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CONTENTS

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**Prohibition of Child Labour in Nigeria -
A wrong Impression of the State of the Law
(M.A. AjaNwachuku, Ph.D)**

**Investor's Protection Laws in Nigeria:
An Appraisal (Prof. R.A. Akande; C.V. Iteshi)**

**Community Policing in Nigeria: A Panacea
for the Chibok Sad Saga
(Kevin Omeke Ududu, Ph.D)**

**Regulatory Framework for the Protection of
Copyright in Nigeria: Challenges to Rights
Protection (Uguru Uchechukwu;
Odoh Ben Uruchi; Unigwe Nnaemeka)**

**The Law Relating to Copyright in Nigeria -
A Succinct Forensic Appraisal
(G.C.Nwagbo-Egwu)**

**Child Adoption in Nigeria- Beyond the Provisions
of the Statutes and Filling the Gaps Therein
(M.A. AjaNwachuku, Ph.D)**

**A Critical Review Of Reservations To Treaties in
International Law
(Felix Chukwu; Chinedu Akam Igwe)**

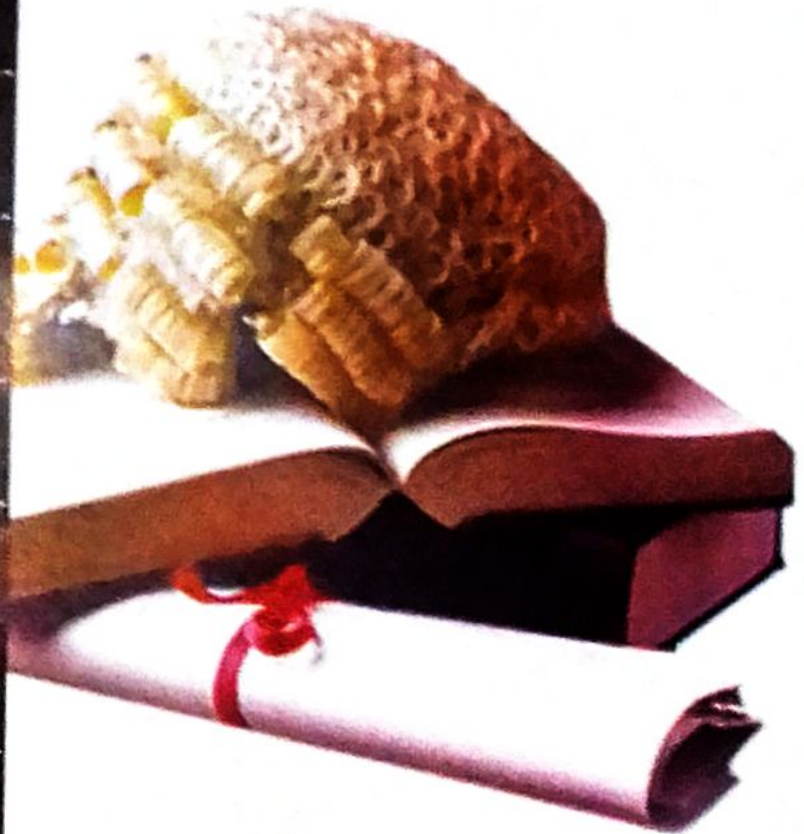
**The Constitutional Engineering of Human
Rights Protection and Development in
Anglophone Africa in the Contemporary
Globalised Regime (E.A Udu)**

