

A PANORAMA OF GENDER IMBALANCE IN THE OFFENCE OF RAPE IN NIGERIA

“A system founded on inequality is against the nature”

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Abstract

Over the years, the gendered essence of rape has become deeply embedded in the purpose of the statute and rape is a very serious sexual assault under both Nigerian law and other jurisdictions. In Nigeria, the Criminal and Penal Codes have made provisions for what constitutes rape, which is still tied to the apron strings of the traditional common law concept with its peculiarities. A careful review of the history and literature shows that the law itself has fitted us with blinders, compelling us to focus exclusively on harms caused to female gender by men and to ignore the possibility of female-perpetrated rape of boys or men, even in the years since the law became official gender-neutral in some jurisdictions. Under these laws for example, a woman cannot be guilty of rape. However, the evidence extracted from these studies in light of the wide spectrum of the conception in some jurisdictions, it is apparent that the scope of rape under the Nigerian Jurisprudence is not comprehensive enough to include every act that constitutes rape in current global conception. This article discusses the offence of rape being presently conceived as gender imbalance under Nigerian law and advocates for a reform to make the concept be in consonance with the current global trend.

Keywords: Gender; Rape; Sex; Sexual Assault; Jurisdiction

1.0. INTRODUCTION

Gender issues have become incessant conversations in almost every sector of the society. Nevertheless, if clamor for equal treatments for the two genders is anything to go by, then it is imperative for the male and female to be treated equally by the law. The offence of rape in Nigeria does not reflect the ardent need to treat the male and the female gender equally because rape is a gender discriminatory offence, which can only be committed by a male upon a female as defined in the Nigerian Criminal Code and the Penal Code; this is gender bias against the male folks. By the definition, a female on a male victim cannot commit the offence of rape, nor can a man on a man commit it. The offence of rape takes its root from a historical era where women are considered as commodities, which should not be trespassed upon since early law on rape was enacted with a view to protecting virgins from rape, abduction and forced marriage. It was also the intention of the law makers to protect the interest of a father in the virginity of his daughter or the interest of a husband in his wife's fidelity. As the court held in *People V, Liberto*¹.

The purpose behind early rape was to protect the chastity of women and thus their property value to their fathers or husbands”.

Today, the cardinal aim of the law of rape is to protect woman or girl from sexual assault or sexual harassment.² This echoes that, it is only the man who can take advantage of a woman for sexual gratifications. This belief is no longer the position in the present time since women can also in a way of force or deceit subject a male victim to unwanted sex to have sexual gratifications. This work is aimed at examining the *lex lata*³ of the sexual offence law in Nigeria with a view to arriving at the *lex feranda*⁴.

It is no doubt that there has been much hoots and cry against the marginalization of the female gender, at least in an unprecedented magnitude in the last two decades. This is quite evident in the female movement and non-governmental organizations preaching equality in the treatments of both the male and the female genders by the society and by the law alike. The male gender through cultural and traditional heritage is more favoured compared to the female counterpart. This position is also reinforced by the gender bias language the Nigerian draftsmen often employ in drafting the laws. The female gender is seen as a weaker sex and more susceptible to danger, and thus deserves the protection of the society, and the law should be adopted as one of the primary instruments for actualizing this aim. It is against the backdrop of unequal treatment of the two genders that there have been yearnings to place the duo on equal platform of treatments, even in political representations at both local and the national scenes.

