

STATUTORY RAPE UNDER THE CHILD'S RIGHT ACT OF NIGERIA: ANALYSIS OF THE CRIMINAL RESPONSIBILITY OF A CHILD OFFENDER\*

**Abstract**

From time immemorial the act of rape has received absolute disapproval by all and sundry particularly due to the unpleasant effects on its victims. The gravity of this offence has led to a recent clamour for life imprisonment to be replaced with death penalty as punishment for the crime. This is however not out of place. The first rapist in the Bible, Amnon, who outraged his half-sister, Tamar, was killed by Absalom to avenge the loss of his sister's pride, chastity and dignity.<sup>1</sup> Rape has been categorized into different classes and degrees, sometimes, depending on the age of the victim, the number of offenders and circumstances of the act committed.<sup>2</sup> Both international and national laws exist that condemn the act of rape and also punish offenders. Recently, a class of rape described as statutory rape sprung up to give underaged persons special and more effective protection from sexual abuse. Most incidents and prosecution of rape of a minor involve adults who are usually believed to take undue advantage of the minor's innocence and immaturity in judgment. There are however, cases of sexual intercourse taking place on regular basis among children or minors. This paper understudied the criminal culpability of a minor engaged in sexual activity with another minor under the Child's Right Act<sup>3</sup>. It was discovered that no distinction in the class of offenders was made in the Act. In fact, the word 'any person' was used showing that even minors can be punished for violation of the affected section of the Act. It is therefore recommended that where the offender is a child, *mens rea*, should be considered. Where intercourse is consensual, both sexual partners should be made criminally liable. In non-consensual rape, the minor using force or exerting undue influence should be prosecuted. The age limit of criminal responsibility in the Criminal Code should be adopted and leniency ensured in imposing sanctions.

**Keywords:** Statutory Rape, Child's Rights Act, Criminal Responsibility, Child Offender

**1. Introduction**

Rape is the most serious kind of sexual assault and is punishable with imprisonment for life with or without whipping.<sup>4</sup> Victims of rape are made to suffer unquantifiable anguish, some become diagnosed with post-traumatic stress disorder, dissociation from reality, depersonalization, they endure physical violence, avoid social life, get infected with sexually transmitted infections, encounter serious difficulty in remembering events, relives moments of sexual assault and unwanted pregnancy amongst other ills.<sup>5</sup> The severity of the offence of rape cannot be over emphasized. In curbing the prevalence of this offence, the Indian parliament recently approved death penalty as punishment for the offence<sup>6</sup>. In ensuring adequate protection of the child from sexual abuse, Nigeria has among other laws, promulgated the Child's Right Act of 2003 (CRA), which outlawed sexual intercourse with a person less than 18 years old and called it rape. Before the emergence of CRA, carnal knowledge of a child was prohibited by the Criminal and Penal Codes<sup>7</sup> and prosecuted as rape<sup>8</sup>, defilement<sup>9</sup> or indecent assault as the case may be. Despite the existence of these Codes, sexual exploitation of children appears to be trending. Thus, demanding for more effective ways of deterring potential offenders from the crime. In view of this, the CRA elevated unlawful carnal knowledge of a child from an offence requiring a guilty mind to one of strict liability irrespective of the age of the offender. This paper is anchored on the implications of criminal liability of a minor for statutory rape under the CRA.

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<sup>1</sup> 2 Samuel 13

<sup>2</sup> Statutory rape, gang rape, fraud rape etc. See D Finkelhor and R Ormrod, and M Chaffin, 'Juveniles Who Commit Sex Offenses Against Minors', <<https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf>> accessed 27/6/2019

<sup>3</sup> Cap C50 Laws of Federation Nigeria(LFN),2004

<sup>4</sup> C O Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria*, (2<sup>nd</sup> ed., London: Sweet & Maxwell, 1980), p.271

<sup>5</sup> J Wale, 'Rape under Nigerian Laws', <<https://www.myjobmag.com/square/article/26/rape-under-nigerian-law>> accessed 21/6/2019

<sup>6</sup> India confirms death penalty for child rapists', <<https://www.ucanews.com/news/india-confirms-death-penalty-for-child-rapists/82982>> accessed on 21/6/2019

<sup>7</sup> Cap C38 LFN, 2004 and Cap P03 LFN, 2004

<sup>8</sup> Sections 367 and 358 of the Criminal Code and Section 282(1) of the Penal Code