**ADR and Restorative Justice: Panacea for Delay
in the Dispensation of Justice (Odoh Ben Uruchi;
Uguru Uchechukwu)**

**Rethinking the Law of Rape and other Sexual
Offences in Nigeria (F.O. Iloh)**

**The Law of Contract: A Functional Analysis
(J.O. Ogbonnaya; D.I. Njoku)**

**The Control Mechanism vis-a-vis the Models of
Corporate Governance: A Legal or
Ethical Approach (E.A. Udu)**



RETHINKING THE LAW OF RAPE AND OTHER SEXUAL OFFENCES IN NIGERIA*

Abstract

The offence of rape and other sexual offences, particularly sexual assault on children, have been on the rise in recent time. This paper is not interested in x-raying the offences mentioned above, for in the estimation of the writer that has been sufficiently undertaken by writers in various scholarly works. Rather, given the geometrical progression in these offences, and given also that convictions are scanty, partly due to the 'difficulties' in fulfilling the provisions of the laws, the paper centres on the need to review the law on sexual offences in Nigeria. The significance of this paper lies in the fact that law makers and policy formulators, in the face of this menace, must really do a rethink on how to combat the increasing war with regards to the crimes under discussion. The offences of rape, indecent assault on females and defilement will be discussed in this paper against proffered suggestions on how to rethink the law so as to secure conviction and thus stem the ugly tide.

Keywords: Rape, sexual offence, children, corroboration, reform

INTRODUCTION

In Nigeria sexual offences, particularly rape and indecent sexual assault of children have been on the rise¹. Given the rise in these crimes, expectedly we should have a consequential movement in convictions. However, that is not the case. This paper argues that there is need to overhaul the laws as far as these offences are concerned. Rape laws in Nigeria need to be amended to match contemporary realities. The government, it will be contended, needs to build rape crisis centres, where victims will receive quick medical attention.

The menace of child rapists is alarming as it is terrible on the psyche of the child victim. And to think of it, this crime, abominable as it is, is on the rise in the country. Some factors have contributed to the geometrical soaring of these crimes.

While the offenders are allowed to go scot-free, the victims are left with lifelong trauma, inability to fuge meaningful relations with the opposite sex, unwanted pregnancies and sexually transmitted diseases. And because of the unhelpful way the police attend to rape victims who are bold enough to report their ordeal, many cases do not even go to court or when they do, the trial last forever². Therefore, this

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¹ Nehru Odeh, "Sege of child Rapists", *The News*, May 6, 2013. vol. 40, No. 17, pp. 14-15.

² Editorial, 'Addressing rising epidemic of rape cases', *The Punch*, Tuesday, November 5th, 2013, p.24.

paper is an advocacy for the need to tighten the noose around the extant laws with regards to the crime under discussion.

EXTANT LAW

Rape

Rape is the most serious kind of sexual assault³ and is punishable with imprisonment for life with or without whipping⁴. The offence is defined in section 357 as follows:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.

Given the law above, section 30 of the Nigerian Criminal Code is germane here. And that is, a male person under the age of twelve years is presumed to be incapable of having carnal knowledge. It follows that he cannot be guilty of the offence of rape or attempted rape although on such a charge he may be convicted of indecent assault⁵. The presumption is one of the law and cannot be rebuffed by showing that the accused has reached the full state of puberty even though he is below the age of twelve years.

For carnal knowledge according to the law⁶, the slightest penetration of the vagina is sufficient. It is not necessary to prove that the hymen was ruptured or that there has been an emission of semen. Under the Criminal Code⁷, any penetration by some object does not amount to rape – as these acts do not amount to penetration within the meaning of 'penetration' as provided by the law in question. In some climes, e.g. England and United States of America such acts constitute rape. However, it should be pointed out that the law, on the issue of penetration, and ultimately what constitutes rape, has gone beyond the position obtained under the criminal code in some states in Nigeria, and under one or two statutes in Nigeria. This shall be discussed somewhere in this paper.

There must be absence of consent on the part of the complainant – victim. The prosecution must prove, in order to secure conviction, that the accused had carnal

³ Okonkwo and Nash, *Criminal Law in Nigeria* (London: Sweet and Maxwell, 1980), p. 271.

⁴ Section 357 of the Criminal Code.

⁵ Criminal Procedure Act Cap C41 Laws of the Federation of Nigeria, 2010 section 176.

⁶ Note 4, *op.cit.*, section 6.

⁷ Applicable in the Southern parts of Nigeria.

knowledge of a woman or girl, despite her age, without her consent. Consent obtained by force or by means of threats or intimidation or fear of harm is no consent. Consent given because of exhaustion after persistent struggle and resistance would appear to be no consent. Usually evidence of some struggle or resistance by the complainant may be the best proof of lack of consent but this is not always necessary⁸. In *Igboanugo v. State*⁹, the torn pant, bra and clothes of the prosecutrix were taken as evidence of non consent.

