

The
REFORM
OF
SEXUAL
OFFENCES IN NIGERIAN
CRIMINAL LAW

By

ISABELLA OKAGBUE



Nigerian Institute of Advanced Legal Studies

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ISABELLA OKACHIE

Senior Research Fellow,

Nigerian Institute of Advanced Legal Studies

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INTRODUCTION

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By

... of the Nigerian Institute of Advanced Legal Studies

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... protection... the only purpose for which power can be
... rightfully exercised over any member of a civilized
... community against his will is to prevent harm to
... others. His own good never justifies compelling him to
... sufficient warrant. He cannot rightly be compelled to
... his or her neighbor because it will make him happy.

1. This is the author's name as it appears in the Nigerian Institute of Advanced Legal Studies.
2. Senior Research Fellow, Nigerian Institute of Advanced Legal Studies.
3. Law of the Federation of Nigeria and Lagos (LFN, Cap. 18).
4. Law of Western Nigeria, (LWN, Cap. 18).

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(CRIMINAL LAW)

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First Published 1991,
Reprinted 2007,
By
Nigerian Institute of Advanced Legal Studies,
P.M.B. 12820,
University of Lagos Campus,
Lagos, Nigeria.

ISBN 978-2353-25-6

Printed by NIALS Press, Abuja.

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INTRODUCTION*

Both the Criminal Code of Southern Nigeria¹ and the Penal Code of Northern Nigeria² contain a bewildering multiplicity of different provisions on offences which contain a sexual element. These provisions cover such conduct as rape, indecent assault, incest, defilement, abduction, indecent treatment, sodomy, bestiality and homosexuality to mention but a few. Not all of these offences are contained in both Codes and even those which do appear in both are sometimes defined differently and are subject to differing punishments. In this paper we shall be examining, on the one hand, how the different provisions may be streamlined into one uniform code applicable to the entire country. On the other hand, we shall also be examining whether the offences should be retained in their present form or whether in fact some of them should be retained at all. In approaching this task it is first necessary to explain the principles on which this paper is based.

One of the primary functions of the law consists of the delicate balancing of competing interests in society. In the area of criminal law, one of the major problems is the reconciliation of the individual's right to liberty and the society's right to protection from conduct which is harmful and injurious. John Stuart Mill the noted 19th century liberal philosopher has stated that:

.... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their members is self protection.... the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others. His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will make him happier,

* This is the revised version of an article first published in *Unification and Reform of the Criminal Laws and Procedure Codes of Nigeria*, Prince Bola Ajibola ed. (Lagos: Federal Ministry of Justice, 1990) being the proceedings of a Conference of the same name.

1. Laws of the Federation of Nigeria and Lagos 1958, Cap. 42.
2. Laws of Northern Nigeria 1963, Cap. 89.

because, in the opinion of others, to do so would be wise or even right.³

It is recognized that this statement is somewhat of an oversimplification of the function of the law nevertheless it serves as a good starting point in an exercise of this nature.

While some sexual conduct do in fact cause injury to others, a significant proportion of private sexual behaviour is considered punishable under Nigerian criminal law simply because it offends against the cultural and moral values of the society. A shared moral standard is indeed part of the unifying fabric of any society but this does not mean that society will fall apart if every aspect of its moral code is not enforced by the criminal law.⁴ Indeed, in a culturally and religiously diverse society such as Nigeria, it would be impossible to accommodate all the divergent views on morality within the criminal law.⁵ Any argument in favour of an attempt to do so must be answered by a question and the question is this; is there really any wisdom in burdening our already overstretched law enforcement agencies with the additional task of enforcing purely religious or moral standards? It is the central thesis of this paper that the area of private morals is best left to religious, social and educational influences; and that the State regulation of private morals can only be justified when there is some utilitarian justification for intervention beyond the protection of the moral code. In this respect, it is submitted that only the public, corruptive or violent manifestations of sexual behaviour should continue to attract punishment under the criminal law.⁶

I shall briefly reiterate and summarise my position thus:

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3. John Stuart Mill, on Liberty, p. 22.
 4. H.L.A. Hart: "Immorality and Treason" in *The Philosophy of Law* ed. R.M. Dworkin (Oxford University Press 1977) pp.82-88.
 5. See A.G. Karibi-Whyte: *Groundwork of Nigerian Criminal Law*, (Nigerian Law Publications Ltd. 1986) pp. 30-35.
 6. The *locus classicus* of this view is the *Report of the Wolfenden Committee on Homosexual Offences and Prostitution* 1957, Cmd 247 para 13. For similar views see, Schwartz: "Morals offences and the Model Penal Code," (1963) 63 Col. L.R. 667; *Report of the Royal Committee on Human Relationships*, (Australian Government Printer, 1977) para. 24, Pt. I, Vol. 1, 25.

