



A redefinition of rape under Nigerian law: The need for enabling statutory provisions

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Abstract

This paper seeks for a redefinition of rape to include enabling provisions on male rape on male in the Criminal code, Penal code, Sharia Penal code save Violence Against Person (Prohibition) Act as they do not provide for it. It is trite that there are incidences of male rape on male in Nigeria. The paper states that if enabling provisions on male rape on male are included in the above-named statutes, cases pertaining to male rape on male will become cognizable under the law and perpetrators will become culpable for their acts. It concludes that the inclusion of enabling provisions on male rape on male in the abovementioned statutes will accord with the tenets of justice.

Keywords: redefinition of rape, male rape on male, criminal code, penal code, sharia penal code, violence against person (Prohibition) Act, enabling statutory provisions

Introduction

Under common law, rape was defined as a woman's forcible sexual penetration against her will.

However, because the common law treated wives as their husband's properties, a woman's husband could not be found guilty of raping her, irrespective of whether he used force against her to get sex. Wives could not legally refuse to have sex as a result of the marriage contract. Thus the law deemed marital rape, an impossibility. Blackstone defined rape in the eighteenth century as "the carnal knowledge of a woman by force and against her ^[1]". Muhammed JCA (as he then was) in *Rabiu v The State* ^[2], defined rape thus:

Rape is the unlawful carnal knowledge of a woman by a man forcibly and against her will, or put more tersely, it is the act of sexual intercourse committed by a man with a woman not his wife and without her consent, committed when the woman's resistance is overcome by force or fear, or under other prohibitive conditions.

Further, the International Criminal Tribunal for Rwanda (ICTR) defined rape in the *Akayesu case* ^[3] as "a physical sexual invasion, committed on a person under coercive circumstances". The Tribunal recognized ^[4] the coercive requirements as an aspect of the crime that did not need to be shown by physical force: "threats, intimidation, extortion and other forms of coercion that prey on fear or desperation may constitute coercion". On the other hand, in the *Kunarac et al case* ^[5], the International Criminal Tribunal for the Former Yugoslavia (ICTY) defined rape as: "sexual penetration, however slight: (a) of the victim's vagina or anus by the perpetrator's penis or any other penis or (b) the victim's mouth through the perpetrator's penis; where that sexual penetration occurs without the consent of the victim ^[6]." The statute of the ICTY, article 5 (g) lists rape as a crime against humanity and the statute of the ICTR, article 3 (g) also does the same.

Rape is punishable with life imprisonment with or without whipping ^[7]. In Nigeria, the offence of rape is contained in section 357 and 282 of the Criminal code ^[8] and Penal code ^[9] respectively. Section 357 of the CC states that any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent, if consent is

obtained by force or through threats or intimidation of any kind or through fear or harm, or by misrepresentation or fraudulent representation as to the nature of the act or, in the case of a married woman, by impersonating her husband, is guilty of rape.

However, lacunae exist in the definition of rape under the CC and other criminal law statutes ^[10] as they do not cover male rape on male. These issues are germane as it is trite that they have been reported cases of the above forms of rape in the Nigeria society.

This paper in view of the above seeks to address the salient issue of male rape on male in Nigeria and the urgent need for enabling provisions in our CC, PC, SPC to tackle the incidences of male rape on male in Nigeria. This paper deals with six interrelated parts in examining the redefinition of rape under Nigeria law taking into consideration the issue of male rape on male. It begins with the introductory part. Part 2 highlights the incidences of male rape on male and states that it exists in Nigeria. Succinctly, part 3 takes cognizance of the literatures of scholars such as Cahill, Bourke in the jurisprudence of rape. Their views on the subject matter are well articulated. Under part 4, the effect of male rape on the victim is highlighted in so far that following their abuse, victims of rape experience sexual dysfunctions and ambivalence about their own sexuality. Consequential with anal trauma caused by sodomy, such an act of aggression, increased fear and anxiety about HIV/AIDS is a very real concern for male victims of rape. Part 5 deals with the applicable laws on rape in Nigeria. These laws are the Constitution of the Federal Republic of Nigeria, the Criminal code, Penal code, Sharia Penal code and Violence Against Person (Prohibition) Act. The chapter states that the definition of rape in these statutes do not cover male rape on male. There is therefore the need for a redefinition of rape in these statutes save Violence Against Person (Prohibition) Act to cover male rape on rape. Finally, part 6 concludes that the redefinition of rape should cover male rape on male as contained in the Violence Against Person (Prohibition) Act and this should be included in the Criminal code, Penal code and Sharia Penal code. This will accord with the tenets of justice in bringing to book perpetrators who commit these acts.