In rape cases trials, the courts have held severally that where there is a possibility that the prosecutrix consented, the case of the prosecution must fail. In *Iko v. State*¹⁰, for instance, the court held that the most essential ingredient is penetration and consent on the part of the victim is a complete defense to the offence. A clear distinction must be drawn between consent and submission. While consent is a willing state of the mind to proceed with the act in question, that is, act of sexual intercourse, submission may be due to threat, fear or intimidation. In *R.v Day*¹¹, the prisoner, a well-built man, offered to accompany a ten-year old girl on a lonely lane where he carnally knew her. This was held by the court to be submission and not consent. According to the court in that case "every consent involves a submission; but it by no means follows that a mere submission involves consent"¹². To have carnal knowledge of a sleeping woman is rape. It is also rape to have carnal knowledge of a woman by personating her husband. Submission by a person of weak intellect or a person who is too young to understand the nature of the act done is not consent.

THE OFFENCE OF RAPE IN LAGOS STATE.

The Criminal Law of Lagos State¹³ abolished the Criminal Code Law, under which the offence of rape is as discussed above. This law, though incorporated the common law position¹⁴, as it is under the Criminal Code Act, went further than that. This law created another sexual offence dubbed 'sexual assault by penetration'¹⁵. According to the law,

Any person who penetrates sexually the *anus*¹⁶, *vagina*¹⁷, *mouth* or *any other opening*¹⁸ in the *body*¹⁹ of another person²⁰ with a *part of his*²¹ body or *anything else*²², without the consent of the person is guilty of a felony and is liable to imprisonment for life.²³

⁸ Note 3, *op.cit.*, p.273.

⁹ (1992) 2 NWLR (pt. 228) p. 176.

¹⁰ (2001) 35 W.K.N.I.

¹¹ (1841) 9 C & P 722.

¹² *R. v. Day* (1841) 9 C& P 722 at 724.

¹³ Criminal Laws of Lagos State, 2015.

¹⁴ *Ibid.*, section 258.

¹⁵ *Ibid.*, section 259.

¹⁶ Italics for emphasis.

¹⁷ Italics for emphasis.

This section, giving its tenor, as far as penetration is concerned, went beyond the common law definition of penetration. Here, as it is under the Criminal Code Act, the vagina could be penetrated by the penis; but further, it could be penetrated by any part of the body, for instance fingers, or *anything else*²⁴. Importantly, in the Criminal Code Act, where only the vagina is capable of being penetrated, section 259²⁵ provides that '*anus, mouth or any other opening in the body of another person*²⁶ can be penetrated for the purpose of this offence. From the way the section²⁷ is couched, it is evident that it is gender – neutral, "Any person who penetrates sexually ..." ²⁸

In this law, with regards to rape or sexual assault by penetration, consent is given if the complainant agrees by choice and has the freedom and capacity to make and communicate that choice.²⁹

SEXUAL ABUSE OF KIDS

The offence of sexual assault, particularly rape is on the rise in Nigeria. In 2013, the Commissioner of Police, Lagos State, Nigeria stated that one hundred and thirty-two cases of rape were reported to the command in 2013³⁰. More pathetic, is the unpalatable fact that children are daily sexually assaulted and raped in Nigeria. Newspapers and magazines in the country are replete with the odious stories of child rapists who stride the length and breadth of the country like wolves looking for potential child victims to pounce upon. In 2014, an Ebute Metta Magistrate Court in Lagos, Nigeria ordered the remand of a 27 years old man, Adegoke Apata, for allegedly raping a secondary school girl. The girl was aged fourteen years.³¹ Sometime in 2013, in Ekiti State, Nigeria, a 34-year old man allegedly raped his neighbour's 13-year-old daughter to death³². Still in 2013, in Benin, Edo State, Nigeria, a consultant pathologist in the Central Hospital, sounded the alarm that the hospital recorded more than 80 rape cases from March to mid-October.³³

¹⁸ Italics for emphasis.

¹⁹ Italics for emphasis.

