

Criminal Law through the Gender Lens: A Comparison of Rape Laws in England and Nigeria

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Abstract

Criminal law focuses on the principle of harm to protect other members of the society. However, it is systematically constructed often precluding the expressive nature of women. The legal process translates everyday experiences into legal relevance basing judgment on the structured account. Gender, that is, the social construct role is visible in criminal law. This paper analyses criminal law, typify by the offence of rape through the gender lens. Rape objectifies the body and omits emotional complexities of women. Consequently, it leaves indelible marks on the victims. The paper considers rape laws in England and Nigeria, both countries sharing common law similarities. In England, there have been series of laws reforms to address the gendered effect, albeit new issues are springing up. The Nigerian criminal laws have remained unchanged for over 50 years, exacerbating the trauma of rape victims. This paper proposes law reforms; change of assumptions in legal reasoning and adjustment in cultural rape myths.

Introduction

Criminal law centres on the principle of harm and public wrong as distinct from morally wrong behaviour. It is concerned with preventing harm to others and prohibiting wrong which concerns the public.¹ As suggested by the Mills Harm Principle, “the only

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purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others".² In essence, the main reason for criminalisation is to protect social stability or trust.

As far as criminal law is concerned, the experience of the victim is inconsequential. It acknowledges mechanistic as opposed to evaluative emotions. Baker distinguishes the two; she labels the former as simplistic and one-dimensional emotion such as anger, frustration or fear. However, the law is inept in appreciating the latter which is complicated with multifaceted and competing emotional situations such as fear and desire, love and hate. She concludes, women emotional responses fall into the latter group and criminal law failure to recognise this category lead to gender bias in the law.³ Inadvertently, emotional complexities and emotional harm in rape is not couched in criminal law.

Gender, as a social construct role is visible in the criminal law. According to Irigaray and Guynn, it does not see the woman as an autonomous, different subject or consider the particularities of a feminine world in terms of language, body, work, nature and culture.⁴ Due to this gap, offences are male-defined without accommodating the specialties of women. Relatedly, the legal process translates everyday experiences into legal relevance. It excludes a great deal which might be relevant to the parties and makes judgment on the structured account. Hence, it disqualifies

¹ Ashworth, A. & Horder, J; *Principles of Criminal Law* (England: Oxford University Press, 2013) at 28.

² *Ibid.* This was expanded by Feinberg to include other factors for criminalisation such as gravity of harm, its degree of probability and the social value of the otherwise dangerous conduct.

³ Baker, K. K; "Gender and Emotion in Criminal Law", (2005) 28 *Harv.J.L& Gender* at 447-448.

⁴ Irigaray, L and Guynn, N; "The Question of the Other", 87 *Yale French Studies*, Another Look, Another Woman Retranslation of French Feminism (1995) at 9,13. Her language reflects a relationship with the other; her body (puberty, virginity, birth, menopause); work (relationship in workplace, social recognition of work) culture (marriage, divorce).

alternative account of social realities of women.⁵ In addition, Raitt and Zeedyk discuss an entire mythology that has taken roots and continues to influence the attitudes of criminal justice personnel; the notion that rape is a woman's fault is still extraordinarily prevalent.⁶

However, rape is a serious and too frequent crime and there is need to curb it. Jones reverberates on the agonizing consequence of rape thus; it harms the victim and her family as well as injures the societies who lose the full participation of such women due to fear. It serves as an excruciating reminder of how a culture that does not obstruct aggressive exercise of power can foster callous oppression at the cost of female autonomy.⁷ In England, rape laws have been reformed, yet gender impact is still visible in the offence and legal process, making little of the reforms and prodding future amendments. In Nigeria, the laws have not even been changed for the past fifty years, making the gender effect of rape even more pronounced and magnified.

This paper seeks to investigate criminal law and criminal justice system, especially in the offence of rape using the gender lens. Drawing a comparative analysis from the laws of England and Wales and Nigeria, it examines the impact of gender on the laws of both jurisdictions. In England and Wales, Sexual Offences Act 2003 codifies the offence of rape. Though consent is pivotal to establishing the offence, the meaning is still very unclear. Hence, the courts are faced with the herculean task of determining capacity to consent in different scenarios. Similarly in Nigeria, the law of rape hinges on establishing penetration with corroborative evidence as well as proof of lack of consent with show of physical injury. The paper argues that despite law reform in the Sexual

⁵ Smart, C; *Feminism and the Power of Law*. (London: Routledge, 1989) at 4-25.

⁶ Raitt, F. E. and Zeedyk M.S., "Rape Law : Harboring an Implicit Relation between Law and Psychology" in C. McGlynn (ed.); *Legal Feminisms: Theory and Practice* (England: Ashgate, 1998) at 91.

⁷ Jones, O. D; "Sex Culture and the Biology of Rape: Towards Explanation and Prevention" (1999) 87 (4) *California Law Review* at 829-830.

Offences Act, gender is visible in the legal definition and process. There is need for further clarification in certain areas of the law. For both the Nigerian codes, law reform is urgently needed to assuage the situation of rape victims. The paper concludes that change in societal perception of a woman and cultural rape myths are some of the factors that will stem further injustice.

A Brief Historical Background of English Law and Nigerian Codes

Essentially, the Nigerian criminal law could be traced to English common law. Due to British colonisation of Nigeria, the Criminal Code was originally enacted for the Protectorate of Northern Nigeria in 1904 by the Colonial Governor of the Northern Nigeria, Lord Lugard.⁸ After the unification of both Northern and Southern Protectorates in 1914, the Criminal Code applied throughout Nigeria.⁹ However, by 1959, the Criminal Code did not apply in Northern Nigeria. First, throughout the colonial era, the courts in the Northern region of Nigeria lacked professionally trained personnel in criminal law. Secondly, the British judges were uncertain how to deal with the Emirs in regard to various offences and punishment under Islamic (Maliki) Law. Consequently, a panel of jurists was set up to introduce a code that would take into cognisance Muslim interests and values. The jurists modelled the Penal Code after the Sudanese penal Code (an Islamic State).¹⁰ It fused English jurisprudence and Islamic thought.¹¹

Presently, Nigeria operates a tripartite system of criminal law and justice: the Criminal Code (based on the English Common

⁸ Arikpo, O; *The Development of Modern Nigeria* (Baltimore: Penguin Books Inc, 1967) at 202. This was modelled after the code that was introduced into the State of Queensland, Australia in 1899 by Britain.