Incidences of male rape on male in Nigeria

Obviously, incidences of male rape victims raped by their fellow men exist in Nigeria. These have not graced media headlines because victims hardly discuss^[11] their ordeal in the hands of male rapists. This is due to religious and cultural contexts that see it as a taboo. The under-mentioned few instances^[12] portray this.

A man whose name was given as S. Ude in April 2016, 35, from Amuzu community of Am Asiri, Afikpo North Local Government Area, Ebonyi State, was reportedly arrested for raping a 10-year-old boy. Ude later lured him to join him to the farm and raped him through the anus.

On 23 February 2016, Mallam Isiaka, a 34-year-old trader was arrested in the Iju part of Lagos state for supposedly raping through the anus a nine-year-old boy. There was a similar incident in the first quarter of 2020, in Benin City, Edo State. This time, not a single person was involved in the rape. More than 10 boys were apparently kidnapped by a young gay Nigerian couple and kept as the sex toy for the couple by forcefully having anal sex with them.

Literature on the crime of rape

Medhelf states^[13] that the word 'rape' comes from the Latin verb *rapere*, meaning 'to seize or force.' It is a forced, unwanted sexual intercourse; it is also sometimes referred to as sexual assault which can happen to men and women of any kind of any age^[14]. According to Omoera, Many people believe^[15] that rape represents a sexual act. Although rape involves sexual acts, it is motivated not by sexual attraction or the desire for sexual gratification but by the desire^[16] for power and control over someone else. To put it another way, rape is a crime of violence^[17].

Liebling, Sleggh, and Ruratotoye observe^[18] that in the Democratic Republic of Congo, women and girls bearing children from rape is a poorly understood topic as the root causes and effects of sexual abuse and their effect on Millennium Development Goals (MDGs) are hardly appreciated by the majority of the people. Buchwald and Roth, authors^[19] of the popular 'Transforming a Rape Culture' defines the phenomenon as a "complex of beliefs that fosters sexual aggression by men and a society in which violence is seen as sexy and sexuality as violence." Thornhill and Palmer reveal^[20] the key flaws in the theory of rape in the social science, which argues that rape is an acquired behaviour whose goal is the collective political, social and economic domination of women by men. Cahill says^[21] rape and sexual violence are deeply rooted in particular political, economic and cultural environment.

The effects of male rape on the victim

According to Pretorius and Hull, there doesn't seem to be a single atypical emotional

Response^[22] that will endure male victims of this type of attack. The emotional responses displayed^[23] can range from appearing calm and rational to anger, depression and hysteria

expressed. Some men might even withdraw and seem irresponsive. Given that individuals react^[24] differently, each of the behaviours described above should be considered a normal response to trauma, primarily in terms of its own identity, culture and background. According to Rogers, evidence suggests^[25] development of post-traumatic stress disorder (PTSD) growth in male rape

survivors following their assault. Moreover, Brochman indicates^[26] that it is not unusual for a male rape victim to blame himself for the crime, assuming that he was responsible for the attack in some manner and giving the rapist permission. Additionally, Katz opines^[27] that men seem to share a similar apprehension of female rape victims regarding other people believing the myth that they enjoyed being raped. Some men may still claim they were not raped or that they gave consent because they were^[28] sexually aroused, had an erection or ejaculated.

Goyer and Eddleman submit^[29] that the interpersonal connections of the victim's life is an area that seems to suffer under the effect of the rape. They state further that the manner^[30] in which these disturbances manifest in social relationships is however varied. Continuing, according to them^[31], relationships are often influenced on an individual basis and to varying degrees of severity. They posit^[32] that sleep, appetite and digestive disturbances are the physical difficulties most commonly experienced with male rape victims. Anderson on his part observes^[33] that the physical problems experienced by these victims could be grouped into stress related symptoms including tension, headaches, ulcers, eating difficulties, sleep difficulties, colitis and stomach complaints.

