



E-ISSN: 2789-9500
P-ISSN: 2789-9497
IJCCSL 2023; 3(2): 55-63
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www.criminallawjournal.org
Received: 23-06-2023
Accepted: 27-07-2023

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Comparative legal analysis of the offence of rape in Nigeria, United Kingdom and the United States of America

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Abstract

This paper examined the comparative analysis of the offence of rape in Nigeria, United Kingdom and the United States of America. It differentiated what constitutes the offence of rape in these jurisdictions. The paper also highlighted the menace of the offence of rape and the new trend of the offence of rape in the 21st century. The methodology used is doctrinal approach, as research was done through the use of textbooks, constitutions and judicial precedents. The paper found that the concept of marital rape does not exist under the Nigerian law because the evidence of a valid and subsisting marriage between an accused husband and the woman will negate the offence of rape since sexual intercourse is one of the incidents of a valid marriage and a man is deemed in law to have obtained perpetual consent of his wife at marriage thereby removing any likelihood of an allegation of 'unlawful carnal knowledge of his wife'. It was finally concluded that the Nigerian Criminal and Penal Codes being of foreign sources and origin, but now regulating our criminal justice system might require some significant amendments that would take into consideration the societal peculiarities of Nigeria which criminal administration it relates.

Keywords: Rape, penetration, consent, force, seduce, spousal-rape

Introduction

Rape is one of the oldest crimes in human history. All over the world, rape is a crime but definitions and punishments for the offence differ from place to place. It has also been noticed that rape cases are reported more in western world than any other part of the globe. It is believed that in Africa and Asia, rape victims usually lack the courage to speak out or report their experiences to the law enforcement agencies due to negative societal attitude prevalent in such countries. Rape thrives in secrecy and in a culture where victims are blamed for what happens to them, instead of the perpetrators. In this paper, a comparative legal analysis of the offence of rape in Nigeria, United States of America and the United Kingdom is critically carried out and recommendations made on the solution to this menace.

Definitional Concept of Rape

In a simple language, rape may be defined as the act of a male person, having sexual intercourse with a woman or a girl against her will, or without her consent. Rape is defined under Section 357 of the Criminal Code which applies to the southern part of Nigeria in the following words:

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. It is punishable by imprisonment for life with or without whipping.

The combined effect of the above provision is that a person is deemed to have committed the offence of rape, when he has sexual relations or carnal knowledge of a woman or girl against her will;

- a) Without her consent or
- b) While putting her in fear of death or hurt or
- c) Personating the husband of the woman or
- d) Having carnal knowledge of a girl under 14years, with or without her consent or
- e) Having carnal knowledge of a girl with an unsound mind.

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Looking critically at the Criminal Code definition, it is observed that it is deficient in a number of ways. First, what constitutes unlawful carnal knowledge is not spelt out in the Code. The time and circumstances at which consent is deemed to be obtained or withdrawn are also not spelt out in the Code. It further becomes unclear when there is no withdrawal of consent or in cases of presumed consent between lovers, partners and married couples. In cases where rape victims are under the influence of the suspects whether being a subordinate, worker, job seeker or dependent of the one who has carnal knowledge of them, the line is not clear whether consent obtained by people of influence would validly constitute consent properly so-called. Other twist to the consent debates includes situation where the rape includes situation where the rape victims give consent by conduct but withhold verbal consent or even gave previous consent only to withdraw same during the act for reasons best known to her alone. All the aforementioned instances may require distinguishing between consent and submission.

In the northern part of Nigeria, rape is defined under Section 282 of the Penal Code in the following words:

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 hurt;
 - d) With her consent, when the man knows that he is not her husband and that her consent is given because she believes herself to be lawfully married;
 - e) With or without her consent when she is under fourteen years of unsound mind.
2. Sexual intercourse by a man with his own wife is not rape, if she has attained puberty.

The two definitions above show that in Nigeria, rape can only be committed by a man against a woman and not vice-versa. In other countries, this is not the case because it has been recognized that a man may also be a victim of rape and it may be perpetrated by a person including a woman.