¹ 64 N.Y.2d 154,p167(1984)

² See Yakubu J.A (1990). The rape crisis-society on trial. The Advocate International Journal Law Students' society,Obafemi Awolowo University,Ile-Ife,14&15:34-37

³ Law as it is

⁴ Law as it ought to be

1.1 DEFINITION OF RAPE

Rape, which is the gravest form of sexual assault, is any unlawful or non-consensual carnal knowledge of a woman by a man. The weaker stance a female gender stands compared to a male counterpart could be one of the reasons the laws of most nations including Nigeria, criminalized the offence of rape which is defined as unlawful carnal knowledge of a woman or girl without her consent, or if the consent is obtained by force or by means of threats, intimidation of any kind or by fear of harm or by means of fraudulent misrepresentation as to the nature of the act or in case of a married woman by impersonating her husband⁵. Despite several sections dedicated to the offence of rape under the Criminal Code and Penal Code in protection of the female gender from unwanted sex and sexual assaults, it is observed that these provisions are not adequate to confidently safeguard the loopholes in the provisions and justice administration of the offence. Though the issue of rape has been frankly over thrashed as regards its inadequate and scanty protection it offers the female gender in Nigeria, little or nothing has been said on widening the scope of the offence to accommodate safeguarding the male gender against unsolicited sex. In essence, without making a backlash against the female protection from unwanted sex, if the world needs to be transformed into a gender-neutral one, there will be a need for paradigm shift to accord equal treatments to both genders in society and under the law.

It is based on this background that the offence of rape under the Nigerian law needs to be revisited in order to suggest viable solutions that will accommodate the much acclaimed gender equality. The aim therefore is to treat male sexual victimization, the approach in other jurisdictions and possible reforms in the law of rape in Nigeria.

2.0. THE GENDERED HISTORY OF RAPE

The highly gendered way of thinking about the participants in rape derives, primarily, from the statutes that defined the crime for much of its history. In light of the gendered language embedded in the traditional statutory definition of ‘age of consent’ sex crimes, the equal protection arguments this language generated, and the patterns of enforcement for the past century, it is no surprise that lawyers almost instinctively regard rape as a crime committed by men against females⁶. Then, rape is understood as a crime that could be committed only against female. In addition, gender rape law is epitomized in the California statutes that was challenged and upheld by the U.S Supreme Court in *Michael M. v. Superior Court of Sonoma County*⁷ in 1981. The California Penal Code defined ‘unlawful sexual intercourse’ as an act of sexual intercourse accomplished with a female who is not the wife of the perpetrator where the female is under the age of 18 years. However, in this definition, the female gender appears twice as the victim of the act and the law further gendered the putative actors by requiring that the victim not be the wife (an exclusively female status) of the perpetrator, who, by definition then, must be male⁸.

⁵ See section 357 of the Criminal Code Act, Cap C38 Laws of the federation of Nigeria, 2004 and section 282 of the penal code(Northern States)Federal Provision Act,Cap. C38 Laws of the federation of Nigeria, 2004

⁶Kay L. Levine(2005),“No Penis, No Problem”, Fordham Urban Law Journal,33(2),4

⁷ 450 U.S. 464(1981)

⁸ Modern “defence of marriage “Laws preserve and support this presumption, as they insist that only a man and a woman can enter into a matrimonial relationship,hence,only a man can have a wife

From legal scholarship in this area, rape laws were created in a patriarchal society where the nuclear family was the primary social unit⁹. At this structural level of the society, women were viewed as property of their fathers or husbands, and they lacked legal personhood¹⁰.

The value of a girl-child in this era depended on economic worth or economic security, which could be got through marriage¹¹. Her ability to marry then depended on her sexual purity; hence, her virginity was her greatest asset: her bargaining tool in securing a socially acceptable future¹². A loss of this treasure albeit in an unwholesome way was considered as harm, both to her own value and the entire social structure in which she existed. Therefore, law of rape operated to prevent such occurrence. By this value system, where chastity of a girl was held in high esteem, a girl who in a contrary way has engaged herself. This inference thus promotes the belief that unmarried women fall into two separate categories-which are those who are sexually pure and those who are not¹³. However, it is worthy of note to state here that rape laws were originally defined and regarded as an assault to the honour of the woman's family or on the property of the husband¹⁴. In this wise, the owner¹⁵ of the defiled 'property' would be compensated for the assault done on that woman¹⁶.