According to Roos and Katz^[34], suicidal ideation and the act of suicide are also common occurrences among victims of male rape, particularly amongst those victims who are unable to have access to supportive networks. In addition to physical and emotional difficulties, struggling to connect with their religious faith is another important theme experienced^[35] by victims of male rape suggests^[36] that victims appear to experience a "schism" in their religious relationship for a period of time followed by a desire to reconnect.

Applicable laws on rape in Nigeria

Applicable statutes such as the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Criminal code, the Penal code, the Sharia Penal code and Violence Against Person (Prohibition) Act (VAPPA) will be examined as they pertain to rape.

1. The Constitution of the Federal Republic of Nigeria, 1999 (as Amended)

Although, the CFRN, 1999 (as amended)^[37] does not specifically prohibit rape, it clearly prohibits torture and other inhuman or degrading treatment. It is trite that rape is a form of torture and cruelty meted on the victim. Section 34(1) states that: "every individual is entitled to respect for the dignity of his person, and accordingly, (a) no person shall be subjected to torture or to inhuman or degrading treatment".

2. The criminal code

According to section 30 of the CC, a male individual under 12 years of age is *doli incapax*, that is, he is presumed to be incapable of having carnal knowledge^[38]. This assumption of the law is irrebuttable and cannot be disproved by proving that despite his age, the boy has reached puberty. From this it follows that he cannot be convicted of the crime of rape.

Section 357 of the CC provides^[39] for the crime of rape. Furthermore, section 6 of CC states that:

When the term “carnal knowledge” or the term “carnal connection” is used in defining an offence, it is implied that the offence, so far as regards that element of it is complete upon penetration”. The second limb of the above-mentioned section goes on to state that: “unlawful carnal knowledge” means a carnal connection that occurs rather than between husband and wife.

A cursory look at the provisions of the CC above show that the offence of rape can be committed only by a man on a woman or a girl. Both provisions are narrow in scope as they fail to take account of the possibility of committing a rape offence by a man on another man. The provisions do not cover male rape on male and therefore culpability cannot lie in the commission of such an act. However, it is settled law by the combine effect of the provisions of section 357 and section 6 of the CC that there is marital exemption^[40] to the crime of rape. The exemption under the CC is wider^[41] than the marital exemption to the crime of rape provided for under section 282(2) of the PC. Pointedly, a man can commit the crime of rape against a woman or girl under our criminal laws and this has been adjudicated on by the courts in a plethora of decided cases^[42].

3. Penal Code

Under section 282 of the PC, a man cannot^[43] be guilty of raping his wife. However, it is observed that section 282(2) of the PC has a qualification. It states: “sexual intercourse by a man with his own wife is not rape if she has attained puberty”. It may mean that the exemption will only be enjoyed by a man who has forceful sexual intercourse with his wife who has attained the age of puberty. It may therefore follow that, a man who has non-consensual sex with his wife who has not reached puberty may be guilty of rape within the wordings and simple interpretation of section 282(2) of the PC. By the clear and logical interpretation of the wordings of section 282(2) of the PC, it may mean that a man can be guilty of raping his wife, if the wife in question has not attained puberty. Ochem and Emejuru observe^[44] that by the provision of section 282(2) of the PC, a lot of men who marry very young girls especially in the northern part of Nigeria can safely be convicted of raping their child-wives. This may be so because most of the child-wives might not have reached the age of puberty.

Similarly, a look at the provision of the PC above shows that the offence of rape cannot be committed by a husband on his wife except based on the condition stated in section 282 of the PC. Under the PC, rape can be committed by a man on a woman or a girl. The provisions of the PC are narrow in scope as they fail to take into consideration that the offence of rape can be committed by a man on another man.