²⁰ Italics for emphasis.

²¹ Italics for emphasis.

²² Italics for emphasis.

²³ *Ibid.*, note 15.

²⁴ Italics for emphasis.

²⁵ *Ibid.*, note 13.

²⁶ Italics for emphasis.

²⁷ *Ibid.*, note 15.

²⁸ *Ibid.*

²⁹ *Ibid.*, note 13, section 264.

³⁰ Samson Forarin, "132 rape cases reported in 2013- Lagos CP", *The Punch*, Wednesday, February 12, 2014, p.6.

³¹ Comfort Oseghale, "Father told me about Husband at age 14", *The Punch*, Tuesday, February 11, 2014, p.5.

³² *Op.cit.*

³³ *Id.*

THE LAWS ON CHILD SEXUAL ASSAULT

The Criminal Code Act³⁴ criminalizes sexual assault on children³⁵. Section 218, for instance, provides:

Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without caning.

Any person who attempts to have unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without caning.

Thus, the section criminalizes unlawful carnal knowledge of girls under the age of thirteen. It is also an offence for a householder who permits defilement of young girls on his premises³⁶. If the girl is above thirteen and under sixteen years of age, he is guilty of a misdemeanor and is liable to imprisonment for two years, with or without caning³⁷.

It is unlawful for any person to have unlawful carnal knowledge of a girl being of or above thirteen years and under sixteen years of age³⁸; or knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her. In these circumstances, such a person is guilty of a misdemeanor, and is liable to imprisonment for two years, with or without caning³⁹.

It is a misdemeanor, and is liable to imprisonment for two years, with or without caning of any person who unlawfully and indecently deals⁴⁰ with a girl under the age of sixteen years⁴¹, if the girl is under the age of thirteen years, he is guilty of a felony and is liable to imprisonment for three years, with or without caning.

Any person who detains a woman or girl against her will or upon any premises in order to her being unlawfully carnally known by any man, whether a particular man or not; or detains a woman or girl against her will in a brothel; is guilty of a misdemeanor, and is liable to imprisonment for two years.⁴²

³⁴ Chapter C38, Laws of the Federation of Nigeria, 2010.

³⁵ See *ibid.*, sections 218, 219, 221, 222A, 222B, 223, 224, 225.

³⁶ *Ibid.*, section 219.

³⁷ *Ibid.*

³⁸ *Ibid.*, section 221(1).

³⁹ *Ibid.*, section 221(2).

⁴⁰ "deals with" includes doing any act which, if done without consent, would constitute an assault.

⁴¹ *Ibid.*, section 222.

⁴² *Ibid.*, section 226.

Any person who conspires with another to induce any woman or girl, by means of any false pretence or other fraudulent means, to permit any man to have unlawful carnal knowledge of her is guilty of a felony, and is liable to imprisonment for three years.⁴³

WHETHER THE LAWS ARE SUFFICIENT

This is a very critical part of this discourse. The question whether the extant laws, as it affects rape⁴⁴ and other sexual assaults, is sufficient is pertinent giving the geometrical rise in the commission of these offences. Somewhere in this write up, it was shown that rape and other sexual assaults continue to be on the rise – why so?

THE SEVERITY OF THE LAWS

What is the severity of the laws examined in this article? It is the opinion of this writer that severity of these laws is on the low side. To start with, child molestation or abuse is the physical, sexual or psychological abuse of a child, who according to the Child's Rights Act, is anyone below the age of eighteen.

For instance, under section 221⁴⁵, defilement of girls under sixteen and above thirteen, and idiots is classified as a misdemeanor. In criminal jurisprudence, 'misdemeanor' is the second class of crimes, after felony. A misdemeanor is any offence which is declared by law to be a misdemeanor, or punishable for not less than six months, but less than three years. Therefore, the pertinent question is: why would the law classify an offence as serious as defilement of female minors as not a felony and this attracting less severe punishment of two years? The implication of this, is that accused persons, upon conviction, get only a slap on their wrists as punishment. Consequently, prospective offenders are not deterred. It is here suggested that defilement of girls should be made to carry life imprisonment. This suggestion is in tandem with the position of the law in Lagos state, Nigeria where the same offence is declared to be a felony, and it attracts imprisonment for life.