⁹ *Ibid*, at 203.

¹⁰ Ebbe O.N.I; *Nigeria World Factbook of Criminal Justice Systems* <<https://www.ncjrs.gov/pdffiles1/Digitization/16965>> accessed 28 July 2014. Okonkwo, C. O; *Okonkwo and Naish on Criminal law in Nigeria*. (London: Sweet and Maxwell, 1980) at 9-10.

¹¹ Ofori-Amankwah, E. H; *Criminal law in the Northern States of Nigeria* (Zaria: Gaskiya Corporation Limited, 1986) at

Law and legal practice) for Southern Nigeria; the Penal Code (based on Maliki Law and Muslim system of justice) for Northern Nigeria and Customary Law (based on customs and traditions of the people).¹² The Criminal Code shared similarities with the British common law. Also, English cases are undoubtedly important sources for interpreting the provisions of the two codes. Whilst Britain had made changes to her laws, especially the rape law, the codes have remained unchanged 50 years after independence, needing dire reforms.¹³

The Northern part of Nigeria is operating the Penal Code. But in 1999, Zamfara State (one of the states) adopted a Sharia Penal Code which was followed by 11 other states in Northern Nigeria.¹⁴ Though Oba narrated the ways women can have improved access to justice in Islamic criminal justice, this writer submits that the Sharia Penal Codes is significantly different from the two codes. There are separate stipulations for men and women for the same offences, often leading to injustices against women.¹⁵ The colonial symbiosis of the Nigerian Criminal Code with English laws makes the country a first point of reference in legal reforms. A perusal of the Court of Appeal and the Supreme Court decisions on criminal law, either under the Criminal Code or the Penal Code indicates an unabashed referral to English cases for guidance. Hence, there are legal cultural similarities between the two countries that can influence law reforms in Nigeria.

¹²Ebbe, note 10.

¹³Nigeria got her independence from Britain in 1960.

¹⁴The states are Niger; Bauchi; Borno; Gombe; Jigawa; Kaduna; Kano; Katsina; Kebbi; Sokoto and Yobe.

¹⁵ Oba, A. A; "Improving Women's Access to Justice and Quality of Administration of Islamic Criminal Justice in Northern Nigeria" in *Sharia Implementation in Nigeria Issues and Challenges on Women's Rights and Access to Justice* (Women's Aid Collective (WACOL) Enugu/Port Harcourt/Abuja and Women's Advocates Research and Documentation Centre (WARDC) Lagos, 2003) at 44-71 .

Rape

Historically, rape was perceived as a threat to both male and female interests as it devalued wives and daughters and jeopardised patrilineal system of inheritance. Overtime, due to stringent constraints on male sexuality and risk of criminal charges based on female fabrications, the offence was surrounded with substantive exceptions and procedural safeguards that leave considerable latitude for aggression. For instance, under early English law, the offence was graded; rape of a virgin could result into death sentence whilst rape of nuns, wives, widows received lesser penalties.¹⁶

Rape in Africa, including Nigeria revealed pernicious continuities between colonial and post-colonial regimes. Mama submits, in the advent of colonialism, rape was used as an instrument of defeat and pacification of a country as women were brutalised and degraded. It humiliated women in gender specific ways.¹⁷ In the present Nigeria, the socio-cultural milieus where victims have imbibed the culture of silence coupled with weak legal structures have created an environment where rape is committed with impunity.¹⁸

Obviously, in both jurisdictions, the offence of rape has been used to entrench male subordination of women. Scholars have always linked rape with patriarchal gender stratification system. Russell suggests unequal positions in society and male monopoly

¹⁶ Rhode, D. L; *Justice and Gender Sex Discrimination and the Law* (USA: Harvard University Press, 1989) In many ancient societies such as Babylonia and Assyria, the severity of the offence depended on the social and sexual status of the victim. Rape of a virgin was worse than rape of married women. At times, the victim was required to marry her assailant and her father was entitled to rape the aggressor's wife or sister. In the Anglo-American, rape law was built on class, race and gender biases.

¹⁷ Mama, A; "Sheroes and Villains: Conceptualising Colonial and Contemporary Violence against Women in Africa" in M.J. Alexander & C.T. Mohanty (eds.); *Feminist Ideologies, Colonial legacies, Democratic Futures* (Routledge, 1997) at 51-61.

¹⁸ Nigeria Rape-the Silent Weapon Amnesty International, 2006. http://www.univie.ac.at/bimtor/dateien/nigeria_ai_2006_rape_the_silent_weapon.pdf accessed 1 August 2014

on power as causes of rape. She warns that rape may also be a way some men express their hostility towards women.¹⁹ Ajdukovich, equally concludes based on an analysis of four countries that patriarchal domination of the criminal justice system result in the treatment of rape, not only as a crime but an instrument of social control. Curiously, it is the victim who is treated as subject of sanction rather than the offender.²⁰ The offence of rape is abusive, fear-inducing and humiliating. It leads to significant social, legal and medical problems fostering untold hardship on the hapless victims.²¹

Rape Laws through the Gender Lens

Feminist theories on rape begin largely in the 1970s. They argued that rape was not specifically about sex but power relations and politics.²² The most influential response to rape at that time is that of Brownmiller. She posits that rape is not about a natural or biological need but rather founded in political motivation to dominate. Deeply rooted in social power, rape is “nothing more and nothing less than a conscious process of intimidation by which all men keep all women in a state of fear.”²³ By raping a woman, the rapist degrades and denies her being as well as autonomy and elevates his own. Hence, the act of rape becomes an echo and imposition of social structure by which the full personhood of women is not recognised.²⁴

¹⁹ Whaley, R. B; “The Paradoxical Relationship between Gender Inequality and Rape: Toward a Redefined Theory” (2001) 15 (4) *Gender and Society* at 531-532.