For example in the United States of America, ^[1] the Department of Justice defines rape as:

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

In the United Kingdom ^[2], under Section 1 of the Sexual Offences Act (2003), rape is defined in the following words:

A person commits an offence of rape if -;

- a) He intentionally penetrates the vagina, anus or mouth of another person (victim) with his penis;
- b) If the victim does not consent to the penetration, and

¹ An updated definition of rape, available at <http://www.justice.gov/opa/blog/updated-definition-rape> (visited last on 2nd December 2015)

² A critical analysis of the UK's definition of rape shows that the offences can only be committed by a man, like women, could also be a victim. Under the Department of Justice's definition, on the other hand, both men and women may be victims or perpetrators. It is observed that both the US and UK's definition make use of the word "penetration", instead of "carnal knowledge" or "sexual intercourse" as found in the Nigerian definitions rape may be committed where a person's vagina, anus or mouth is penetrated with a penis, object or any part of one's body whether there is sexual intercourse or not.

- c) The offender does not reasonably believe that the victim consents
 - (1) whether the offender's belief is reasonable is to be determined having regard to all the circumstances including any steps the offender has taken to ascertain whether the victim consents
 - (2) A person guilty of an offence under this section is liable, on conviction or indictment, to imprisonment for life.

There are new developments in the assessment of rape offence and the expansion of the frontier of legislations on the offence of rape. For instance, the criminal law of Lagos (CIL) extended beyond the scope of criminal and penal code by explicitly stating that sexual intercourse by a man with his wife cannot be unlawful, thus a man cannot rape his wife. ^[3] Also, the Violence against Persons Prohibition Act ^[4] (VAPPA) has introduced a new twist to the cases of rape. It defines rape as "when a person intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else without consent, or with a wrongly obtained consent ^[5]. It is instructive to note that this is the first legislation in Nigeria that acknowledges the fact that a man can be raped. However, all four legislations – the Criminal Code, the Penal Code, Criminal Laws of Lagos State and the Violence against Person Prohibition Act Prescribes life imprisonment for the offence rape but there is not a mandatory sentence to all of them.

The Positions of the Holy Bible, Holy Quran and African Tradition on Rape

Both the Holy Bible and Holy Quran, which are the two most important and widely respected Holy Book condemned the act of rape. In the same vein, the Africa traditional culture is frontal in the condemnation of the heinous crime. As recorded in the Holy Bible, Dinah the only daughter of Jacob was the first victim of rape ^[6], despite the fact that she had attained puberty (because she was addressed as a damsel) before she was raped, the Bible labeled the act as defilement. The perpetrators paid for it with their lives. Much later, when the Laws of Moses were laid down for the Israelites, God did not leave out the issue of rape ^[7]. The Holy Book condemns the act ^[8] and establishes the fact that it is against the laws of God.

In Islam, Rape known as *zina bi al-ikrah*, is generally defined by Muslim jurists as forced intercourse by a man with a woman who is not his wife and without her consent. It is a crime punishable against the rapist with a *hadd* penalty-stoning (if he is a married person); or lashing (if he is unmarried) ^[9]. However Islam allows a man to have intercourse with his slave woman whether married or not married ^[10]. Proof of rape is difficult and strict under Islamic law because Islamic law does not recognize rape if witnesses to the crime are not up to four persons or personal confession. The Quran provides: why did they not bring four witnesses of it? But as they have not brought witnesses they are liars

³ Section 258, Criminal Law of Lagos State, 2011. No 11 resources.

⁴ VAPPA

⁵ Rape and the provision under section 1 and 26 of the Violence Against Persons Prohibition Act, 2015

⁶ Genesis 34 verse 2

⁷ Deuteronomy 22 verse 23 -29

⁸ Deuteronomy 22 verse 25

⁹ Islam Q & A, Fatwa No 10382, November 24 2015

¹⁰ Quran 5.33

before “Allah.”

Some Muslim scholars lent their voices to establish that where rape occurs, a victim of rape caused it and therefore carries the blame. Sheik Feiz recently said that a rape victim ‘has no one to blame but herself. She displayed her beauty to the entire world... to tease man and appeal to his carnal nature’^[11]. Dr. Abdul-Aziz Fawazan, a professor of Islamic law said:

If a woman gets raped, walking in public alone; then she herself is at fault. She is only seducing men by her presence, she should have stayed at home like a Muslim woman^[12].

This view was echoed by the Imam of a Salafist Mosque in Cologne, Germany in the wake of the shocking sex abuse rampaged by recently arrived Muslims on New Year’s Eve in 2015. He explained that “the event (which included rape)” were the girls’ own fault because they were half naked and wearing perfume^[13].

In the traditional African setting, from time immemorial, the sanctity of family and the sacredness of intercourse have been preserved with keen guidance, even to almost a destructive level. One of the capital offences in the traditional African setting is rape. The African culture frowns at an act of sexual relationship between a man and a woman that are not married, not to even talk of rape. In the African traditional setting, many means were designed to curb this act which is considered sacrilegious, an abomination or an anathema.