1. The primary function of the law is to proscribe harmful activity and not to dictate standards of personal sexual behaviour.
2. Private truly consensual sexual activity between adults should not be subject to criminal prosecution.
3. With regard to sexual activity the law may however interfere to protect;
 - (a) the personal integrity of individuals against unwanted sexual violation,
 - (b) the young and other special groups who cannot fully appreciate the nature of sexual activity and may thus be exploited or corrupted, and
 - (c) the society against acts which offend publicly against community standards of morality.
4. The definition of sexual offences should be rationally consistent with the above mentioned principles and should be drafted in language which is easily understood.
5. As much as possible sexual offences should be drafted in gender neutral terms since the male as well as the female body is worthy of equal protection against unwanted sexual violation.
6. Every possible variation of sexual behaviour need not be enumerated. Legislation should be drafted in a generalized style so as to avoid multiplicity of offences.

Working with these six basic principles we shall now embark on an examination of the different sexual offences in the Criminal and Penal Codes.

RAPE

The Crime of rape in Nigerian criminal law is defined as the unlawful non-consensual carnal knowledge of a woman by a man⁷ and is punishable by life imprisonment.⁸ The offence is a classic example of a gender oriented crime in that it can only be committed by a male upon a female. The reason for this gender orientation can be traced historically back to the times when the law was primarily interested in protecting the male's property in the female body and his right to determine the circumstances of female procreation.⁹ Thus, the offence of rape originally required the emission of semen. Today, penetration no matter how slight is sufficient to constitute the offence¹⁰ and neither ejaculation nor the rupture of the hymen¹¹ is necessary, yet the archaic qualifications upon the sex of the offender remain intact. This narrow definition of the offence of rape means that only vaginal penetration by the penis suffices to constitute the offence. Thus, the act of sodomy performed upon a woman without her consent or the insertion of objects in her genital or anal cavities cannot be defined as rape, nor can sexual attacks by a man against another man or by a woman against another woman. At the moment, such activities may be punished under separate provisions relating to indecent assaults¹² and assaults with intent to commit unnatural offences¹³ which attract punishments ranging between 2 and 14 years imprisonment respectively.¹⁴ The introduction of foreign objects in the vagina or

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7. See sec. 357 of the Criminal Code and sec. 282 of the Penal Code. In the latter provision the somewhat quaint term "carnal knowledge" is avoided in favour of the more modern expression "sexual intercourse."
 8. Sec. 358 of the Criminal Code and sec. 283 of the Penal Code.
 9. See F.V. McNiff: "Reform of Sexual Offences in Victoria; The Time to Abandon the Victorian Perspective", (1980) 4 Crim. L.J. 328 at 332; see also C. Mitra. "...For She has no right or power to refuse her consent". (1919) Crim. L.R. 560.
 10. Aguda: *The Criminal Law and Procedure of the Southern States of Nigeria*, 3rd ed. para. 1772.
 11. *Se R v. Marsden* (1891) 2 Q.B. 149 and *R v. M'Rue* 8 C & p. 64 respectively.
 12. Secs. 360 and 353 of the Criminal Code and sec. 285 of the Penal Code.
 13. Secs. 214 and 352 of the Criminal Code and sec. 284 of the Penal Code.
 14. The punishments under the two codes in this respect differ quite widely. Thus under the Criminal Code an indecent assault is punishable with 2 or 3 years imprisonment depending on the sex of the victim (secs. 353 and 360) whereas under the Penal Code an act of gross indecency is punishable with 14 years imprisonment (sec. 284).

rectum may however cause far greater pain and damage than the act of rape itself. So also, acts of forced oral intercourse may cause just as much shame and degradation as a rape. It has been argued that it amounts to a tacit trivialisation of such conduct to continue to categorise it as indecent assault.¹⁵ It is submitted that there is no justifiable reason for the distinction between penetration *per vaginam*, penetration *per anum* and penetration *per os*. Neither is there any validity in the distinction between penal penetration and penetration by an inanimate object. Furthermore, the object of the law should be to protect any individual against unwanted sexual violation and the definition of rape must be adjusted in sex-neutral terms in order to meet this requirement.

The *mens rea* of rape is the intention to have sexual intercourse with a woman without her consent. While it is clear that there must effectively exist in the perpetrator an intent to have sexual intercourse, it is not entirely clear what his state of mind should be regarding the question of consent. Must the accused actually know that a woman is not consenting, or is recklessness or negligence as to this fact also sufficient. In England, the Sexual Offences (Amendment) Act 1976 section 1(1) provides that a man commits rape if he either knew that the woman did not consent to the intercourse or if he was reckless as to whether she consented.¹⁶ This means that a defendant is not guilty of rape if he is merely negligent in ascertaining whether or not the woman consented. Or to put it another way, if the defendant honestly believes that the woman consented to the intercourse it does not matter that the belief was unreasonable.¹⁷

The argument has been put forward that this is also the position under Nigerian law,¹⁸ despite the requirement under section 25 of the Criminal Code that mistakes of fact must be both honest and reasonable. Briefly, the contention is that where an offence requires *mens rea* in the form of intention or recklessness, an honest mistake as to relevant circumstances negative *mens rea*. To go further to hold that

15. J. Temkin: "Towards a Modern Law of Rape," (1982) 45 M.L.R. 399 at 412-413.

16. This statutory provision confirms the controversial decision in *Director of Public Prosecutions v. Morgan* (1976) A.C. 182.