<sup>9</sup> Section 218 of the Criminal Code and Section 282(1)(e)

## 2. Statutory Rape

The term 'statutory rape', is a combination of two words: 'statutory' and 'rape'. 'Statutory' means decided or controlled by law<sup>10</sup>. Literally, therefore, rape is statutory where there is a law providing for it. Statutory rape is used to describe sexual intercourse with a minor. It is however, submitted that this description is inappropriate as all types of rape are statutorily prohibited. The definition of rape differs from one legal system to another. Sometimes, it differs from one statute to another within the same legal system. Originally, rape meant the unlawful carnal knowledge of a woman by a man forcibly and against her will.<sup>11</sup> Chukkol towed this line in his definition of rape as intercourse with a non-consenting female with the knowledge by the accused that his victim was not consenting<sup>12</sup>. In *Ogunbayo v The State*<sup>13</sup>, the Supreme Court, per I.F. Ogbuagu, JSC, while interpreting section 357 of the Criminal Code stated that, in legal parlance: '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 threats 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, is guilty of the offence of rape'. The traditional concept of rape is restricted to non-consensual penetration of the vaginal by the penis<sup>14</sup> and tried to protect only the female gender from sexual violence. However, following continuous reforms, rape has been defined as the act of obliging an individual to have sexual intercourse against his or her will, using force, violence, or any other form of coercion. Section 1(1) of the Violence Against Persons (Prohibition) Act<sup>15</sup> provides a novel definition of Rape. 'A person commits the offence of rape if-

- (a) he or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;
  - (b) the other person does not consent to the penetration; or
  - (c) the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.
- (2) A person convicted of an offence under subsection (1) of this section is liable to imprisonment for life except -
- (a) Where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years imprisonment;
  - (b) In all other cases, to a minimum of 12 years imprisonment without an option of fine; or
  - (c) in the case of rape by a group of persons, the offenders are liable jointly to a minimum of 20 years imprisonment without an option of fine.
- (3) The Court shall also award appropriate compensation to the victim as it may deem fit in the circumstance.

It is pertinent to note here that the Act is only applicable at the federal level and states are at liberty to make it applicable at state levels as they may so wish. This is a serious limitation. A person commits rape whenever he or she intentionally uses any part of his/her body or thing to penetrate the vagina, anus or mouth of another person, provided the other person did not consent or the consent was obtained by fraud or by any other unlawful means. By the common law definition, rape is sex without consent. Statutory rape is normally defined as requiring proof of nothing more than that the defendant (1) had intercourse with, or penetrated (2) a juvenile below a particular age.<sup>16</sup> Generally, any adult defendant who has sexual relations with a minor is liable for statutory rape, even if the child 'actually' consents.<sup>17</sup> Moreover, and of particular significance here, it does not matter whether the offender actually knew that his victim was below the age of consent.<sup>18</sup> In some many jurisdictions<sup>19</sup>, statutory rape is a strict liability offence. In many states of the United States of America for instance, under the clear majority rule, statutory rape has been committed even if the adult was unaware of, or indeed, is affirmatively misled by the

<sup>10</sup> <<https://dictionary.cambridge.org/dictionary/english/statutory>> accessed 5/6/2019

<sup>11</sup> What is RAPE? <<https://thelawdictionary.org/rape/>>accessed 5/6/2019. See section 357 of the Nigerian Criminal Code.

<sup>12</sup> KS Chukkol, *Law of Crimes in Nigeria*, (Kaduna, ABU Press Ltd., 1989), p.186

<sup>13</sup>(2007) NWLR (Pt. 1035)157

<sup>14</sup> AN Nwazuoke, 'A Critical Appraisal of the Violence Against Persons (Prohibition) Act, 2015', (2016) 4 *Journal of Law, Policy and Globalization* 69

<sup>15</sup> 2015

<sup>16</sup> R A Posner and K B. Silbaugh, *A Guide to America's Sex Laws* (Chicago: University of Chicago Press, 1996), pp. 44-64