Beginning from the nuclear family setting, it is a very important training for a child to know how to sit properly (with both thighs properly closed). The sleeping arrangement in the home, whereby the sleeping quarters of the male children are distinctly separated from that of the female children is another measure to avoid incidence of rape. A male child is not allowed to watch the nakedness of his mother or that of any young girl. It is an abomination, a thing of shame and reproach for a bride not to have his groom break her knot, virginity or *ibale*^[14] on the night of her wedding. Some husbands, in order to checkmate adultery, lace their wives with thunderbolt locally called “*magun*”^[15] or magnetic jujū to punish frivolous men and to shame their promiscuous wives.

Looking at the cases of rape, from the religious and traditional points of view, one may submit that these institutions frowned at the commission of rape whilst the offenders or violators are visited with evil sanctions. Thus, the society was able to cohabit peacefully and humanity was preserved with checks and balances.

Consent Distinguished from Submission

Consent can be said to be the basis upon which the criminal punishment for rape is predicated. Since rape is sexual intercourse without consent, it must be freely and voluntarily given by a girl or woman who has the capacity for normal intercourse. The definition of consent was offered in the Canadian Criminal Code^[16]. It provides that for the purpose of the sexual assault offences and for greater certainty, it is imperative that the specific situations that do not constitute

consent at law be set out. Section 273(1)^[17] defines consent as the voluntary agreement of the complainant to engage in the sexual activity in question. Conducts short of a voluntary agreement to engage in sexual activity does not constitute consent in law. It is hereby submitted that this Canadian code is evasive in its definition of rape by not stating expressly the ingredients constituting “consent.”

From the foregoing, it is safe to say that no consent would therefore have been obtained in a situation where the agreement is expressed by words or conduct of a person other than the complainant or rape victim; where the complainant is incapable of consenting to the sexual activity by reasons of age, incapacity, lack of cognitive ability or unsound mind, where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; where the complainant expresses by words or conduct, lack of agreement to engage in the activity; or where the complainant, having consented to engage in sexual activity, expresses by words or conduct a lack of agreement to continue to engage in the activity. There is therefore a question whether consent is the same thing as submission in rape cases.

In the United Kingdom’s Sexual Offences Act 1956,^[18] there was no statutory definition of ‘consent.’ Jurists are encouraged to give the word ‘consent’ its ordinary meaning and therefore, there is a difference between consent and submission.

However, the Indian case of *Sheoji Singh vs The State*^[19] comprehensively sets out the distinction between consent and submission in a case of rape. The Punjab – Haryana High Court contended that “a mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving-in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be valid ‘consent’ as understood in law. It expressed consent on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Thus, submission of a woman’s body under the influence of fear or terror is no consent. Therefore, there is a clear difference between consent and submission.

Consent involves a submission but the converse does not follow and a mere act of submission does not mean consent. Consent of a girl in order to relieve an act of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one’s will or pleasure. A woman is therefore said to consent, only when she freely agrees to submit herself, while in free and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold one’s will. It is a voluntary and conscious acceptance of what is proposed to be done by another and concurred to by the former.^[20]

In cases where consent is not wholly given, there are legal situations and circumstances warranting this. This is called passive submission. Whole consent is therefore voluntary agreement to the sexual requisition otherwise called voluntary consent. The fact that someone submits without resistance would not be consent.

¹¹ Quran 23.13

¹² <https://www.thoughtco.com> April 23, 2016

¹³ Ibid

¹⁴ Ibale means virginity in Yoruba language

¹⁵ Magun is a potent African voodoo that kills instantly any man that trespasses to commit adultery with the carrier

¹⁶ Section 273 (1) of the Criminal Code of Canada

¹⁷ Ibid.

¹⁸ Sexual offence Act 1956 applicable in the United Kingdom

¹⁹ (1957) AIR 1958 PH 123 1958, (RIL) 563

²⁰ Ibid

New Developments in the Phenomenon of Rape in Nigeria

One of the elementary features of law is that it is dynamic and not static. Law grows with the society and changes as the orientation of the people it governs changes. The Nigerian Criminal Code was enacted in 1916, having been borrowed from the Queensland, Australia over 100 years ago. Its provisions on sexual offences, over these years have undergone very minor and insignificant changes or amendments despite the fact that the code has been severally amended where it was originated. ^[21] The Nigeria criminal law in the area of sexual offences is filled with uncertainties; therefore, there is always a persistent call to bring certainty and clarity to the existing state of affairs in its provisions. This is a right call, looking at the present level of development in our society with other countries.