4. Sharia penal code

The provision of the Sharia Penal code^[45] is very similar with the provision of the PC^[46] except for very minor variations. The SPC provides in section 128 provides that: (1) a person save in the case referred to in subsection (2) is said to commit rape in any of the following circumstances: a. against her will b. without her consent; c. where her consent is obtained by putting her in fear of death or hurt; d. If, with her consent, the man knows that he is not her husband and that her consent has been given because she believes that he is another man to whom she is or believes

to be married legally; e. with or without her consent, if she is under the age of fifteen or of an unsound mind”. Sexual intercourse by a man with his wife is not rape^[47] under the SPC. The subject of assessment here is specifically the provision of section 128(2) which stipulates that sexual intercourse by a man with his wife is not rape. This provision is a clear expression of the draftsman’s intention to create total marital exemption to the crime of rape. The SPC unlike the PC does not have limitation to marital exemption. Under the SPC, rape cannot be committed by a husband on his wife unlike the PC under a stated condition. Under the SPC, rape can be committed by a man on a woman or a girl. The provisions of the SPC are narrow in scope as they fail to take into consideration that rape can be committed by a man on another man, otherwise known as male rape on man.

5. Violence Against Person (Prohibition) Act (VAPPA) 2015

With the introduction of the Violence Against Person (Prohibition) Act^[48] 2015, the traditional definitions and elements of rape has been expanded, that is, given broad meanings. In discussing the crime of rape under the VAPPA, particular reference will be made to section 1. From the provisions of section 1 of VAPPA, the following issues are adumbrated. The frontiers of what constitute rape has been expanded. Going by the definition of rape in the CC, PC and SPC, only a man can be a defendant to a charge of rape. In law, a woman cannot be said to be capable of committing rape. Apart from that, only the males are equipped to penetrate virtue of section 6 of the CC. By virtue of paragraph (a) of subsection (1) of section 1 which is stated thus: “(a) he or she intentionally penetrates the vagina, anus or mouth of another person with any part of his or her body or anything else”. According to Unini^[49], under VAPPA, intercourse occurs not just when the penis penetrates the vagina, but even when another person’s anus or mouth is penetrated with some other part of his or her body or “anything else”. It is submitted that anything else could be anything apart from penetration or slight penetration of the vagina. It could be the penetration of the anus of another. This is atypical of male rape on male where in most instances there is penetration through the anus. Therefore, the provisions of VAPPA above takes cognizance of male rape on male in Nigeria. This is laudable as the CC and SPC do not have such provisions. Though, paragraph (a) of subsection (1) of section 1 was drafted with a cue from the United Kingdom Criminal Justice and Public Order Act of 1994, which defines rape to include penis penetration of the anus. The inclusion of the penetration of the “mouth by any part of his or her body or anything else” in VAPPA is laudable in broadening the definition of rape.

However, as laudable as the provisions of the VAPPA are, it has limitation being an Act of the National Assembly, the Act is only applicable in the Federal Capital Territory of Abuja. Suffice to also state that the definition of rape by VAPPA accords with that of other jurisdictions.

Conclusion

It is remarkable that male rape on male is not recognized under Nigeria law. Nigeria should therefore provide an enabling-provisions through amendment by the legislature. It is axiomatic to include enabling statutory provisions on

male rape on male in the CC, PC and SPC. Therefore, the redefinition of rape to cover male rape on male as contained^[50] in VAPPA which is apt and commendable should be included in the CC, PC and SPC so that commission of the offence becomes culpable in the southern and northern parts of Nigeria. This takes cognizance in dealing with male rape on male in Nigeria. This will accord with the tenets of justice in bringing to book perpetrators who commit this crime.