<sup>17</sup> S P Green, 'Lies, Rape, and Statutory Rape',

<[https://law.rutgers.edu/sites/law/files/Lies%20Rape%20and%20Statutory%20Rape\\_\\_final%20edits\\_\\_9781107108783c04\\_p194-253.pdf](https://law.rutgers.edu/sites/law/files/Lies%20Rape%20and%20Statutory%20Rape__final%20edits__9781107108783c04_p194-253.pdf)> accessed 26/6/2019

<sup>18</sup>*Ibid.*

<sup>19</sup> Like Nigeria

victim herself about—the fact that his victim is a juvenile.<sup>20</sup> The concept of statutory rape, emanated from the English Common Law with the codification of the statutory rape law in the Statute of West Minister of 1275. Statutory rape laws are based on the premise that an individual is legally incapable of consenting to sexual intercourse until that person reaches a certain age. The law mandates that even if he or she willingly engages in sexual intercourse, the sex is not consensual.

### 3. Meaning of a Child

There is no unanimity in the definition of a child. After analysing the difficulty of defining a child, Cohen J in *Re Carton*<sup>21</sup>, said that the meaning of the word, 'child' must in every case depend on the context in which it appears. In the legal milieu, the very notion of a child is subject to the provisions of the different legal instruments protecting the rights of a child. Here, who a child is, is determined by the age of the person being considered as a child. The term usually refers to anyone below the age of majority. Both international and the domestic laws have laid down different minimum age below which a person is referred to as a child. The meaning of a child is, therefore, made 'dependent on each respective legal system in order to accommodate the different economic, social, political, cultural and legal systems of the respective state'.<sup>22</sup> Generally, under the international law, there appears to be a consensus that a child is a person under the age of 18years.<sup>23</sup> The CRA<sup>24</sup>, in Section 277 adopted the same definition. Before the promulgation of the CRA, there were other legislations in existence protecting the child which have either expressly or impliedly defined the child but we shall confine ourselves to the definition in the CRA.<sup>25</sup> The applicability of the definition in the CRA, depends on its domestication by the different states in Nigeria. Out of the 36 states of the federation, about 24 states have adopted the CRA.<sup>1</sup> This situation portends a likelihood of variations in the definition of the Child. In Jigawa state for instance, a child is defined as a person who has not attained puberty.<sup>26</sup> Once a person attends puberty though he is less than 18years, he is no longer a child.

### 4. Criminal Responsibility

Responsibility means an obligation to answer for an act done and to repair or otherwise make restitution for any injury it may have caused.<sup>27</sup> Section 1 of the Criminal Code<sup>28</sup> defines 'criminally responsible' as being 'liable to punishment as for an offence'. The definition of criminal responsibility varies from place to place, but, in general, to be responsible for a criminal act implies the perpetrator must understand what he is doing and that it is wrong.<sup>29</sup> The general principle of criminal responsibility in Nigerian is akin to the common law doctrine of *actus non facit reum nisi mensit rea*. By the time of Sir Edward Coke in the 17th century, this concept of subjective blame-worthiness of no liability without fault had become firmly rooted.<sup>30</sup> In England, this doctrine used to be absolute. It was expressed thus:

....there can be no crime large or small without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent without which it cannot exist. Every crime by this doctrine has a physical side which is volitional deliberate or willed in nature and not accidental and without the knowledge of the actor express or implied, while there is a mental element which connotes blame worthiness in the sense of the harm intended to be caused or

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<sup>20</sup> A Sarat, *Law and Lies: Deception and Truth-Telling in the American Legal System* (New York, Cambridge University Press, 2015) p. 239

<sup>21</sup> (1945) Ch. 372

<sup>22</sup> 2003

<sup>23</sup> Article 1 of the Convention on the Rights of the Child, (CRC) and African Charter on the Rights and Welfare of the Child, 1990; Article 3(d) of the 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000. Nigeria is a signatory to these Conventions.

<sup>24</sup> Cap C50 LFN, 2004. This Act domesticated the CRC in Nigeria.

<sup>25</sup> For instance, sections 50 of the Penal Code<sup>25</sup> and 30 of the Criminal Code<sup>25</sup>, respectively, define a child on the basis of criminal responsibility. Section 2 of the Children and Young Persons Act defines a child to mean a person under the age of fourteen while a young person is defined as any person who has attained the age of fourteen years and is under the age of 17 years. There is no definition of the child in the Constitution of the Federal Republic Nigeria but Section 29(4) (b) of the Constitution presumes a child to be a person less than 18 years or earlier..