Certain people are exempted by the Criminal Code Law from having the capacity to commit rape offence. These persons include a husband against his wife; a male child under the age of 12years ^[22] and an impotent who cannot commit rape. There is also the issue as to whether a man can be raped by a woman. All these issues have at one time or the other been a serious concern and subject of controversies amongst scholars and jurists. For example, the presumption that a male person of below 12 years of age cannot commit the offence of rape must have partly been informed by the traditional notion of rape as only a violent crime requiring strength. It is unimaginable that a male person under the age of 12years cannot force a woman or a girl into consensual carnal connection, especially now that children are being raped and defiled. Such irrationality can be rebutted these days with the present level of development, hormonal changes, genetic disorder and the rascality in the society. The present view is that rape can be committed without the use of force. In *R V Larter* ^[23], it was held that a male person under the age of 12years can have erection; therefore he can penetrate at least an infant girl. If that happens and a charge is brought under rape or defilement, it is presumed that it might be unjust to absolve the accused especially where the victim is of a tender age.

Female to male rape is another area of recent concern. Definition of rape under the Nigerian Law points at the conclusion that a woman cannot actively rape a man. This is with utmost respect, erroneous. It has been contended in many quarters that this postulation seems unreal or rather ridiculous. The possibility of a female sexually assaulting a male seems remote but it is not rare and is, in fact, not a recent phenomenon. As far back as 1978, it was reported that certain lady called Joyce McKinney in the case of the "Mormon Sex in Chains" scandal was convicted of chaining a man and forcing him to have sexual intercourse with her ^[24].

The assumption that only females can be raped is due to a number of wrong or stereotypical cultural assumptions, such as the presumption that men always want sex, initiate sex or that boys and men cannot be victims of rape because of their

physical strength or because they are easily physically aroused. It must be understood that the male erectile response is involuntary which is very similar to a female response. Whilst it is agreed that a female, while being sexually assaulted, may still experience involuntary arousal which is a mechanical stimulation, this position is also applicable to men or boys. There are instances where a man can be scared, intimidated or blackmailed into engaging in sexual relations with a woman outside his wishes. Therefore, it is apt to say that men in Nigeria have been, over the decades, subjected to, social, political and legal double standards in this respect by the presumption in the statute books that only women could be victims of rape.

To further rebuff the claim that a man cannot be raped, the cases of Mary Kay Letourneau and Debra Lafave where teachers sexually abused underage boys who were supposed to be under their care is of good example ^[25]. Recently, in Nigeria, there was a viral video circulating, depicting a girl sexually assaulting a younger male. This female to male rape is otherwise called 'made to penetrate' cases, ^[26] it is, therefore my humble opinion that a more inclusive definition of rape be pronounced, this is to include or reflect genuine concerns that a man or a boy can be victims of rape, the punishment in this respect should rank *pari passu* with that of a male sexual offender.

Following the amendment of the Laws of England and other European countries which now make a husband liable for the rape of his wife, coupled with the global trend in the agitation of women to have control over and decide freely and responsibly in matters related to sexuality, including sexual and reproductive health, being free from discrimination and violence; there has been repeated calls by some Nigerians for our laws which exempts a husband from raping his wife to undergo a reform ^[27].

Rape in the United Kingdom

Rape is a statutory offence in England and Wales ^[28]. The Sexual Offences Act, 2003 provides as follows in creating the offence of rape;

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.
2. Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
3. Sections 75 and 76 apply to an offence under this section.
4. A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

This definition is notably has narrow in scope. For example, if a victim is forcefully penetrated with an object other than a penis, this is classed as "Assault by Penetration," ^[29] and if the victim is made to penetrate another, the act can be prosecuted

²¹ *Ibid.*

²² There is an irrebutable presumption in the Criminal Code Act that a male Child of below 12 years cannot commit the offence of rape. Non-liability of a male person under the age of 12years of age is provided for in the third paragraph of section 30 of the Criminal Code and is an irrefutable presumption of law no matter the evidence adduced to the contrary.

²³ (1995) Crim LR 75.

²⁴ Weird News: Woman Chains Man to have forceful Sex with Him. <https://www.weirdnews.html> Accessed 19th July, 2017.

²⁵ *Ibid.*

²⁶ H.L Rawdowski, 'The Intricacies of Men-Rape and Male Sexual Victims'. Random Reports, South African Ridge Bulletin, P. 147.