17. Of course if the mistake is not based on reasonable grounds it is unlikely to be believed.

18. See Okonkwo and Naish: *Criminal Law in Nigeria*, 2nd ed p. 274.

the mistake should also be reasonable, is tantamount to substituting negligence as the basis of liability for that crime. It is only where a general affirmative defence of mistake of fact is raised that section 25 comes into operation.¹⁹ Cogent as this argument may be in respect of other crimes, it is submitted that it should not be applicable in the case of rape. While in very many cases the unreasonableness of a belief may lead to the conclusion that it was not honestly held, there are conceivable circumstances in which resting liability for rape on intention and recklessness alone would produce injustice. These could include cases where an accused argues that he honestly did not believe the woman's refusal because in his view women never really know their own minds. Or an accused might similarly argue that he honestly disbelieved the victim's refusal because she was dressed provocatively or was of loose morals and that in his view all such women are usually amenable to sex, whatever protests they make to the contrary. Such beliefs though unreasonable may be honestly held and would thus afford a defence. Arguments of this nature ought never to constitute a valid answer to a case of rape. "The guiding principle of the law of rape should be the protection of sexual choice."²⁰ It is true that a requirement that a mistake must be reasonable might be inappropriate in certain areas of the criminal law,²¹ but it is perfectly proper when applied to rape. A man can ascertain with very little effort whether or not a woman is consenting by virtue of the very close proximity which is required for the performance of the act. Since there is no social utility in the act to justify his running even the slightest risk that she may not be consenting, the defendant must act at his peril if he unreasonably chooses to disbelieve her refusal. An unreasonable mistake in the context of rape is "an easily avoided and self-serving mistake produced by the actor's indifference to the separate existence of another."²²

19. For further this see Colin Howard: *Australian Criminal Law*, 2nd ed. pp. 374-375.

20. J. Temkin: "The Limits of Reckless Rape" (1983) *Crim L.R.* 5 at 7.

21. The rule that a mistaken belief in the necessity for self-defence must be reasonable, for example, sometimes works injustice by requiring the defendant to act with calm and rational deliberation in a situation fraught with fear. See Glanville Williams: *Textbook of Criminal Law*, 2nd ed. pp. 137-138.

22. T. Pickard: "Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime" (1980) 3 *U. Toronto L. J.* 75 at 83.

Two categories of persons are exempted from the operation of the provisions on rape under the Criminal Code. The first of these categories embraces boys below the age of 12 years.²³ The justification for this exemption rests on the assumption that before the age of puberty a young boy is physically incapable of having sexual intercourse. The presumption is one of law and cannot be controverted by showing evidence to the contrary. It should be noted that this rule does not exist under the Penal Code. In this writer's opinion the rule is clearly absurd and capable of producing injustice. It is the ability to produce semen and not the ability to have an erection that heralds the onset of puberty. Since rape only requires penetration and not fertilization, it is difficult to understand why puberty is considered so crucial to the offence of rape.²⁴ In any case, in view of the fact that it is proposed that rape should be defined in terms beyond vaginal penetration, there is no reason why anybody of any age (within the rules of infant responsibility) should be excluded from the operation of the provisions on rape.

The second category of exempt persons embraces the husbands of the victims concerned. Section 6 of the Criminal Code defines unlawful carnal knowledge as carnal connation which takes place otherwise than between husband and wife. Since unlawful carnal knowledge is an element of the offence of rape, it follows²⁵ that sexual intercourse between a husband and wife cannot constitute rape. The justification for this exemption rests on the belief that when a woman enters into a marriage contract she thereby gives her consent to all future acts of intercourse which she cannot subsequently revoke.²⁶ If a husband uses force or violence to exercise his marital rights he may however be guilty of assault or wounding.²⁷ Under the English common law, this

23. See sec. 30 of the Criminal Code. In circumstances of rape however such a person may be convicted of indecent assault *R. v. Williams* (1893) 2 Q.B. 320.

24. On this point see also, Glanville Williams, *op. cit.* n. 21 at p. 237.

25. Section 282(2) of the Penal Code achieves the same result in slightly different terms. The Criminal Code approach in some sense implies that extra-marital intercourse is "unlawful" even when no particular law is being contravened. The approach of the Penal Code avoids making this moralistic judgment by simply providing that sexual intercourse between a husband and wife is not rape if she has attained to puberty.

26. Per Hawkins J. in *R. v. Clarence* (1889) 22 Q.B.D. 23 at 51.

27. *R. V. Miller* (1954) 2 Q. B. 282