<sup>26</sup> 'Inhuman sentencing of children in Nigeria', Briefing for the 17th session of the Human Rights Council Universal Periodic Review in October 2013, submitted by the Child Rights International Network, file:///C:/Users/BAR.%20TITO%20ONYEMA/Downloads/CRIN\_UPR17\_NGA\_E\_Main.pdf accessed on 27/6/2019

<sup>27</sup> HC Black, *Black's Law Dictionary*, (6<sup>th</sup> ed. Minnesota, West Publishing Co., 1990) p. 1312.

<sup>28</sup> *Op. Cit.*

<sup>29</sup> <www. Enotes.com>enotes Home->accessed on 20/11/2019.

<sup>30</sup> F B Sayre, 'Mens Rea', (1932) 45 *Harvard Law Review*, 974 -1026

actually caused, where the actor is reckless as to whether or not the harm occurs, or indeed negligent as to the outcome.<sup>31</sup>

The importance of *actus reus* and *mens rea* for conviction in Nigeria, has been re-emphasized by the Supreme Court in *Board of Customs & Excise v Alhaji Ibrahim Barau*<sup>32</sup>, where the court held Per Fatayi Williams, C.J.N (as he then was) that:

.....in all offences where knowledge or intent or fraud forms part of the elements necessary to prove a charge, there is the requirement that not only must the *actus reus* be committed but the defendant must 'have *mens rea* before he can be convicted for the offence. In other words the defendant must have known that what he did was wrong or amounted to a breach of what the law wanted to protect. The defendant may have a reasonable idea, not actual knowledge that a particular course of action has been prohibited but he deliberately or recklessly refuses to find out the true position, that is he 'shuts his eyes' in such a situation the defence of ignorance may or may not avail him.

The only known exceptions to the common law doctrine of *actus non facit reum nisi mensit rea* are strict liability offences which are offences that do not require proof of *mens rea* to be complete. In other words, proof of the *actus reus* is sufficient to ground a conviction<sup>33</sup> for instance, statutory rape under the CRA.

### 5. Legal Framework for Protection of the Child from Sexual Abuse in Nigeria

The legal framework for the protection of children in Nigeria consists of international and regional human rights instruments ratified by Nigeria, the 1999 Constitution of the Federal Republic of Nigeria Constitution and subsidiary laws, some of which are discussed hereunder.

#### *Supranational Human Rights Instruments*

Child rights are an essential part of the transnational human rights systems. The rights of the child have been incorporated in various international and regional human rights instruments ratified including: the 1924 League of Nations Declaration on the Rights of the Child; the 1959 UN Declaration on the Rights of the Child; the International Covenant on Civil and Political Rights (ICCPR)<sup>34</sup>; International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>35</sup>; African Charter on Human and Peoples' Rights (ACHPR)<sup>36</sup>, Convention the Right of the Child (CRC)<sup>37</sup> and the African Charter on the Rights and Welfare of the Child ACRWC<sup>38</sup>. These instruments, specifically deal with the rights of the child at the international and regional levels respectively. The applicability of these instruments depends on their domestication in Nigeria by virtue of *section 12(1)* of the Constitution. Until its enactment into law by National Assembly, an international treaty has no such force of law, as to make its provisions justiciable in our courts.<sup>39</sup> This is also the position in England. In countries like Ethiopia, these international treaties are automatically incorporated into the laws of the land upon ratification.<sup>40</sup> Some of these treaties have been domesticated in Nigeria such as: the African Charter on Human and Peoples' Rights<sup>41</sup> and the CRC<sup>42</sup>. Where there is a conflict between a treaty that has been enacted by the legislature and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the

<sup>31</sup>V Akpotaire, 'Strict Liability And The Nigerian Criminal Codes: A Review', <<http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf>> accessed on 26/6/2019

<sup>32</sup>(1982) 10 S.C. (REPRINT) 23

<sup>33</sup>*Adeyemo v The State*(2015) 16 NWLR (Pt. 1485) 311, *Odunlami v The Nigerian Army* (2013) 12 NWLR (Pt.1367) 20 @ 50-51 H-A, 68-69 F-C

<sup>34</sup>Resolution 2200A (XXI) on 16 December 1966

<sup>35</sup>1966 through GA. Resolution 2200A (XXI)