²⁰ Ajdukovich, L. A; “The Patriarchal Treatment of Rape across Cultures” (1980) 55 *Phil. L.J* at 51-52. The four countries are USA, Chile, Iran and Philippines.

²¹ Belknap, J; *The Invisible Woman, Gender, Crime and Justice*. (USA: Cengage Learning, 2015) at 323-374.

²² Mehrhof, B. & Kearon, P; “Rape: An Act of Terror” in A.Koedt, E. Levine & A. Rapone (eds.), *Radical Feminism* (New York: Quadrangle, 1973) at 228-233.

²³ Brownmiller, S; *Against Our Will: Men, Women and Rape* (New York: Bantam, 1976) at 15.

²⁴ *Ibid*, 16-30.

Some other feminists have unsuccessfully canvassed for a desexualised account of rape by asserting that rape is just another form of violence. Sommer, in support of her gender free conception of rape summarises,

to view rape as a crime of gender bias is perversely to miss its true nature. Rape is perpetrated by criminals, which is to say, it is perpetuated by people who are wont to gratify themselves in criminal ways and who care very little about the suffering they inflict on others...Rape is just one variety of crime against a person and rape of women is just one sub variety...²⁵

Her submission has been rightly jettisoned, in Henderson's view; her exposition denies the social imposition of gender division. In so doing, she underestimates the significance of the depth of gender and the various ways sex and gender are co-constituted.²⁶ Recent feminist scholars have reintroduced the notion that "rape is sex". Plaza submits that sex cannot be dissociated from rape precisely because social sexing not only precedes rape but actually reinforces it. To her, social sexing is the primary system through which women are differentiated and subordinate to men, it is a violent process of heteronormative socialization.²⁷ Similar to Plaza, MacKinnon argues that sex and rape are related, the latter is not less sexual because it is violent. She places the phenomenon of rape squarely within the confines of normal (but imposed) heterosexuality marked by a dominance/submission model of desire where women come to be defined by inequality. Worryingly, she says sexual use and abuse of women does not register as harm because "it is seen as only natural where sex is

²⁵ Sommer, C.H; *Who Stole Feminism?: How Women Have Betrayed Women* (New York: Touchstone, 1994) at 227-321.

²⁶ Henderson, H; "Feminism, Foucault and Rape: A Theory of the Politics of Rape Prevention" (2007) 22 *Berkeley J. Gender L. & Justice* at 244.

²⁷ Plaza, M; "Our Damages and their Compensation" (1981) 1 *Feminist Issues* at 31. Rape is sexual essentially because it rests on the very sexual differences between the sexes...it is social sexing which is latent in rape. If men rape women, it is because they are women in the social sense.

what women are for.”²⁸ Consequently, Henderson reiterates, systemic gender inequality not only hides women’s responses to rape but also shapes them.²⁹

What does criminal law think about abuses of sexuality? Lacey rightly contends that the law continues to be oblivious to changes in the value of sexual experience and the wrong or abuse in certain forms of sexual behaviour. Contemporary values in sexuality such as self-expression, connection, intimacy and relationship are absent in the law. In addition, affective experience such as violation of trust, infliction of shame and humiliation, objectification and exploitation are equally non-existent or invincible behind the veil of rational and abstract legal subjectivity.³⁰

Lacey further argues that the idea of harm communicated in the definition of rape is a mentalist incorporeal one. A person sexuality is appropriated without consent. The lack of consent is mapped on the bodily experience, but criminal law blocks the articulation of inextricable integration of mental and corporeal experience. Criminal law does not indicate any expression of the corporeal dimension of violation of choice. She canvasses; sexual autonomy is simply proprietary autonomy, the choice to exclude another from access to bodily property. Citing section 1 of the Sexual Offences Act 1956, she notes that the centre of the legal wrong is lack of the victim’s consent. Since sexual intercourse is the conduct element of rape, the offence protects an interest, that is, the woman has a controlling access to an object which she stands in the position of ownership, her body.³¹

Furthering the argument on sexual autonomy, Tadros justly asserts that definition of criminal offences ought to appropriately

²⁸MacKinnon, C; *Towards a Feminist Theory of the State*. (USA: Harvard University Press, 1989) at 171-183.

²⁹ Henderson, note 26 at 246

³⁰ Lacey, N; “Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law” (1998) 11 *Can J.L. and Jurisprudence* at 54-62.

³¹ *Ibid.*

describe the conduct of the defendants who are convicted under them. The offence of rape ought to be clearly defined to show it concerns the defendant who achieves intercourse with the complainant without respecting her sexual autonomy.³²

As it is, Lacey laments, rape victims giving evidence in court are silenced, caught between the inept discourses of the body as property framed by the legal doctrine. Feminine identity as body prejudices their experience by equating it with stereotyped and denigrating views of female sexuality. Such victims do not even approach the court with the status of a person capable of retelling their stories and sharing their traumatic experiences.³³

To Reyes, underlying rape laws are the assumptions that rape is difficult to distinguish from desired sexual intimacy and female victim's allegation must be carefully scrutinized because women have been considered to be inherently suspect as witnesses.³⁴

In a similar vein, Reece observes that rape myth researchers find consistency in the manner cultural myths and stereotypes on rape are embraced not only by the general public but at all levels of the justice system. She continues, worse still, it is not easy to dispel stereotypes or social attitudes. It involves persuading people that they believe the most perverse rape myths. The distinction that those attitudes that are disapproved are rape-supportive and those views that are not shared are rape myths closes public discussion on this important and at times controversial issue (p. 473).³⁵ Hence, Temkin asserts, rape myths continue to influence the

³² Tadros, V; "Rape without Consent" (2006) 26 (3) *Oxford Journal of Legal Studies* at 524.