3.0.GENDER IMBALANCE IN THE OFFENCE OF RAPE

Modern socio-legal realities have revealed that the legal definition of rape in Nigeria can no longer be sufficient because of the definition of the offence of rape under the Criminal Code¹⁷ and the Penal Code¹⁸, which portrays gender imbalance, which define such an offence as being committable by a male. This definition is the centre of gravity upon which this research on gender imbalance in the commission of rape in Nigeria is hinged. Assault to the dignity of a woman has been a focal point of most feminist movements canvassing for solidification and viability of enforcement of the law on rape to better protect the female gender, thereupon suggesting adoptable reforms in the offence of rape and the trial proceedings. However, much as the female gender has dignity of her body so is the male counterpart, and therefore requires the protection of the law and the society. In as much as the law is used as an instrument of protection to the female gender, equal protection should also be accorded the male counterparts because they are no less human. More so, the Constitution¹⁹ of the Federal Republic of Nigeria in Chapter IV, section 34 provides for the protection of human dignity regardless of gender.

⁹ Marsha Green,(1977) "Protecting Lolita: Statutory Rape Laws in feminist Perspective, 1,women's Law Journal 1,4

¹⁰ Wendy W. Williams,(1982) "The Equality Crisis: Some Reflection on Culture, Courts and Feminism,WOMEN'S RTS.L.RPTR.175,176-77

¹¹ Marsha Greenfield (1977) op. cit. p.5

¹² Ibid

¹³ Mary Odem (1995): Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States,1885-1920,78

¹⁴ T.O. Ifaturoti.(1996) "The Law of Rape and Legal Reform in Nigeria, Ibadan University Law Essays,edited by J.D Ojo,167-194

¹⁵ i.e,the father or the husband, whichever is the case

¹⁶ Schwendinger, J and Schwendinger, H, (1982) "Rape, the Law and Private Property" Crime and Delinquency, 28 at P.2, 171-191

¹⁷ Section 357

¹⁸ Section 282

¹⁹ 1999 Constitution of the Federal Republic of Nigeria

The reason the law protects the female from sexual exploitation is not far-fetched from the fact that women are more vulnerable to emotional, physical and social harm resulting from sexual intercourse²⁰.

The corollary to this fact is that boys are by nature sexual aggressors²¹, and thus males will corrupt and exploit young females unless they are prevented by serious criminal sanctions. The treatment of 'male rape' and sexual assault appears to be partly influenced by societal attitudes and rape myths²². Although the majority of reported perpetrators of rape are males, women can, and do also, sexually assault men but are seldom reported. The fact that males are regarded as actors in the offence of rape by statutory definition does not mean that they are not vulnerable to sexual attacks. There have been constant stories about female sexual attacks and female sexually assaulting the male counterpart, regardless of the age. This happens at various levels, places and times in the society. This may happen at homes, work, prisons, colleges, universities, and all sort of places²³. Many times, we hear real life stories of housemaids sexually assaulting the underage male children of their bosses: female school teachers defiling the male pupils; female neighbours having illicit affairs with male and underage children in the neighbourhood, etc. The issue of female folk gang-raping males is a constant phenomenon, especially in the citadels of learning. That male gender is constantly sexually assaulted day in day out is no longer new. At times, such news is blazoned on the pages of newspapers for public consumption²⁴. Male sexual assaults, especially grown up men, frequently involve higher level of violence, weapons, and are more likely to involve multiple assailants. Even though it is against the law of nature that a male should get pregnant, a male who is a victim of sexual assault may otherwise have a risk of internal tearing and damage if he was involved in forceful anal sex. In addition, there could be a possibility of a higher risk of HIV transmission to the male victims of sexual assaults.

Having a look at the definition of rape as encapsulated in section 357 of the Criminal Code. It states:

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.