In the words of the Law in Lagos State, "any person who has unlawful sexual intercourse with a child is guilty of a felony, and is liable to imprisonment for life".⁴⁶

Before this law, the position of defilement in Lagos state was as obtained under the Criminal Code Act, as discussed above. This position now belongs to the trash can of history as Lagos state has abolished the old law⁴⁷.

⁴³ *Ibid.*, section 227.

⁴⁴ Criminal Code Act.

⁴⁵ See section 3, Criminal Code Act, *Supra*

⁴⁶ Criminal Code Laws of Lagos State. That came into effect in 2011, section 137.

⁴⁷ *Ibid.*, section 417.

It is of note that all the offences against morality (including sexual assaults against girls) provided under the Criminal Code Law (*in pari materia* with the Criminal Code Act) are also provided under the extant law of Lagos and even more.⁴⁸ Moreover, worthy of note is that the punishment of most of these offences under the extant law, carry more punishment in terms of custodial sentences. Still on child sexual assault, the law broke new ground in Nigeria:

Any person having the custody, charge or care of a child who has attained the age of four years and allows that child to reside in or frequent a brothel, shall be liable to a fine of ninety thousand naira or imprisonment for six months or to both.⁴⁹
This is commendable.

THE NATURE OF EVIDENCE AND SEXUAL OFFENCES

It has been variously held by the courts that corroboration in rape cases is not an express requirement of the law. Therefore the Nigerian Supreme Court in *IGP v. Sunmonu*⁵⁰, observed that it is not save to convict on the uncorroborated evidence of the prosecutrix, but that the jury may, after paying attention to the warning, nevertheless convict if they are satisfied of the truth of her evidence.⁵¹

As a general rule, evidence given against a defendant does not need to be corroborated. The implication of this is that an accused person can be convicted upon the uncorroborated evidence of a single credible witness, provided the judge or jury is satisfied, beyond reasonable doubt of the guilt of the accused person.

Under the old Nigerian Evidence Act⁵², in order to secure conviction in some sexual offences, the testimony of a single witness must be corroborated.⁵³ Happily, the new Nigerian Evidence Act⁵⁴, abolished corroboration in sexual offences. However, despite this, it is arguable, given the poise of the court for a long time that the situation, practically, may not have changed. A learned writer evaluated the attitude of the court thus:

Traditionally, the evidence of victims of sexual offences generally has been regarded as peculiarly susceptible to fantasy or fabrication, perhaps motivated by frustration, spite or remorse. It is therefore the intention of the corroboration rules to reduce the danger arising from the fact that complaints of sexual offences are easy to make but difficult to refute. There is also a serious concern that too much

⁴⁸ *Ibid.*, sections 135 (1) (2), 137, 138, 139, 141.

⁴⁹ "Allowing a child to be in a brothel", *ibid.*, section 139.

⁵⁰ 1957 WRNLR 23.

⁵¹ *Ibid.*, p. 24, per Ademola, C.J.N. (as he then was).

⁵² The Evidence Act (Chapter E14) Laws of the Federation of Nigeria 2004.

⁵³ Section 179(5). These offences are in sections 218, 221, 223 or 224 of the Criminal Code. These offences have been discussed in this discourse.

⁵⁴ Evidence Act, 2011, commenced 3rd June, 2011.

sympathy for the complainant as a witness may prevent the jury or judge from evaluating the evidence dispassionately.⁵⁵

Thus, in rape cases, the courts have in most cases, if not always, required the testimony of a single credible witness to be corroborated. In *Iko v State*⁵⁶, the court stated in unmistakable terms that apart from the instances, as it were under the old Evidence Act, where the law required corroboration in sexual offences, the court had made it part of its practice to always demand that a victim of rape adduces evidence, independent of her to support her claim that further to stress that where the uncorroborated evidence of the prosecutrix was the sole evidence to be relied upon them, the judge must warn himself before going ahead to convict.⁵⁷

CORROBORATION: TO BE OR NOT TO BE?