³³ Lacey, note 30.

³⁴ Reyes, I. B; "The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy" (2001-2003) 12 *UCLA Women's L.J.* at 364.

³⁵ Reece, H; "Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?" (2013) 33 (3) *Oxford Journal of Legal Studies* at 445-473. Real rape myth means violent rape by a stranger, women cry rape myth- when the woman is reporting before the police she must be crying; coffee myth-when she invites a man home she must have wanted to have sex with him.

judgment and decisions made by prosecutors, juries and judges.³⁶ This inevitably creates the justice gap with rape victims at the bottom of the ladder. Arguably, in England and Nigeria, the legal construction of the offence of rape as well as the underlying legal reasoning attests to this.

Rape in England

In England and Wales, section 1 (1) of the Sexual Offences Act defines rape as an intentional penetration by one person A, of the vagina, anus or mouth of another B, where B does not consent and A does not reasonably believe that B consents. Consent has long been a pivotal concept around the law of rape in this jurisdiction.³⁷ However, until the Act, consent remained broadly undefined.³⁸ Section 74 of the Act is intended to make statutory provision on the concept clearer. It defines consent as “a person consents if he agrees by choice and has the freedom and capacity to make that choice.” However, Elliot and De Than query “agreed by choice” in the definition. To them, the real determinant is whether a person has the freedom and capacity to agree because once a person agrees to something, you have consented, and the issue of choice does not matter again. They point out that in many rape scenarios; the concept of choice is non-existent. If the juries are to be examining constraints on choice, this may open up the possibility of judging the victim rather than the offender.³⁹ Tadros asks if the jury is to determine whether the complainant agreed by choice first and determine whether she had the relevant capacity and freedom. Or is he or she to address the question of capacity and freedom first, and if either capacity or freedom is lacking concludes that she

³⁶ Temkin, J; “And Always Keep A-Hold of Nurse, for Fear of Finding Something Worse: Challenging Rape Myths in the Courtroom” (2010) 13 (4) *New Criminal L Rev.* at 714.

³⁷ *R v Camplin* (1845) 1 Cox 220.

³⁸ The court distinguished only distinguished consent from mere submission in *R v Olugboja* (1981) 3 All ER 1382.

³⁹ Elliot, C. and De Than, C; “The Case for a Rational Construction of Consent in Criminal Law” (2007) 70 *Mod.L.Rev.* at 225-249.

did not agree by choice. He rightly concludes that consent is still ambivalent.⁴⁰

He further contends that questions concerning the capacity of the complainant at the moment of intercourse and the extent to which her freedom was constrained are central to understanding when penetrative sex constitutes rape at a theoretical level. But the Act leaves those questions open for determination by courts, and ultimately the jury.⁴¹ The explanatory notes to the Act released by the Office of the Public Sector Information (2003) simply state that “a person might not have sufficient capacity because of his age or because of mental disorder”.⁴²

The lack of adequate meaning of capacity has shown in the area of voluntary intoxication.⁴³ The courts are indefinite on situations that will constitute rape in this regard. The fact in *R v Bree*⁴⁴ was that both appellant and complainant had consumed large amount of alcohol, sexual activity occurred and the appellant was charged with rape. The Court of Appeal considered the effect of voluntary intoxication in the law of rape. According to the court, the proper interpretation of section 74 is

if through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting... if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed substantial quantities of alcohol, but nevertheless remains capable

⁴⁰ Tadros, V; “Rape without Consent” (2006) 26 (3) *Oxford Journal of Legal Studies* at 521-522.

⁴¹ *Ibid.*

⁴² *Explanatory Notes to the Sexual Offences Act 2003* (London: Office of Public Sector Information, 2003) at 139.

⁴³ *R v Dougal* (Swansea Crown Court Unreported 2005) was a case of voluntary intoxication which did not lead to unconsciousness. The trial judge did not leave the issue of capacity to the jury, rather he directed a not guilty verdict to be entered.

⁴⁴ (2007) 2 All ER 676.

of choosing whether or not to have intercourse..., this will not be rape.⁴⁵

Elvin points out a major fault with the decision as it did not clearly stipulate when a person lacks capacity in the instances of intoxication.⁴⁶ In this context, Sir Igor Judge P stated, “capacity to consent may evaporate well before a complainant becomes unconscious.” He further elaborated that this would be deduced from the fact of each case by the jury.⁴⁷ With due respect, the judge’s submission makes capacity in this instance to be very elusive as there are no set standards. Rightly so, Rumney and Fenton criticise *Bree*, as indicating that capacity to consent when voluntarily intoxicated is an issue for the jury to decide, with the aid of some unknown judicial direction. At least, the Court should have indicated some factors that judges will consider in directing the jury.⁴⁸ The rationale of this case maybe lending credence to the initial fear of the Government that the current law may not provide sufficient protection to vulnerable individuals who lack genuine capacity to consent and may even be weaker than under the prior common law.⁴⁹

*R v H*⁵⁰ was another case for the court to determine the capacity of the complainant to consent when voluntarily intoxicated. The judge found evidence of drunkenness but decided it would be unsafe to leave the issue of capacity to the jury. However, the Court of Appeal held that it was the jury that should determine consent, with proper guidance from the trial judge and

⁴⁵ *Ibid*, 684.

⁴⁶ Elvin, J; “The Concept of Consent under the Sexual Offences Act 2003” (2008) 72 *J. Crim. L.* at 524.

⁴⁷ *R v Bree*, note 44 at 684.