By the above definition, only a man can commit the offence of rape by an act of penile penetration of a woman's vaginal. The only case where a woman can be linked with the offence of rape is provided for in section 7 of the Code, in which she can be charged with aiding,

²⁰ Rita Eidson.(1980) "The Constitutionality of Statutory Rape Laws, 27 U.C.L.A.L.Rev. 757

²¹ Ibid at 769

²² Susan Estrich:(2006,December 24) "Male Rapes Occurs and It's Time to Address Them".Pocono Record

²³ In fact, in the U.S.A. it is said that there are far more male rapes everyday in prisons alone than there are rape of all females in the U.S.

²⁴ For instance, it was reported in "The Saturday Tribune 4 September, 2010 at P7. That a 23 year old man in Bogoro,Bauchi State in Nigeria allegedly had sex with 27 male children in the area over a period of time

counseling or procuring the commission of the offence²⁵. The offence of rape is committed where there is the slightest penetration of the vaginal by the penis²⁶. The definition of rape has been described as so narrow that it does not accommodate other sexual assaults which can cause even greater distress to the woman and man²⁷. Narrow as this definition may be it does not include the fundamental fact that a great distress can be caused on the victim of the crime even by the penetration of the anus, be it a male or a female victim. More importantly, the offence does not include within its scope the fact that a male can also be forced by a female to have unwanted sexual intercourse with his person. It is submitted that the offence of rape as contained in both Criminal Code and Penal Code should be rephrased to reflect a gender neutral meaning, so that any female who unlawfully cause any man or boy to have her carnal knowledge without his consent, or if such 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 will also be guilty of the offence of rape. Moreover, any act on a male victim who was made to suffer anal, mouth or whatever penetration by any organ, whether biological sexual organ or artificial organ, or any object whatsoever, or any part of the body, like the finger, toe or tongue, by any assailant, regardless of the sex should also be made an offence of equal magnitude to the offence of rape under the legal Codes. This definition is being advocated because the primary aim of the law should be for the protection of any individual from unwanted sexual intercourse or interference without discrimination of any kind²⁸. In essence, the current definition of statutory rape should be widened to reflect a gender-neutral protection. Some jurisdictions have already taken gallant steps to redefine their rape offences in a gender-neutral language, and have made radical reforms in their sexual offences laws, among which are Canada, Australia and the United States of America²⁹, especially in the 1980s. These reforms were often influenced by writings, usually from a feminist perspective about what should be appropriate sexual conduct and attitudes in society³⁰. The reforms sought to change the ways in which sexual offences were defined by the law (for example, by having no separate category of rape or by defining sexual assault as part of the wider law on assaults) and to clarify the manner in which consent to sexual activity should be understood (by statutory statements of situations which are to be treated as indicating absence of consent). Many other jurisdictions in recent years have made several considerations of their sexual offences with a view of reforming such laws³¹. Nigeria should take bold steps to reform the current position of the law on the offence of rape in a gender-neutral manner or language, *inter alia*. California state of the United States of America de-gendered its statute on rape in 1993, as legislators realized that outrageous sexual conduct by women (factually documented and widely publicized) could not be prosecuted under the then existing law³². In some quarters, authors seem to assume that the law's gender bias in the offence of rape may be justified, as the threat posed by female sexual abuse appears minimal.

²⁵ See *R v Ram* (1893) 17 Cox 609

²⁶ *R v Kufi* (1960) W.N.L.R.I.

²⁷ T.O. Ifaturoti (1996) op. cit. p. 170

²⁸ *Ibid.* p. 171

²⁹ See also The African Charter on Human and People Rights (Ratification and Enforcement) Act. 1983; The United Nations Charter on Human Rights, The declaration on the Elimination of Discrimination Against Women by the UN General Assembly on 7th November, 1967

³⁰ A Discussion Paper on Rape and Other Sexual Offences, (June 2004) Scottish Law Commission (Discussion 131)

³¹ Such countries include Australia Capital Territory, South Africa, and England and Wales

³² S. Miller (1994): "The Overturning of Michael M.: Statutory Rape Becomes Gender Neutral in California; 5 U.C.L.A. WOMEN'S LJ 289-299.