<sup>36</sup>Adopted on June 27, 1981, Organisation of African Unity. Doc. CAB/LEG/67/3/Rev. 5

<sup>37</sup> See United Nations General Assembly Session 44 Resolution 25. Convention on the Rights of the Child A/RES/44/25 adopted on 20 November 1989

<sup>38</sup>Adopted by the Organisation of African Unity (OAU) in 1990 (in 2001, the OAU legally became the African Union) and was entered into force in 1999

<sup>39</sup>Adopted in 1989

<sup>40</sup> According to Article 9 (4) of the FDRE Constitution, 'all international agreements ratified by Ethiopia are an integral part of the law of the land'. This means that the provisions of human rights treaties, which Ethiopia has ratified, are part and parcel of the law of the land.

<sup>41</sup>African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990

<sup>42</sup>Child's Rights Act of 2003, Cap C50, LFN 2004.

legislature does not intend to breach an international obligation. The Charter possesses 'a greater vigour and strength', than any other domestic statute except the Constitution which is supreme over all enactments.<sup>43</sup> Among the international and regional human rights instruments, the most important sources of the rights of children are the CRC and ACRWC. By Article 19(1) of the CRC, states have a duty to take all measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. *Article 34*, specifically prohibits all forms of sexual exploitation and exploitation of the child. Thus, state parties have a duty to prevent: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; and the exploitative use of children in pornographic performances and materials. States also have a duty to protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.<sup>44</sup> No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.<sup>45</sup> Articles 16 and 27 of the African Charter on the Rights and Welfare of the Child, protects the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment, sexual exploitation and sexual abuse. There is therefore no doubt that the international law recognizes the right of a child not to be raped.

### **Nigerian laws**

A bill of rights ranging from the right to life to the right to own property has been enshrined into the Nigerian Constitution which forms the legal framework for the protection of all citizens of the country as human beings. Children, as human beings, benefit from these protections. Unlike the Ethiopian Constitution which devoted its Article 36 to exclusively deal with the rights of children<sup>46</sup>, there is no special provision for the protection of the child under the Nigerian Constitution *albeit*, Section 3 of the Child's Right Act, adopts *Chapter IV* provisions of the Constitution as applicable under the Act. Specifically, section 36(1)(d) of the Ethiopian Constitution, provides that every child has the right not to be subjected to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being. In addition to the aforementioned rights, the Ethiopian Constitution recognizes the basic principle, i.e., the best interest of the child<sup>5</sup>, to be considered by public and private welfare institutions, courts of law, administrative authorities or legislative bodies while undertaking actions concerning children. Section 31 of the CRA equally contains provisions on the right of the child to respect for dignity of his/her person and freedom from sexual abuse. Accordingly, a child should not be subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse or subjected to torture, inhuman or degrading treatment or punishment; or to attacks upon his honor or reputation. In further protection of the child, sections 218, 357 and 358 of the Criminal Code, section 282 of the Penal Code and *section 1* of the Violence Against Persons Act, (VAP)<sup>47</sup>, all prohibit unlawful carnal knowledge of a minor as would be discussed in details later in this paper.

### **6. Statutory Rape as a Strict Liability Offence under the Child's Right Act**

In Nigeria, sexual intercourse with a child is a strict liability offence under the Child's Right Act. To this effect, *section 31* of the Act provides that:

- (1) No person shall have sexual intercourse with a child.
- (2) A person who contravenes the provision of Subsection (1) of this section commits an offence of rape and is liable on conviction to imprisonment for life.
- (3) Where a person is charged with an offence under this section, it is immaterial that- (a) the offender believed the person to be of or above the age of eighteen years; or (b) the sexual intercourse was with the consent of the child

Section 32 of the Act provides for other forms of sexual abuse and exploitation of the child but our discourse is limited to rape as provided in section 31. This section explicitly condemns the act of having carnal knowledge of a person below the age of 18 years (whether male or female). Once the act of sexual intercourse is established, it is irrelevant to prove state of mind of the accused person. It is a strict liability offence as it does not entertain defence of consent by the child or mistaken belief as to his/her age. Apart from the CRA, the Criminal Code, the Penal Code and the Violence Against Persons Act, prohibit sexual intercourse with a minor but whether the offence is one of strict liability or not depends on the age of the victim and the applicable law. Before the enactment of the CRA, unlawful sexual intercourse against a girl was charged under the Criminal and Penal Codes.