⁴⁸ Rumney, P. and Fenton, R; “Intoxicated Consent in Rape: Bree and Juror Decision-making” (2008) 71 (2) *MLR* at 288.

⁴⁹ *Convicting Rapists and Protecting Victims- Justice for Victims of Rape A Consultation Paper* (London: Office for Criminal Justice Reform, 2006). *Meyers* (1872) 12 Cox CCC 311, common law held that an unconscious or asleep complainant was incapable of consenting.

⁵⁰(2007) ECWA Crim 2056.

ordered a retrial. Arguably, presently, there are no clear cut pathways for the courts in cases of voluntary intoxication which may lead to unfairness to the rape victims. Elvin submits that a dilemma in this area of law is drawing the line between capacity and incapacity in cases of intoxication.⁵¹

As early as 2013, the Court of Appeal in *R v B*⁵² was faced with the task of determining the relevance of mental disorder to the reasonableness of a defendant's belief. The court left the issue open-ended and concluded that mental disorder can actually affect reasonableness, depending on the fact of each case. B was convicted of rape and there was evidence that B was suffering from paranoid schizophrenia or schizo-affective disorder at the time of the offence. The Court dismissed the appeal and held that psychiatric evidence established that B's mental illness did not affect his ability to understand whether his partner was consenting. This is a welcome decision; otherwise sexual pillagers can hide under the guise of mental illness to continue to rape women. Nevertheless, the court went on to state that there might be instances in which defendants impaired ability to read social signs or behavioural cues could be relevant to the reasonableness of the belief.⁵³ Wortley rightly rationalises that rape victims by defendants with mental disorder might still not have respite because from the court's statement, each case will be decided on its own. Evolving from this is that until a particular diagnosis or symptom had been considered by the Court of Appeal, it remains opaque if its characteristic will be taken into account in assessing the reasonableness of any belief in consent.⁵⁴ This writer submits, that the piecemeal approach in mental disorder cases will subject rape victims to agony and torture.

Section 75 of the Act stipulates evidential presumptions about consent. Once the prosecution proves that the defendant did the

⁵¹ Note 46 at 527.

⁵² (2013) ECWA Crim 3

⁵³ *Ibid* at 41.

⁵⁴ Wortley, N; "Reasonable Belief in Consent under the Sexual Offences Act 2003" (2013) 77 *J. Crim. L.* at 188.

relevant act in “circumstances” of “using violence”, complainant was “unlawfully detained”, “asleep or otherwise unconscious”, “physical disability”, “a substance was administered to stupefy or overpower”, the complainant is presumed not to have consented. It is left for the defence to adduce sufficient evidence to show consent or reasonable belief in consent.⁵⁵ In the context of this section, the defendant will give supporting explanation for non-application of the presumption. According to Temkin and Ashworth, the matter comes up to judges’ interpretation of the section. There is also the concern of the action that will constitute violence, substance that can stupefy or overpower.⁵⁶ The Judicial Studies Board is yet to issue clear guideline on this section. Again, rape victims wanting to come under the ambit of this section may yet meet a brick wall as this is subject to courts inclinations and discretion and may be unfavourable.

Section 76 of the Act creates two conclusive presumptions on consent but the interpretation of these circumstances by the courts is not clear-cut. The first, section 76 (2) (a) apply if the prosecution proves that the defendant did the relevant act in ‘circumstances’ of “deception as to the nature or purpose of the act”, and second section 76 (2) (b) “inducement by impersonating a person known to the complainant.”⁵⁷ But in *R v B*⁵⁸, the Court of Appeal prodded conclusive presumptions in circumstances where the defendant did not disclose his HIV status. The Counsel objected on the premise that the section did not cover implied deception or deception in the context of transmissible diseases. The court supported the contention and held that section 76 (2) (a) did not apply to deception about the defendants HIV status.⁵⁹ Elvin argues that this decision is controversial because in principle by not disclosing his status, he deceived the complainant on the extent of risk

⁵⁵ Section 75 Sexual Offences Act 2003.

⁵⁶ Temkin, J. and Ashworth, A; “The Sexual Offences Act 2003: Rape, Sexual Assault and the Problems of Consent” (2004) *Crim. LR* at 343-344.

⁵⁷ Section 76.

⁵⁸ (2007) 1WLR 1567.

⁵⁹ *Ibid* at 1570

involved.⁶⁰ Similarly, Herring advises that in order for a decision to carry the weight we expect of autonomy, we need to ensure that the decision-maker is aware of the key facts involved in making the decision.⁶¹ In this writer's view, it is the height of deception as this is not only a transmissible but a terminal disease.

Again, the Court in *R v Jheeta*⁶² analysed the ambit of conclusive presumption in section 76 (2) (a) of the 2003 Act. According to the court, the section will apply in instances that the defendant deliberately deceived a complainant about the nature of intercourse. The court maintained that the lies of the defendant's however deceptive or persuasive did not foreclose the nature of the act. J had deceived the complainant and had pressurised her into having sexual intercourse more frequently than she would have done. However, she was not deceived as to the nature or purpose of intercourse. Emanating from this decision, Fitzpatrick wonders about the type of pressure and as well as the magnitude to be exerted on the complainant to vitiate consent.⁶³ The Courts appear to favour a restrictive interpretation of section 76. In view of this, Herring suggests an approach of considering the wider understanding of the act as well as the jury determining the parties understanding of that particular act of sexual intercourse.⁶⁴

Latham LJ agrees that this area is problematic as the Law Commission actually acknowledged that there was a case for treating deception to a person's HIV status or freedom from other sexually transmissible disease as being of such fundamental importance as to nullify consent.⁶⁵ However, in the final Report, the Law Commission felt that these are delicate matters requiring expertise in public health and social policy rather than law, hence

⁶⁰ Note 46 at 533.