²⁷ S.O. Oluokuade (2016) 'Rape and Legal Reforms'. SLBJ Vol. 34, P. 56-59.

²⁸ The offence is created by section 1 of the Sexual Offences Act, 2003 United Kingdom

²⁹ See Section 2, Sexual Offences Act, 2003 United Kingdom.

as "Causing a person to engage in sexual activity without consent." [30]

A man or woman assisting another man to commit a rape can be prosecuted for the crime as an accessory. A man guilty of rape is liable on conviction to imprisonment for life or for any shorter term. In *R v Millberry*, [31] the Court of Appeal held that "there are, broadly, three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the degree of harm to the victim; the second is the level of culpability of the offender; and the third is the level of risk posed by the offender to society." Subsequently, the court held in *Attorney General's Reference* [32] that these three dimensions can be applied to sentencing for other categories of sexual offences. In September 2019, serial rapist Jason Lawrence appealed against one of his convictions, in which he had told a victim he had had a vasectomy, prior to sex, but admitted afterwards that this was untrue. The conviction for rape by deception, and the appeal (At this time ongoing), are believed to be the first of their kind in the UK.

Rape of a Child Under 13

This is a statutory offence created by section 5 of the Sexual Offences Act 2003.

(1) A person commits an offence if-

- a) He intentionally penetrates the vagina, anus or mouth of another person with his penis, and
- b) The other person is under 13.

Any consent of the complainant is of no relevance if he or she is under the age of thirteen.

Female Perpetrators

In England and Wales, the specific drafting involves a "he", using "his penis." Under section 1 of the Sexual Offences Act 2003, females are unable to commit rape. However, there may be a movement away from this drafting after notorious cases such as the American case of *Cierra Ross*, [33] where a mother was charged with rape after forcing a male to penetrate her friend at gunpoint.

A female who has committed a sexual crime against a male or a female would receive sentences such as assault by penetration, sexual assault, or causing sexual activity without consent. The sentencing council offers sentencing guidance on sexual crimes. For sexual assault involving physical harm, the sentencing can be 3-8 years, whereas the sentencing council's guidance on rape under section 1 of the Sexual Offences Act 2003 can receive a life imprisonment.

History and Development of Rape Offence in England

Rape was an offence under the common law of England and was classified as a felony. The common law defined rape as "the carnal knowledge of a woman forcibly and against her will." The common law defined carnal knowledge as the penetration of the female sex organ by the male sex organ [34].

The crime of rape was unique in the respect that it focused on the victim's state of mind and actions in addition to that of the defendant. The victim was required to prove a continued state of physical resistance, and consent was conclusively presumed when a man had intercourse with his wife. One of the most oft-quoted passages in UK's jurisprudence on the subject of rape is by Lord Chief Justice Sir Matthew Hale from the 17th century, where he said;

Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.

Lord Hale is also the origin of the remark, "In a rape case, it is the victim, not the defendant, who is on trial." However, as noted by Sir William Blackstone in his Commentaries on the Laws of England, by 1769 the common law had recognized that even a prostitute could suffer rape if she had not consented to the act.

On the punishment for rape, Section 16 of the Offences against the Person Act, 1828 read as follows: '*And be it enacted, that every Person convicted of the Crime of Rape shall suffer Death as a Felon.*' Here, "death as a felon" means death by hanging and confiscation of his land and goods, which were pronounced against felons, as opposed to the quartering which befell traitors. Thus it was assumed that the definition of rape was so well understood and established by the common law of England that a statutory definition was unnecessary. The death penalty for rape was abolished by section 3 of the Substitution of Punishments for Death Act, 1841 which substituted transportation for life. Transportation was abolished by the Penal Servitude Act, 1857, which substituted penal servitude for life. These sections were replaced by section 48 of the Offences against the Person Act, 1861. Penal Servitude was abolished by the Criminal Justice Act 1948, which substituted imprisonment for life. These sections were replaced by sections 1(1) and 37(3) of, and paragraph 1(a) of the Second Schedule to the Sexual Offences Act 1956.

In January 1982, the Government accepted an amendment to the Criminal Justice Bill the effect of which, if enacted, would be to compel judges to sentence men convicted of rape to imprisonment. This followed a case earlier that month in which John Allen, 33, businessman and convicted of raping a 17-year-old hitchhiker, had been fined £2,000 by Judge Bernard Richard, who alleged the victim's "contributory negligence. The final paragraph of section 4 of the Criminal Law Amendment Act, 1885 provided that it was rape for a man to have carnal knowledge of a married woman by impersonating her husband. This provision was replaced by section 1(2) of the Sexual Offences Act, 1956. Rape ceased to be a felony on 1 January 1968 as a result of the abolition of the distinction between felony and misdemeanour by the Criminal Law Act 1967.