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<sup>43</sup>*Abacha v Fawehinmi* (2000) 6 NWLR 228

<sup>44</sup>*Article 36* of the CRC

<sup>45</sup>*Section 37* of CRC

<sup>46</sup> A Tesfaye, 'Child Rights Protection in Ethiopia: Critical Analysis of the Statutory Rape Provisions of the Criminal Code and Their Application', (2017) 8 *Beijing Law Review*, pp. 503-504

<sup>47</sup> 2015

The offence of rape is explicitly provided for in sections 357 and 358 of the Criminal Code and section 282 of the Penal Code. Generally, a conviction for the offence of rape, under these Codes mandatorily requires proof of absence of the victim's consent who must be a female. The Criminal Code suggests that any person both male and female, can commit the offence of rape but the Penal Code specifically mentioned man. A plethora of authorities show that the act of sexual intercourse is not sufficient, the guilty mind must be proved.<sup>48</sup> The presence of the victim's consent negates guilty mind. In *Isa v Kano State*<sup>49</sup> the Supreme Court held that:

the law is settled and well-grounded that the prosecution has the burden and duty to prove the accused person guilty of the following ingredients in order to sustain the conviction of the offence of rape: (a) that the accused had sexual intercourse with the prosecutrix; (b) that the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation; (c) that the prosecutrix was not the wife of the accused; (d) that the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not (e) that there was penetration.

In relation to a child of less than fourteen (14) years of age under the Penal Code, rape is committed once a man has sexual intercourse with the girl with or without her consent.<sup>50</sup> This makes the offence a statutory rape, with strict liability. In the South, a similar provision is made in *Section 218* of the Criminal Code *albeit*, termed defilement on its marginal note, which reads that: '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'. Where the girl is above thirteen years and under sixteen years of age, the offender is guilty of a misdemeanour, and is liable to imprisonment for two years, with or without caning. Unlike a girl under the age of thirteen, it is a defence to a charge that the accused person believed, on reasonable grounds, that the girl was of or above the age of sixteen years. Under the Criminal and Penal Codes, statutory rape is therefore committed only against a girl under 13 years of age in the South and 14 years of age in the North. It is noticeable that all offenders are liable to the same punishment both adults and children under these Codes in respect of both the crime of rape and statutory rape.

The Violence Against Persons Act on his own part, prohibits all forms of violence against persons in private and public life, and provides maximum protection and effective remedies for victims and punishment of offenders. Like the Criminal and Penal Codes, absence of consent is a mandatory ingredient of the offence of rape. What the VAP did differently was to expand the meaning of rape to include penetration of a man. Both sexes can be offenders. Penetration can be with any part of the body or anything not only penis any longer. What can be penetrated has also been expanded to include anus or mouth.<sup>51</sup> There are no age differences mentioned in the application of this provision. The Act applies to both children and adults. Literally, where a child is raped under this Act, *mens rea* must be proved. It seems that where a child consents to the sexual activity, it can lead to an acquittal. This position may not represent the intention of the lawmakers who have in other laws aforementioned imputed lack of consent to the child. Therefore, there is no provision for statutory rape under the VAP but it provided punishment for under aged offenders. Generally, where the offender is found culpable, he would be sentenced to life imprisonment<sup>52</sup> but where he is less than 14 years, the punishment is a maximum term of 14 years imprisonment.<sup>53</sup>

Comparatively, in Ethiopia, prosecution of a crime of statutory rape (whether consensual or non-consensual) requires prove of the mental element of intention or negligence.<sup>54</sup> A first glance at the Ethiopian Criminal Code<sup>55</sup> concerning statutory rape, indicates that the *mens rea* element is missing and strict liability is applicable; because, as can be seen from the provisions of Articles 620 (2a), 626 (1&2), and 627 (1&2) of the Criminal Code, *mens rea* is not expressly embodied.<sup>56</sup> However, this is not true as the concept of strict liability in criminal offences, is not envisaged in the Criminal Code.<sup>57</sup> The *mens rea* is implied in these provisions, because Article 59 (2) of the Criminal Code provides that 'crimes committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society.' And the second paragraph of