⁶¹ Herring, J; "Mistaken Sex" (2005) *Crim. LR* at 516.

⁶² (2007) 2 Cr.App. R 34.

⁶³ Note 61 at 517-519.

⁶⁴ *Ibid.*

⁶⁵ Law Commission Consultation Paper No 139, 1995.

refused to make specific statement.⁶⁶ This aspect of the law remains unsettled.

Rape in Nigeria

Converse to the position in England and Wales, Nigeria Criminal Laws on the offence of rape is divergent. Both the Criminal and Penal Codes which were relics of colonial rule are still applicable.⁶⁷ Section 357 of the Criminal Code (Southern Nigeria) provides that,

any person who has unlawful carnal knowledge of a woman or girl without 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 fraudulent representation as to the nature of the act or in the case of a married woman by impersonating her husband is guilty of an offence which is called rape.⁶⁸

Similarly, section 282 of the Penal Code (Northern Nigeria) states, a man is said to commit rape if he 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 that he is another man to whom she believes herself to be lawfully married (e) with or without her consent when she is under fourteen years of age or of unsound mind.⁶⁹

⁶⁶ Home Office Sex Offences Review, 2000.

⁶⁷ The Criminal Code in 1965 and the Penal Code in 1960.

⁶⁸ Cap C38, Laws of the Federation (LFN) 2004.

⁶⁹ Cap P3 (LFN) 2004. In Section 127 (1), Harmonized Sharia Penal Code Law 2005 Zamfara State, rape is defined thus: 'A man is said to commit rape if he has sexual intercourse with a woman in any of the following circumstances:

The legal definition of rape in the Criminal Code is “any person who has unlawful carnal knowledge of a woman or girl...”⁷⁰ The code further provides that “carnal knowledge” is complete upon penetration.⁷¹ In a similar vein, for the Penal Code “a man is said to commit rape when he has sexual intercourse with a woman in any of the following circumstances...” The note of explanation of this section stipulates that mere penetration is sufficient to constitute the sexual intercourse necessary to the offence.⁷² In the writer's view the Nigerian laws still codify rape as being heterosexual. Put in another way, it is only a man that can rape a woman. Relatedly, the act of penetration can only be with the penis. The position in England is preferable, the offence of rape is committed if there is penetration of the “vagina, anus or mouth of another person with his penis.”⁷³ This is *in tandem* with the social realities where several rape victims alleged penetration of other parts of their bodies.

The Nigerian Supreme Court had established that the paramount consideration in the offence of rape is penetration and lack of consent due to the provisions in the codes.⁷⁴ On the first leg, the Criminal Code stipulates, unlawful carnal knowledge without the woman's consent, whereby carnal knowledge is complete upon penetration. By the Penal Code, there is sexual intercourse without the woman's consent and mere penetration is sufficient as sexual intercourse.

Consequently, Nigerian courts have been faced with the issue of determining penetration in rape cases. Interestingly,

(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 that he is another man to whom she is or believes to be lawfully married (e) with or without her consent when she is under fifteen years of age or of unsound mind.’

⁷⁰ Section 357 Criminal Code, CapC38, (LFN) 2004.

⁷¹ Section 6, *ibid*.

⁷² Section 282 Penal Code, Cap P3 (LFN) 2004.

⁷³ Section 1 Sexual Offences Act, 2003.

⁷⁴ *Iko v State* (2001) 14 NWLR (pt. 732) 221, *Ogunbayo v State* (2007) 8 NWLR (pt 1035) 157.

corroboration is still a potent factor in arriving at several decisions of the courts. This legal requirement represented the court's adoption of the British legal scholar Sir Mathew Hale's oft-quoted view that allegation of rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."⁷⁵ Hence, in *Edet Iko v State*⁷⁶ the Supreme Court defined "corroboration in law as independent testimony which affects the accused by connecting or tending to connect him with the crime."⁷⁷ It subsequently held that the fact that the prosecutrix said the accused inserted his penis into her vagina is not *ipso facto* sufficient proof of penetration in the absence of corroborative medical evidence to support the evidence of penetration apart from what the prosecutrix said.⁷⁸ Similarly, in *Jegede v State*,⁷⁹ despite the fact that medical evidence revealed the vagina was very tender with some brownish discharge and a group of bacteria yeast cells, the court held that medical examination did not link the appellants directly with the condition of the prosecutrix's private part as he was not medically examined to confirm he had a similar disease. Hence, he was discharged and acquitted. The case of *Na'an Upahar & or v The State*⁸⁰ is even more pathetic. The court analysed the medical evidence as showing the hymen was lax meaning loose, not tense or rigid but disregarded it as not specifically stating the cause of laceration of the hymen. It went further to consider the testimony of an eye-witness that he met the accused on top of the appellant. Ironically, the court concluded that the evidence has only a limited probative value because it showed accused was on top of the appellant but did not corroborate the actual act of penetration. This led to accused being convicted of attempted rape and sentenced to just three years imprisonment. It is our contention that since

⁷⁵ Reyes, note 34 at 360.

⁷⁶ (2001) 14 NWLR (pt. 733) 221.

⁷⁷ *Ibid* at 241.

⁷⁸ *Simon Okoyomon v The State* (1972) 1 SC 21.

⁷⁹ (2001) 14 NWLR (pt.733) 264.

⁸⁰ (2003) 6 NWLR (pt. 816) 230.

penetration of the victim must always be supported by an extraneous fact such as an independent testimony, medical evidence as shown in the above cases, it is nearly impossible to secure conviction for rape cases.