A statutory definition of "rape" was provided by section 1 of the Sexual Offences (Amendment) Act 1976. This was intended to give effect to the Report of the Advisory Group on the Law of Rape (Cmd 6352) and to the opinions expressed by the House of Lords in *DPP v. Morgan* [35].

It provides as follows:

182, [1975] 2 WLR 913, [1975] 2 All ER 347, 61 Cr App R 136, [1975] Crim LR 717, HL.

35 [1976] AC 182, [1975] 2 WLR 913, [1975] 2 All ER 347, 61 Cr App R 136, [1975] Crim LR 717, HL.

³⁰ Section 4, Sexual Offences Act, 2003 United Kingdom.

³¹ [2003] Crim LR 207

³² (Nos. 91, 119, 120 of 2002)

³³ *Cierra Ross*, 25, Accused of Forcing a Man at Gunpoint to have Sex with her Friend. Accessed on 1st July, 2021 from www.dailymail.co.uk/news/article-2414136/Cierra-Ross-25-accused-forcing-man-gunpoint-sex-friend.html

³⁴ It covered all other acts under the crime of sodomy. The definition of rape at common law was discussed in *DPP v. Morgan* [1976] AC

(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if-

- (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
- (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly.

In *R v R* ^[36] it was held that the word "unlawful" in that section did not exclude marital rape. Section 1 of the Sexual Offences Act 1956 was substituted on 3 November 1994 by section 142 of the Criminal Justice and Public Order Act 1994, providing a new and broader definition:

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 also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.
4. Subsection (2) applies for the purposes of any enactment.

That section was replaced on 1st May, 2004 by section 1 of the Sexual Offences Act 2003, providing a still broader definition. References to vaginal or anal sexual intercourse were replaced by references to penile penetration of the vagina, anus or mouth. It also altered the requirements of the defence of mistaken belief in consent so that one's belief must be now both genuine and reasonable. Presumptions against that belief being reasonably held also now apply when violence is used or feared, the complainant is unconscious, unlawfully detained, drugged, or is by reason of disability unable to communicate a lack of consent. The change in this belief test from the old subjective test (What the defendant thought, reasonably or unreasonably) to an objective test was the subject of some debate as it permits a man to be convicted of rape if he thought a person was consenting, were the circumstances thought by a jury to be unreasonable.

Capacity of a Minor to Commit Rape in the UK

At common law, a boy under the age of fourteen years could not commit rape as a principal offender as he was irrefutably presumed to be incapable of sexual intercourse. This rule was abolished by section 1 of the Sexual Offences Act 1993. A boy under the age of fourteen years could commit rape as an accomplice. It was never decided whether a boy under fourteen could be convicted of attempting to commit rape as a principal, rather than an accomplice, if he attempted to have sexual intercourse or actually succeeded in doing so. The reported dicta did not agree on this point.

Spousal Rape in the United Kingdom

A woman could not commit rape as a principal offender, by the nature of the offence, but she could commit rape as an

accomplice. In England, after several attempts at evading the strict adherence to women's rights, It finally gave up the regime of immunities in 1962 by the Law Reform (Husband and Wife) Act, which gave spouse a right of action against the other as though they were never married ^[37]. Today, marriage is on partnership basis, requiring mutual respect, thus reducing the likelihood of the imposition of non-consensual intercourse on any parties. It is becoming clear (especially in England) that it is no longer possible to employ the theory of non-intrusion to oust the criminal prosecution of the offences committed within the confines of marriage. For instance, in *R v. Kowalski*, ^[38] a husband was convicted for indecent assault on his wife, despite his defence of his wife's previous consent. The fact that the husband was convicted of indecent assault in this case also lends credence to the view that a man is deemed legally incapable of raping his own wife.

The effect of the above is that, as of now, equal treatment, irrespective of sex, has emerged as a legal concept of global acceptance. Biased public policy that sought to advocate for the non-intrusion of the criminal law into domestic sphere has collapsed. There are plethora of successful prosecution of even minor offences committed in the home, where marital and filial bonds have succeeded to bar the prosecutor of such offenders.

