consent or reckless as to consent. The 2003 Act has greatly expanded the circumstances in which sexual penetration can give rise to an offence punishable by life imprisonment. First by section 1, the definition of rape is extended to include intentional penile penetration of the anus or mouth, so the victim may be male. Secondly, by section 2, assault by penetration extends to intentional penetration of the vagina or anus by a part of the body or anything else, so the victim may be male or the offender female. Thirdly, in relation to children under 13, by section 5, intentional penile penetration of the vagina, anus, or mouth is rape and by section 6, intentional sexual penetration of the vagina or anus is assault by penetration regardless, in each case, of consent.

In the United States of America, rape is a form of sexual assault usually involving sexual penetration of a person's vagina, mouth, or anus without that person's consent. While definitions and terminology of the concept vary by jurisdiction in the United States, at the Federal level, the FBI's Uniform Crime Report (UCR) defines rape thus:

"Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim".

At the state level as earlier on stated, there is no uniform legal definition of rape. Each state has its own laws. These definitions vary considerably and many of them do not use the term rape anymore. Instead, they use such terms as sexual assault", "criminal sexual conduct", "sexual abuse, sexual battery", etc.⁵⁰ In Canada, the Criminal Code⁵¹ which does not use the word "rape" criminalizes "sexual assault". Sexual assault is defined as sexual contact with another person without that other person's consent. Section 273(1) of the Code defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question"⁵²

Conclusion

We have, in this paper, discussed the offence of rape under Nigerian law, which is still tied to the apron strings of the traditional common law concept with its peculiarities. The features of rape under that regime which distinguishes it from the modern day conception include the fact of rape being sexist, in that only a man can commit rape while the offence can be committed only on a woman or girl; rape can only be committed upon penetration of the vagina and not any other part of the female physiology; and the fact that a man cannot commit rape upon his lawful wife. These features are eh immediate inferences that can be made from the clear and unambiguous provisions of the relevant statutes in Nigeria providing for the offence. The provisions of the relevant laws in Nigeria are in sharp contrast with recent legislation on the subject matter in contemporary society.

Under the current global trend which demonstrates a complete and total departure from the traditional common law concept of rape, as has been applied in England, Namibia, South Africa, the United States of

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⁴⁷Section 1(2)

⁴⁸Section 1(1)

⁴⁹(2005)2 Cr APP R(S) 73, (2005 EWCA 192.

⁵⁰"New Rape Definition", available at <http://www.fbi.gov/about-us/cjis/uct/recent-program-updates/new-rae-definition-frequently-asked-questions> (accessed on 27/5/2015)

⁵¹C-127, 1983

⁵²Sexual Assault Criminal Law, Rape Shield, Evidence... available at www.sexassault.ca/criminalprocess.html (accessed on 11/6/2015)

America etc, rape has been defined in gender-neutral terms to reflect the fact that men and boys can also be raped. Furthermore, that definition not only acknowledges the fact that rapes can occur within marriages but also broadens the scope to cover a range of sexual acts including sexual intercourse, anal intercourse and oral contact with the genitals. This means that in those jurisdictions, rape can be committed through the penetration of the vagina, anus or mouth of the victim with the sex organ or any other body part of the perpetrator or with an object provided the victim, who may be male or female, did not consent to the sexual act. This modern outlook appears to cover almost all the fields and provides answers to the hitherto obstacles in the prosecution of rape offences. It is gender-neutral and offers more protection to not only women but also men and children. Women can exercise full control over their own sexuality and maintain such autonomy that their husbands cannot, except with their consent, have sexual intercourse with them any time they want it. This is the desire of most women and it reflects the mood of the society.

As has been stated in this paper, the foregoing is in sharp contrast with the position under the Nigerian jurisprudence under which strict proof of the established ingredients of the offence including the penetration of the vagina by the penis is required to be established beyond reasonable doubt. Under that regime, proof of the penetration of the anus or mouth of the victim would not amount to rape. Men decide on when, where and with whom to have sexual intercourse. Where the sexual intercourse is with their wives, men do not give a hoot about the consent of their spouse. This appears to be unjust. Besides, the strict requirement of proof of the ingredients of the offence of rape has occasioned grave miscarriage of justice.

It is in view of this that it can be stated that the law of rape in Nigeria is outdated therefore it is recommended that Nigeria could borrow a leaf from South Africa, Namibia and England, and amend its laws on rape to accord with the current modern trend and to give its citizens a greater sense of justice.

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