Okonkwo rightly canvasses that corroboration in rape cases is discriminatory against women. He strongly believes that the rule should not exist at all in the tradition and culture-bound, non-permissive society of Nigeria.⁸¹ Explaining further, Ezeilo says fear of stigma, prejudice to the chances of marriage, attendant humiliation and embarrassment of court appearances are some of the factors that may not make a victim report the incident of rape in the first instance. Hence, the requirement of corroboration is punishing to a victim who has been able to brave the odds to prosecute.⁸² Law reform must follow England as the rule has been abolished.⁸³

As stated earlier, the Nigerian Courts considered lack of consent in establishing the offence of rape. The *mens rea* is that the accused has the intention to have sexual intercourse with the victim without her consent or must be recklessly indifferent as to whether she is consenting or not.⁸⁴ Put in another way, a man commits rape if he has sexual intercourse with a woman that is not consenting. Nigerian scholars hold diverse views on the proof of lack of consent. On one hand is the view that where the accused is found to honestly believe the victim was consenting, he cannot be convicted of rape because he gave thought to the issue of consent of the woman and assumed he had her consent, hence did not commit forcible rape. On the other hand is the application for an objective test that will examine if a reasonable man in the position of the accused in relation to the victim would have believed the

⁸¹ Okonkwo, O.O; “Reform of Nigerian Rape Laws” (Abuja: Women’s Aid Collective WACOL, 2002) at 6.

⁸² Ezeilo, J. N; *Women, Law and Human Rights Global and National Perspectives* (Enugu: ACENA Publishers, 2011) at.

⁸³ Abrogation of Section 31 (1) of the Criminal Justice Act and Public Order 1994.

⁸⁴ *DPP v Morgan* (1975) 1 All ER 8.

victim consented to the intercourse.⁸⁵ As we shall be discussing later in the paper, prove of consent in rape cases rest entirely with the prosecutors. The issue of subjective or objective test does not even arise.

Similar to the position in England and Wales, consent is central in the proof of rape. However, unlike the position whereby arguably consent is defined, the act of consent is unclear in Nigeria. Notably, in the Criminal Code, consent is vitiated if it is obtained by “force”; “threats or intimidation”; “fear of harm”; “false and fraudulent representation as to the nature of the act” or “impersonation of husband.”⁸⁶ The Penal Code provides that consent is absent in instances of “fear of death or hurt” or “husband's impersonation.”⁸⁷

The Nigerian courts use physical injuries on the complainant in determining her consent. The court concluded in *Posu v State*⁸⁸ "that the bruises in the inner thighs showed lack of consent and that the appellants forced their way into the prosecutrix." This trend was also recently followed by the Court of Appeal in *Corporal Nicholas Okoh v Nigerian Army*.⁸⁹ According to Okoro JCA

I hold that the court below was right when it accepted that the torn cloth was part of evidence of struggle...the Medical Doctor said he examined and found bruises on the upper part of the body of the appellant which the prosecutrix said she gave him a bite during the struggle...this is clear evidence that there was struggle between the appellant and the PW1 before she was overpowered and raped...I agree that the prosecutrix did not give her consent...⁹⁰.

⁸⁵ Owoade, M. A; “A Note on Rape” (1990) 1 *Ogun State University Law Journal* at 27, Yusuff, A.O.A; “Consent and the Nigeria Law of Rape” (2004) 1 (2) *Ife Juris Review* at 346.

⁸⁶ Section 357.

⁸⁷ Section 282.

⁸⁸ (2011) 2 NWLR (pt 1234) 393- 407.

⁸⁹ (2013) 1 NWLR (pt 1334) 16.

⁹⁰ *Ibid* at 34-35.

This writer agrees with the view of Yusuff that it is absolutely wrong when a woman insists that she did not consent to an intercourse to seek evidence of her non consent on her body. If she is not bruised or battered, she is disbelieved as the signs on her body should irrevocably confirm her speech.⁹¹ The present position of determining lack of consent rests heavily on the prosecution. In fact, he has to discharge this burden by proving lack of consent of the victim beyond reasonable doubt or the prosecution fails. Ogunniran and Onyejekwe conclude that this onerous method of proving lack of consent based on overt signs on the victims' bodies has made rape to be a man's offence and a female trial in Nigeria.⁹²

As Baker argues above, emotional complexities and harm are outside the ambit of criminal law. Consequently, rape laws in interpreting the existence of consent ignore the emotional complexities in women. She queries the reason the law is structured in such a way that there is no incentive on the pursuer to ask questions and get confirmation in a situation that is very ambiguous. She rightly asserts that present rape placed the burden of ambiguity on the silent party. It equally results in emotional harm such as fear, withdrawal and personal devaluation without affirmative consent.⁹³

In Nigeria, as indicated above, there have been efforts by some states to Islamise their legal codes to bring it into conformity with sharia laws. Azam points out the ongoing debates in Islamic juristic discourse whether rape is under the category of fornication *zina*. Some have argued that conflation of rape and *zina* grew from a misunderstanding of religious tradition by modern sharia legislation. Others further argued that rape has not traditionally been defined in Islamic law as a variant of *zina* but as a type of

⁹¹ Yusuff, note 85 at 351.

⁹² Ogunniran, I; "Male Offences, Female Trials: Rape and the Quest for Gender Justice in Africa" (2012) 18 (1) *The Nigerian Journal Of Contemporary Law* at 9-38.

Onyejekwe, C. J; "Nigeria: the Dominance of Rape" (2008) 10 (1) *Journal of International Women's Studies* at 46-63.