References

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2. (2005) 1 NCC 578.
3. Prosecutor v Akayesu (Jean-Paul), Trial judgment, Case No ICTR-96-4-T, ICL 90 (ICTR 1998), 2nd September 1998.
4. Ibid.
5. The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković IT-96-23 & IT-96-23/1-A 2002.
6. Ibid.
7. See section 283 of the Penal Code. See Republic v. Nwachukwu (1964) 2 ALL NLR 104, Saraki v. R (1964) NMLR 28. The State v. Ojo (1980)2 NCR 391. See O Olopade 'The Law of Rape in Nigeria- A Revisit' in Ogungbe M.O.(ed) Nigerian Law: Contemporary Issues College of Law. Igbinedion University 2003 at 227.
8. It is contained in Cap C38 Laws of the Federation 2004. It shall hereinafter be referred to as "CC". It is applicable to the southern part of Nigeria.
9. It is contained in Cap P58 Laws of the Federation 2004. It shall hereinafter be referred to as "PC". It is applicable to the northern part of Nigeria. Under the Penal code, it is rape to have sexual intercourse with a girl under fourteen years of age or of unsound mind with or without her consent.
10. Statutes such as the Sharia Penal code and the Penal code.
11. O Onwumere 'Rape of Men, Under Reported Sexual Abuse' <<https://www.thisdaylive.com/index.php/2016/08/19/rape-of-men-under-reported-sexual-abuse/>> accessed 5 August 2020.
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14. Ibid.
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16. Ibid.
17. Ibid.
18. Liebling H, Sleg H, Ruratotoye B. 'Women and Girls Bearing Children Through Rape in Goma, Eastern Congo: Stigma, Health and Justice Responses' (2012) Online Journal of African Studies, IV at 1-44.
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20. Cited in Omoera, (15).
21. Ibid.
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34. V Roos, WG Katz 'The Lived Experiences of Male onMale Rape: A Review Article'. Health SA Gesondheid,2003:8(4):66.
35. Ibid.
36. Ibid 65.
37. Cap C3 Laws of the Federation 2004. It shall hereinafter be referred to as "CFRN" 1999.
38. C.O Okonkwo and Naish Criminal Law in Nigeria (2nd ed Spectrum Books, Ibadan, 2009), 272.
39. See n.9 above.
40. In most Nigerian cultures, a wife is seen as the legitimate property of her husband, like all other inanimate properties, the husband is invested with powers to deal with her as he deems fit. Under Islamic religion, which is one of the major religions in Nigeria, a woman cannot refuse to have sex with her husband except on grounds of ill health. See KS Chukkol The Law of Crime in Nigeria (A.B.U Press, Zaria, 1988) 193.
41. This is because the exemption provided under the Penal code does not cover persons whose wives have not attained puberty. It may therefore be safe to state that marital exemption exist in full under the Criminal code.
42. See Iko v. State (2001) F.W.L.R. (Pt 68) 1161 - 1196, Okoyomon v The State (1973) 1All NLR 16., Isaac Sambo v The State (1993) 6 NWLR (Pt 300) 399 and a host of others. It is important to state that to succeed in the crime of rape, the prosecution must not only prove that the accused had sexual intercourse with the prosecutrix but that it was done without her consent. The incident must also be reported to the police as soon as possible. Absence of consent is an essential ingredient that the prosecution must prove for a conviction in rape to stand.
43. Section 282 (1) of the PC provides thus: a man is said to commit rape who, save in the case referred in (2) has sexual intercourse with a female in any of the following circumstances:- (a) against her will; (b) without her consent; (c) with her consent when her consent has

been obtained by putting her in fear of death or of hurt; (d) with her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she believes herself to be lawfully married; (e) with or without her consent if she is under fourteen years of age or of unsound mind (2) Sexual intercourse by a man with his own wife is not rape if she has attained puberty. The subject of consideration is the provision of section 282(2) which is an exception to the provisions of subsection (1) (a)-(e) of same section. The implication is that any person who is within the provision of subsection (2) of section 282 will not be criminally liable for any act committed in contravention of the provision of subsection (1) (a)-(e) of same section. It follows therefore that the provision of subsection (2) has created marital exemption for the crime of rape under the PC.

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45. Zamfara State Sharia Penal Code Law, 2000, which was introduced by Gazette No.10, Vol.3 of 5th June 2000. It shall be referred to as "SPC".
46. Section 128 SPC.
47. Section 128(2)S.P.C
48. It shall simply be referred to as "VAPPA".
49. C Unini 'A Critical Appraisal of the Violence Against Person (Prohibition) Act 2015 <<https://thenigerialawyer.com/rape-and-the-provisions-of-section-1-and-26-of-the-violence-against-person-prohibition-act-2015/>> accessed 2 October 2020.
50. Section 1 provides thus: (1) A person commit the offence of rape if –(a) He or she intentionally penetrates the vagina, anus or mouth of another person with any part of his or her body or anything else;(b) The other person does not consent to the penetration; or(c) The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.