<sup>48</sup> *Ogunbayo v State* (2007) 8 NWLR (Pt 1035) 157; *Upahar v State* (2003) 6 NWLR (Pt 816) 230; *State v Ojo* (1980) 2 NCR 391; *Okoyomon v State* (1973) 1 SC 21; *State v Anolue* (1983) 1 NCR 71 and *Iko v, State* (2001) 14 NWLR (Pt 732) 221

<sup>49</sup>(2016) LPELR - 40011 (SC)

<sup>50</sup> Section 282(1)(e) of the Penal Code

<sup>51</sup> Section 1 of VAP

<sup>52</sup> Section 1(2) of VAP

<sup>53</sup> Section 1(2)(a)

<sup>54</sup>Tesfaye, *Op. Cit.*, p.509

<sup>55</sup>2004

<sup>56</sup>Tesfaye, *Op. Cit.* p.509

<sup>57</sup>*Ibid.*

Article 57 (1) of the Criminal Code states that 'a person is guilty if, being responsible for his acts, he commits a crime either intentionally or by negligence.' The cumulative reading of these provisions tells us that all offences require intention unless a specific provision which defines a given offence expressly states its *mens rea* as negligence. Any provision that does not express negligence as the required moral guilt is thus interpreted as requiring criminal intention<sup>58</sup>. Therefore, the crime of statutory rape under Ethiopian criminal law, requires criminal intention as its *mens rea*. It is thus possible to argue that the Ethiopian criminal law requires the prosecution to prove that the defendant had any *mens rea* as to the victim's age, and consequently a defendant's honest and reasonable belief as to the victim's age can be used as a defence.<sup>59</sup>

### **7. Criminal Liability Of A Child Offender For Statutory Rape In Nigeria**

The Constitution as earlier pointed out, does not define a child neither does it make provisions for the child's criminal liability but by sections 50 of the Penal Code and 30 of the Criminal Code, a child younger than seven years is considered not to be criminally liable and presumed to be *doli incapax* (incapable of committing an offence) and a child between the ages of seven and twelve years will not normally be held responsible for his/her actions unless it can be proved that at the time of committing the offence, he/she had the capacity to know that he/she ought not to do it. Under the Criminal Code, a male child under the age of twelve years is presumed to be incapable of having carnal knowledge. There is no similar provision under the Penal Code. A male child above the age of 7 is capable of having sexual intercourse except that the criminal responsibility of any such male child who is less than twelve years of age is dependent on his capacity to understand the nature of his act. This is because a man as contained in section 282 has been defined by the Penal Code to mean a male human being of any age. It means that a child under the age of 18 years but above 12 years can be made liable to an offence of statutory rape under these Codes. The VAP's provision is to the effect that a child of any age is criminally liable for the offence of rape where committed, but the punishment to be given depends on his age. Where he is less than 14 years, the punishment is a maximum term of 14 years imprisonment.<sup>60</sup> Surprisingly, the CRA that claims to be protecting the child does not exonerate a child from liability to statutory rape. It makes him strictly liable in the same measure with adults. Unfortunately, violence or force need not have been applied for rape under this Act to be committed.

The final issue that could be addressed here is, 'whether sexual intercourse performed between two individuals below the age of consent is considered as statutory rape or not', under the CRA. Generally, the answer to this question depends on the forms of age of consent adopted by the state. For instance, if the state has a single age of consent, there is no possibility by which the act of minors below that age is legal<sup>61</sup>; but in a country that has not adopted a single age of consent, sexual relationship between minors may be considered as legal. Some states, for example, specify age ranges outside of which parties cannot consent to sex. In the District of Columbia, for instance, it is illegal to engage in sexual intercourse with someone who is under the age of consent (16 years) if the defendant is four or more years older than the victim. Thus, in Columbia, sexual relations between a 13-year-old and a 15-year-old would be legal even if both of them are under the age of consent since their age difference is less than four years<sup>62</sup>. As the writer try to show in the introductory part of this article, Ethiopia adopts a single age of consent, which is eighteen years of age. Hence, a male or female under eighteen years of age cannot consent to sex, regardless of the age of the other party. As a result, sexual relations between two minors would be illegal, as would relations between a minor and an adult, and thus is statutory rape. Here it should be noted that there is no minimum limit as to the age of the victim under the Criminal Code for the application of statutory rape. However, there is minimum age limit for a person to be held criminally responsible for any kind of crime, as stipulated in *Article 52* of the Criminal Code. This article states that 'infants who have not attained the age of nine years shall not be deemed to be criminally responsible'. If the perpetrator attains the age of nine years, he/she will be held criminally responsible for the crime of statutory rape if he/she perform sexual intercourse with a person below the age of eighteen.<sup>63</sup> In Canada, statutory rape is committed by anyone who for a sexual purpose, touches directly or indirectly with a part of the body or an object any part of the body of a child under 14.<sup>64</sup> A young person under 14 cannot be convicted of this offence, unless the young person is in a position of trust or authority in relation to the child (e.g., babysitter or parent), or is in a situation where the child victim is dependent on the young person.