Rape in the United States of America Early American History

During the era of slavery, slave women were frequently sexually abused and raped by slave owners, the sons of slave owners, and overseers. The sexual abuse of slaves that occurred prior to the Civil War was so prevalent that it strongly influenced the genetic make-up of the overwhelming majority of African Americans alive today. White men, who raped black women were protected by impunity under Southern society, and children of such unions usually inherited the status of their mothers as slaves. Sexual assaults affected girls as young as 12 years old. A young slave girl named Celia, was the frequent target of her master, Robert Newsom's abuse. After having three children with him in a relationship that began when she was only 14, Celia killed her master in self-defense after another attempt at sexual assault. She was found guilty in court and sentenced to death by hanging.

Slave women were also subject to sexual abuse by slave traders and were routinely assaulted on slave ships; the perpetrators faced no legal punishment. The rape of slave women was also done by masters to result in a substantial growth of their slaves as property and increase profit. Slave owners would attempt to justify the abuse of black women during slavery through the stereotype of the Jezebel, a seductive woman who wanted to submit to them. According to authors Judith Worell and Pamela Remer, because "African American women were sexually exploited during slavery" and because of stereotypes originating from slavery such as the Jezebel, black women "are not viewed as credible complainants, and are stereotyped (e.g., as promiscuous) in ways that blame them for their rapes."

Before and during the American Civil War when slavery was widespread, laws against rape were focused primarily on instances of black men raping white women, real or imagined,

³⁶ [1991] UKHL 12, The House of Lords held that under the English Law, it is a crime for a husband to rape his wife. The Defendant was on the 23rd October, 1991 convicted of an attempt to rape his wife.

³⁷ Judicial support was given to this viewpoint in the cases of *Reg V. C* (1991)1 ALL ER 755 at 755 and *Regina V R* (1992) 1 A.C 599 at 610.

³⁸ (1998) 8 CR.APP.R 339

as opposed to other instances. Black women who were raped by any man were not protected by the law. In some states during the 1950s, a white woman having consensual sex with and a black man was considered rape and is related to lynchings, racial violence, rapes targeting African-Americans (Such as the Tulsa race massacre) that occurred under the suspicion of rape or consensual sex between a black man and white woman.

Contemporary History

Rape, in many US states, before the 1970s, could incur capital punishment. The 1977 Supreme Court case of *Coker v. Georgia* held that the Eighth Amendment to the United States Constitution forbade the death penalty for the crime of rape of an adult woman. The court held that "*Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over, and normally is not beyond repair.*"

Feminism politicized and publicized rape as an institution in the late 20th century. New York Radical Feminists held a Rape Speak Out, where women discussed rape as an expression of male violence against women, and organized women to establish rape crisis centers and work towards reforming existing rape laws. This was the first attempt to focus political attention on the issue of rape. Feminist writings on rape include *Against Our Will: Men, Women, and Rape*, by Susan Brownmiller. Concepts such as date rape and marital rape were brought to public attention.

The murder of Megan Kanka, which occurred in 1994 in New Jersey, when the seven-year-old girl was raped and murdered by her neighbour, has led to the introduction of Megan's Law, which are laws which require law enforcement to disclose details relating to the location of registered sex offenders. Several developments in regard to rape legislation have occurred in the 21st century. Following the intensely publicized case of the 2005 murder of Jessica Lunsford, a 9-year-old girl from Florida who was kidnapped, raped and murdered by a man with prior convictions for sexual attacks, states have started enacting laws referred to as Jessica's Law, which typically mandate life imprisonment with a mandatory minimum sentence of 25 years in prison, and lifetime electronic monitoring, for adults convicted of raping children under 12 years. Furthermore, US sex offender registries contain other sanctions, such as housing and presence restrictions.

In the United States, at the Federal level, the FBI's Uniform Crime Report (UCR) definitions are used when collating national crime statistics from states across the US. The UCR's definition of rape was changed on 1st January 2013 to remove the requirement of force against a female and to include a wider range of types of penetration. The new definition reads: 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.

For 80 years prior to the 2013 change, the UCR's definition of rape was "carnal knowledge of a female forcibly and against her will."

At the state level, there is no uniform legal definition of rape; instead, each state has her separate laws. These definitions can vary considerably, but many of them do not use the term *rape* anymore, instead using *sexual assault*, *criminal sexual conduct*, *sexual abuse*, *sexual battery*, etc. One legal definition, which is used by the United States Armed

Forces is found in the United States, ^[39] defines rape as:

- a) **Rape:** Any person subject to this chapter who commits a sexual act upon another person by-
1. Using unlawful force against that other person;
 2. Using force causing or likely to cause death or grievous bodily harm to any person;
 3. Threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
 4. First rendering that other person unconscious; or
 5. Administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.