This is hinged on the fact that male folks may feel less of a threat of coercion, feel more in control over their relationships, and make them less likely to feel victimized. In fact, that a woman is simply disproportionately older alone suffices to victimize a boy. A writer³³, for example, questions the ability of a minor of either sex to provide meaningful consent to sex, stating further that both sexes need protection from abuses due to immaturity and the resulting lack of ability to make adult decisions particularly when the minor is in a relationship with an adult rather than a partner of a similar age. In a similar manner, another writer³⁴ is of the view that male minors, like girls, are also at risk for some harm associated with sexual conduct like sexually transmitted diseases, self-esteem problems, psychological harm and teenage parenthood. The above indicates, glaring situation of illicit sexual affairs with young lads who could not have had capacity to submit themselves to any sexual intercourse, especially with women who are disproportionately older than they are. This does not mean that “rape” could only be done on a young lad, it can also be perpetrated on a fully-grown man: which is indisputably possible where, for instance, the act is committed under duress or the man is being mesmerized into it, among other possible cases. Indeed, the issue of male rape raises many myths compared to rape committed on a female, especially during trial in states where male rape is recognized.

These myths have the effect of minimizing the gravity of the crime, and the accountability of the perpetrator³⁵. Viewing females as perpetrators of sexual abuse challenges traditional cultural stereotypes. Females have been viewed as non-initiators, limit setters, and anatomically the receivers of sexuality and this makes it difficult for some to imagine a female sexually abusing others³⁶. Some male victims of sexual abuse do not recognize their experiences as abusive at the time, while others who do are not always inclined to report probably for fear of being disbelieved or ridiculed. This may not be far-fetched from the constraints imposed by gender roles and expectations, or by the apparent lack of remedies in the existing law. Notwithstanding the above myths about male rape, the fact still remains that the male gender is equally vulnerable to sexual interference or exploitation, and should be equally protected by the law.

4.0.CONCLUSION

Gender neutrality within rape statutes is the concept that the criminal law should recognize that both men and women could be rape victims as well as perpetrators, in spite of the myths surrounding male issue. Gender neutrality within rape reflects modern understandings of the nature, effects, and dynamics of nonconsensual penetrative sexual acts. The concept of gender neutrality within rape has received positive responses in some jurisdictions and has led to significant reforms in their rape and sexual assault laws³⁷. The fundamental characteristic of

³³ Kelly Connerton (1997): “The Resurgence of the Marital Rape Exemption: The Victimization of Teens by their Statutory Rapists”, 61 ALB, L. REV. 237, 254

³⁴ Lewis Bossing (1998) “How Sixteen Could Get You Life: Statutory rape, Meaningful Consent, and The Implications For Federal Sentences Enforcement”, 73 N.Y.U.L Review 1205

³⁵ See Philip N.S. Rumney, (March 2001) “Male Rape in the Courtroom: Issues and Concerns”. The Criminal Law Review, Sweet & Maxwell.

³⁶ Kathryn T. Jemnings, (1993) “Female Child Molestation: a Review of the Literature in Female Sexual Abuse of Children: The Ultimate Taboo (Michele Elliot ed.)

³⁷ Philip N.S. Rumney (2007) “In Defense of Gender Neutrality Within Rape” Seattle Journal For Social Justice; Vol. 6, issue 1

gender-neutral reforms is that the scopes of definitions of rape were expanded to recognize male victims and female perpetrators. Scholars have criticized traditional rape laws that only prescribe penile-virginal intercourse, their argument being that these laws exclude a great deal of behavior³⁸ which is remarkably similar to the act legally designated as rape and such exclusion appears to rest on no logical or justifiable grounds³⁹

Male rape was first recognized under English law in 1994 when the definition of rape was revised to include non-consensual, penile-anal intercourse of a woman or a man. In 1976, Jocelyne Scutt, writing about rape law reform in Michigan, argued thus:

A principle of criminal law is, surely that all persons should be protected equally from harm of like degree..... The case for treating crimes of like heinousness similarly appears to be stronger than that calling for a distinction to be made between penetrations of the female body, whatever the sex of the actor⁴⁰

Jurisdictions that have adopted gender-neutral laws include: Canada, the Republic of Ireland, Australian states, Finland, England and Wales, and the vast majority of states in the United States of America⁴¹. These gender reforms in these jurisdictions are not uniform. Some jurisdictions have adopted laws that are fully gender-neutral. These laws recognize male victims of rape and acknowledge that women can physically commit the act of rape. For example, in Washington State, rape is defined as follows:

A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion⁴²

Also in *United States V Smith*⁴³, the Ninth Circuit noted that sexual intercourse was defined as “any penetration of the virginal or anus, however slight, by an object, when committed on one person by another, whether such person are of the same or opposite sex and any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another. In order to achieve gender neutrality, jurisdictions have adopted an expansive definition of sexual intercourse with a penis, hand, tongue, or inanimate object. These definition also cover assaults where a woman coerces a man, woman, or child to penetrate her in one or more of the ways stipulated⁴⁴. Some jurisdictions, like England and Wales, have extended the definition of rape to include male victims, but do not recognize females as principal offenders (although women can be convicted as accessories)⁴⁵. Nevertheless, there have been significant measures of

³⁸ Such similar behaviours also include anal penetration of the victim, even with artificial sexual objects.

³⁹ Colleen Hall,(1998) “Rape: The Politics of Definition”. 105 South Africa Law Journal, 67.

⁴⁰ Jocelyne A. Scutt,(1976) “Reforming the Law of Rape: The Michigan example”, 50 Austl. L.J. 615.

⁴¹ Philip N. S. Rumney (2007) op. cit. p. 486

⁴² Washington review Code, S. 9A.44.040 (2006)

⁴³ 574 F. 2d 988 (9th Cir. 1978)

⁴⁴ Philip N. S. Rumney (2007) op. cit. p. 486

⁴⁵ Ibid

reforms in the definition of rape in many jurisdictions which accommodate male victims of sexual assaults in the form of unwanted or coerced sexual intercourse against their persons. The United States of America Model Penal Code focuses on a gender-specific definition of rape, which is justified on the following grounds: that the male who is forced to engage in n intercourse is denied freedom of choice in much the same way as a female victim of rape. Though there is no prospect of unwanted pregnancy in male victim, however, virginity has become a devalued phenomenon in the modern day woman and it is difficult to believe that it should constitute a germane index in comparing level of injury done to the female sex in contradistinction to the male gender.

It has been argued earlier on that rape is a gender discriminatory offence and the law on rape in Nigeria is archaic and need to be amended to apply to current day situations as it was done in other jurisdictions. It is the duty of our policy makers to amend the law of rape to make it gender balance. Recent trends in advanced countries of the world have demonstrated that the males in Nigeria also have to be protected against sexual harassment by the females. Now, it is recommended that Nigeria should take a giant step to reform the rape offence as contained in its penal laws. This is better done by expanding the scope of the definition to include both male and female actors, and both sexes should be made victims of the illicit sexual acts. Moreover, the offence of rape as suggested by many scholars should also be expanded to include any form of penetration, either of the virginal, the anus, the mouth of anybody by a genital organ or any inanimate object whatsoever. The fact remains that female sex abusers and male victims exist in substantial numbers and varieties, and as such, the law should be made a viable instruments to protect both sexes from victimization; the law should ensure that everybody has a freedom to the dignity of his or her body, and be shielded from unwanted sexual assaults. In Nigeria, law should emulate the critical reforms that had taken place in other jurisdictions and in their statutory definitions and scopes of sexual offence of rape, and inscribe it in a gender neutral language so that equal protection can be accorded both male and female genders. In other words, the law of rape should be redefined in gender-neutral term so that it can be committed not only by a male upon a female, but also vice versa. After all what a man can do, a woman can do even better.