In rape cases in England, the Criminal Justice and Public Order Act has finally abrogated the requirement as obtained under the common law of trial judges warning juries of the dangers of convicting on the uncorroborated evidence of accomplices and sexual complainants.⁵⁸ This reform brought about by the 1994 Act was reaffirmed in *R.v Makanjuola*⁵⁹ by the English Court of Appeal. The court in this case, gave guidelines on the circumstances in which a judge ought to warn or not warn the jury to proceed with caution in respect of the evidence of a particular witness and on the terms in which such instruction should be given. Giving the guidelines, it is now within the discretion of the presiding judge, to determine if a warning is indeed required. Where the judge, from the surrounding circumstances, is of the opinion that a warning is required, it is within his absolute preserve the kind of warning that should be given. In exercising his discretion to give warning, the judge should not go extra miles because the witness is testifying in sexual offence related case. A warning shall neither be required simply because the witness is a complainant of a sexual offence nor be necessary just because a witness is alleged to be an accomplice. The said guidelines went on to provide that there must be an evidential basis for suggesting that the evidence of the witness may be unreliable but mere suggestions by cross-examining counsel does not qualify as evidential basis and where warning is required, it will be for the judge to decide the strength and term of the warning, it does not have to be invested with the whole florid regime of the old corroboration rule.

⁵⁵ O.A. Olatunji, "Penetration, Corroboration and Non-Consent: Examining the Nigerian law of Rape and Addressing Its Shortcomings", *University of Ilorin Law Journal (UILJ)* 2012, vol. 8, p.11.

⁵⁶ (2001)35 W.K.N.I.

⁵⁷ At p.22 per Kalgo, J.S.C.

⁵⁸ Criminal Justice and Public Order Act, 1994, Section 32.

⁵⁹ (1995)5 All E.R. 730.

How possible is it to do justice in the absence of corroboration requirement in sexual offences cases? It is postulated that the essence of corroboration is based on the notion that the jury or the judge is likely to be swayed by emotional sympathy of the victim.

It is submitted here that the abrogation of the warning requirement will not occasion injustice on the part of the accused person rather in place of the requirement of warning or corroboration; the Nigerian legal system should adopt the English system wherein the judge has the discretion, among others, to determine where corroboration of the complainants testimony becomes imperative.

ASPECT OF RAPE LAWS AND REFORM

In practice, the court admits evidence of post sexual history of a victim. The implication of this is that, the past immoral conduct of the victim is used to determine whether or not to believe her testimony in the case under focus, worst still the victim is not cross-examined on her past sexual history. It is suggested that the admission of past sexual history of a victim must not be the rule. The admission of past sexual history of the victim has been abolished in England and Austria and its applicability should be on the condition that applying it will serve the purpose of justice. This could be for the presiding judge to decide.

In England there is the provision of anonymity for rape victims. In Nigeria, rape reporting is low and this is because victims are not provided anonymity. The Sexual Offence (Amendment) Act of 1976 in England provides victims of rape anonymity. If this is done in Nigeria more victims of rape will report to the police.

CONCLUSION

Rape in particular, and generally sexual offences are serious crimes. Nigeria laws on rape is based on what was English criminal laws. The Nigerian criminal code is an old legislation which came into effect in 1st June, 1916. This law must be reformed as done in other climes. Some aspect of our laws on rape that needed to be reformed have been canvassed in this discourse, but of course the aspect treated is not exhaustive.

The law is an instrument of social engineering and so, the law must up, its game as societal phenomena change. The issue of corroboration in rape and sexual offence cases is no longer in the Nigerian Evidence Act.⁶⁰ This is commendable. However, judges, it is suggested, should adopt the position in England.

⁽⁶⁰⁾ 2011 Act.

The irrebuffable presumption that a male person under the age of twelve years is incapable of having carnal knowledge has been impugned. The admission of past sexual history of a victim of rape cases and its propriety has been examined and suggestion made thereof, so is the need of the provision of anonymity for victims of sexual offences particularly rape. In all, we submit that, the recommendation herein, if implemented will enhance the quality of justice for the accused, the victims and the society.