⁹³ Baker, note 3 at 450-454.

body injury (*jarh*).⁹⁴ Flowing from this is the unsettled nature of defining rape as a variant of *zina* (fornication). For instance, section 126 of the Zamfara Shariah Penal Code defines *zina* as “a woman or man having sexual intercourse with a person that he or she has no sexual rights.”⁹⁵ Oba accentuates the issue of proof. The offence can be established by three means: evidence, confession and pregnancy. Through evidence (by four impeachable male witnesses); confession (however confession of one party does not bind the other) and pregnancy which can account for countless exceptions.⁹⁶ Consequently, where a woman wants to establish the offence of *zina*, she must proof either of the three conditions or else she faces the risk of receiving one hundred lashes (if unmarried) or stoning to death (if married). Where such a woman is unable to establish the offence of *zina*, she will equally be punished for false allegation of rape. Bariya Ibrahim Magazu faced this hurdle. She was sentenced to 180 strokes of the cane by a lower Sharia Court in Zamfara State. 100 strokes for having sexual relations outside marriage and 80 strokes for allegedly falsely accusing three men of raping her since she could not produce the required number of witnesses.⁹⁷

In both jurisdictions, there have been judicial pronouncements reflecting a continuing attachment to rape cultural myths. According to Raitt and Zeedyk, for example, in 1993 Judge Smedley, in a case tried at the Old Bailey declared that “experience has shown that people who allege sexual offences whether women...or girls for some reason or no reason at all tell false stories.” Similarly it was reported in 1995 that judge David Griffiths in a case in Winchester Crown Court said to the defendant “had you made an apology and sent her a bunch of

⁹⁴ Azam, H; “Rape as a Variant of Fornication (Zina) in Islamic Law: An Examination of the Early Legal Reports” (2012-2013) 28 *J.L. & Religion* at 441-466.

⁹⁵ Shariah Penal Code Law No 10 of 2000, Zamfara State of Nigeria.

⁹⁶ Oba, note 15 at 53-55.

⁹⁷ Amnesty International 2006.

flowers, all this would have been forgiven.”⁹⁸ Relatively in the Nigerian case of *State v Hassan Audu*,⁹⁹ a thirty-nine year old man raped a nine year old girl. He was convicted and sentenced to three years imprisonment but the trial judge suspended the sentence. According to the court

on evidence, I am more inclined to believe that the sexual intercourse came from the deep love which the accused has for Inno (complainant) and which love is unmistakably reciprocated by her. For in spite of the damage caused her by the accused through the intercourse, she did not mince words in declaring in open court that she was prepared to marry him if she would be allowed to do so.

The court asked the girl-child that was abused to marry a person old enough to be her father. This clearly shows an attitude that romanticises the crime of rape and belittles a woman’s experience, in this instance a girl-child. Painfully, though on further appeal, the Supreme Court affirmed the judgment, the court shared the view of setting the accused free if he married the complainant.

As earlier said, the attrition rate in rape is very high in both countries. According to a retired High Court judge in Nigeria, throughout his career as a judge, he presided over just two rape cases, imposing maximum sentence in one.¹⁰⁰ Relatedly, the case of *Poopola v state*¹⁰¹ was one of the few cases where the offence was prosecuted from the High Court to the Supreme Court and the accused was convicted. It is a highly welcome trend, but the sentence of five years imprisonment neutralized any effect of satisfaction with the judgment. The Supreme Court judges lamented about this injustice. Despite this, the court upheld the sentencing by the lower court. It followed the rule that the court would not normally tamper with the decision of a lower court

⁹⁸ Note 6 at 92.

⁹⁹ (1972) 6 SC 28.

¹⁰⁰ Amnesty International 2006.

¹⁰¹ (2013) 17 NWLR (pt 1382) 100.

unless there was an error of law or substantial miscarriage of justice. With due respect, this was a case of injustice as the accused intentionally raped the innocent girl and bolted away. The court should have increased the sentence to ten years to deter potential offenders.

Conclusion

In both jurisdictions, it is evident that gender dynamics is displayed in the construction of the offences and application of the legal processes. In England, several sections of the offence are couched in very unclear terms, leaving the courts to figure out the meanings. The courts are adopting case by case analysis with untold consequences on the victims. As discussed in the cases above, the victims were faced with this legal hurdle which made conviction almost impossible. In view of this, parliament needs to set guidelines on capacity to consent as well as actions that will constitute violence; substance that stupefy or overpower and deception as to the nature of the act. Tadros (2006) recommends law reforms to differentiate the offence into different substantive parts to be applied to different problems; evidential presumptions to be refined and included as substantive aspects of the law and concept of consent not to be considered as central to the offence. According to him, such a law should have the potential to recognize violence in rape when it sees it, focus on the conduct of the defendant rather than complainant, direct decision makers in particular cases and have a scope that is broad enough to accommodate cases which involve non-violent coercion and vice-versa.¹⁰²

Comparatively, the situation is even more precarious in Nigeria. The laws are obsolete with an entrenched gender bias. The cases examined above are quite revealing, due to tedious nature of proof, many of the female victims lost the cases or the accused persons were given inconsequential sentences. The women in the Sharia states face a grim fate due to the present juxtaposing of the

¹⁰² Tadross, note 32 at 543.

offences of rape and *zina*. The application of the present law is like the biblical camel passing through the eyes of the needle. Hence, in Nigeria, total law reform is sacrosanct. There is need to expand the scope of penetrative act; abolish the use of corroboration; establishing *mens rea* by physical injuries and demarcate the scope of rape and *zina*. Since English Laws have always guided Nigerian judicial decisions, the country can seek direction from the Sexual Offences Act.

Legal reasoning ought to consider the feminine model and accommodate their expressive and relational nature. In construing the law, it should include women's experiences. Feminist scholars, academicians and researchers must continue to propagate this phenomenon. Change in societal perception is inevitable. As Starkly rightly put it, "even when law reforms have put strong laws in place prohibiting sexual offences, they cannot successfully compete with a citizenry that condones sexual violence."¹⁰³ Reece substantiates thus, dispelling rape cultural myths entails engaging in public discussion. Drawing a distinction that those attitudes that are disapproved are rape-supportive and those views that are not shared are rape myths.¹⁰⁴ The above safeguards can stem the present injustice in the rape laws.

¹⁰³ Koss, M; "Restoring Rape Survivors: Justice, Advocacy and a Call to Action" 2006 *Annual New York Academy of Science* at 206, 221.

¹⁰⁴ Reece, note 35 at 473.