Federal law does not use the term "rape." Rape is grouped with all forms of non-consensual sexual acts under chapter 109a of the United States Code ^[40]. Under federal law, the punishment for rape can range from a fine to life imprisonment. The severity of the punishment is based on the use of violence, the age of the victim, and whether drugs or intoxicants were used to override consent. If the perpetrator is a repeat offender the law prescribes automatically doubling the maximum sentence. Whether the victim is an adult or of a child, the U.S. Supreme Court has held that the death penalty is not available as a possible penalty if the victim does not die and death was not intended by the defendant. Capital punishment remains available as a penalty where the victim dies, or where the defendant acts with intent to kill the victim but the victim survives.

Some U.S. States or other jurisdictions such as American Samoa recognize penetrative sex without consent by the victim and without the use of force by the perpetrator as a crime (usually called 'rape'). Other states do not recognize this as a crime; their laws stipulate that the perpetrator must have used some kind of force or coercion (physical violence that results in demonstrable physical injury), threats against the victim or a third party, or some other form of coercion) in order for such non-consensual penetrative sex to amount to a crime. Similarly, some states (or other jurisdictions such as the Military) recognize non-penetrative sex acts (contact such as fondling or touching a person's intimate parts, or exposure of a body or sexual activity) without consent by the victim and without the use of force by the perpetrator as a crime, while other states do not.

Jurisdiction on Crime of Rape in the United States of America

In the United States, the principle of dual sovereignty applies to rape, as to other crimes. If the rape is committed within the borders of a state, that state has jurisdiction. If the victim is a federal official, an ambassador, consul, or other foreign official under the protection of the United States, or if the crime took place on federal property or involved crossing state borders, or in a manner that substantially affects interstate commerce or national security, then the federal government also has jurisdiction.

If a crime is not committed within any state, such as in

³⁹ Uniform Code of Military Justice Title 10, Subtitle A, Chapter 47X, Section 920, Article 120

⁴⁰ 18 U.S.C. §§ 2241–2248

the District of Columbia or on a naval or U.S.-flagged merchant vessel in international waters, then federal jurisdiction is exclusive. In cases where the rape involves both state and federal jurisdictions, the offender can be tried and punished separately for each crime without raising issues of double jeopardy. When a state has jurisdiction over a rape case, as a matter of policy, federal prosecution will not be pursued for a rape charge unless the case presents a matter of federal interest, that interest was not adequately addressed by a state-level prosecution, and the government believes that a federal prosecution will be successful.

Jurisdiction issues also complicate the handling of campus rape, due in part to overlapping jurisdiction of campus and local law enforcement, and differences in how various police agencies and prosecutors handle sex offenses.

Summary of Findings and Conclusion

This paper discussed the legal regime of rape in Nigeria, United Kingdom and the United States of America. It set out the provisions of the Criminal and Penal Codes, whilst raising the gaps identified in the statutory provisions while contrasting their provisions with that of the United Kingdom and the United States of America. It found that rape, as defined in the extant laws in Nigeria were becoming obsolete and anachronistic in some respects in contradistinction to the modern developments in the evolution of rape in the developed world and considered the question whether Nigeria should join the train or not, whilst considering the prospects and pitfalls of joining such bandwagon of extending the frontiers of rape.

This study finds that the definition of rape as; having 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 act, or, in case of a married woman, be personating her husband is deemed in many respects as incapable of meeting the demands of modern realities^[41].

It recognized the dynamic nature of the law and the fact that law grows with the people and changes with the society, whilst realizing the fact the Nigerian Criminal and Penal Codes being of foreign sources and origin, but now regulating our criminal justice system might require some significant amendments that would take into consideration the societal peculiarities of Nigeria which criminal administration it relates. It also reiterated the fact that carnal knowledge of the victim by the accused is an essential requirement of the offence and carnal knowledge is complete upon penetration even without the necessary emission of semen.

This paper also examined marital rape in Nigeria and on comparative analysis whilst espousing the contention whether or not a man can be guilty of raping his wife under the Nigerian law and resolved it in favour of the presumption of consent in marriage and as such treated spousal rape as an exception to rape. This is more particularly so because the evidence of a valid and subsisting marriage between an accused husband and the woman will negate the offence of rape since sexual intercourse is one of the incidents of a valid marriage and a man is deemed in law to have obtained perpetual consent of his wife at marriage thereby removing any likelihood of an allegation of 'unlawful carnal knowledge

of his wife.'

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