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<sup>58</sup>*Ibid.*

<sup>59</sup>*Ibid.*

<sup>60</sup>Section 1(2)(a)

<sup>61</sup>A Glosser, *et al.*, 'Statutory Rape: A Guide to State Laws and Reporting Requirements' (2004) 5-7.

. The Lewin Group <<https://aspe.hhs.gov/sites/default/files/pdf/75531/report.pdf>> accessed on 26/6/2019

<sup>62</sup>Tesfaye, *op. cit.* p.509

<sup>63</sup>*Ibid.*

<sup>64</sup>Section 151 of the Canadian Criminal Code

## 8. Conclusion

In Nigeria, though there is no express mention of the term statutory rape in its legal instruments, it has been shown from the laws considered above, that statutory rape is recognized and prohibited in Nigeria. In many of the laws considered with particular reference to the CRA, statutory rape is a strict liability offence. It was also discovered that there is no age limit in culpability for the offence. Whether the sexual activity was consensual or non-consensual, the offender is liable to life imprisonment irrespective of age of the offender. It is easier to prosecute a minor for a non-consensual sexual intercourse with another minor but a serious problem arises where both minors consented to the sexual activity. Here it becomes extremely difficult to determine who the offender or the victim is as the law already presumes them incapable of consenting to sex. Put differently, since both minors are entitled under *section 31* to protection from rape, who then is the rapist and who is the victim for the purpose of prosecution and protection? It appears that the framers of the CRA, did not avert their minds to the situation as painted. There is obviously a lacuna that needs to be filled through an amendment of this section of the Act. In some countries that have not adopted a single age of consent, sexual relationship between minors may be considered as legal. Some states specify age ranges outside of which parties cannot consent to sex. In the District of Columbia, for instance, it is illegal to engage in sexual intercourse with someone who is under the age of consent (16 years) if the defendant is four or more years older than the victim. Thus, in Columbia, sexual relations between a 13-year-old and a 15-year-old would be legal even if both of them are under the age of consent since their age difference is less than four years<sup>65</sup> It is recommended that where the sexual activity is between minors, the age limit of criminal responsibility contained in the Criminal Code<sup>66</sup> should be adopted. If, the intercourse is consensual, for the purpose of prosecution both partners should be made criminally liable to misdemeanor with lesser punishment than life imprisonment. Where however, the sexual intercourse is non-consensual, the minor using force or exerting undue influence, should be prosecuted and a lesser punishment like 5years imprisonment imposed as a corrective measure. More so, like in Ethiopia, in all situations whether consensual or non-consensual, the strictness in liability, should be removed to allow the child's motive or mental state to be tested, since it is believed that a child is feeble and imperfect, both in thinking and decision making. In case of an adult offender mistake as to the age of the victim should avail the offender, particularly where it is proved that the victim he acted on the victim's deceit as to his/her actual age. The age of consent should be reduced to 16 years, as the reality on ground shows that children in the changing world are have rapid growth and mental development due to easier access to information and knowledge. For instance, some children gained admission into higher institutions at the age of 15 and 16. Being an environment meant for adults, there is likelihood that these children are deeply influenced and shaped in their thinking that they start taking independent decisions for themselves.

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<sup>65</sup>Tesfaye, *Op. Cit.*, p.509

<sup>66</sup> Under *Sections 30* and *50* of the Criminal and Penal Codes respectively, there is an irrefutable presumption of law that a seven year old child is incapable of committing an offence and a rebuttable presumption that a child of twelve years of age cannot commit an offence. Also under the Criminal Code, a child less than 12 years of age is incapable of having carnal knowledge.