Rethinking the Ethiopian Rape Law

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Introduction

The word "rape" is at present a household word. In a classical rape scenario, what easily comes to mind is a bogeyman, who is a stranger, armed with some type of weapon, jumping on a victim from where he is hiding, uses force and intimidates his victim to have sexual intercourse with him. Despite such an apparent simplicity, rape is not a simple term that can be encapsulated in such a narrow scope. Contrary to such conventional thinking, the notion of rape is the most difficult subject to handle in any discourse. It may also be added that, of all the crimes, it is rape that has changed its features through time, so much so that, every elements of its definition are criticized and changed time and again. Accordingly, today's definition of rape as a crime is so much different from what it used to be in the past. It helps to note from the outset that, the Women's Movement represented by feminist intellectuals and other lobbyists has contributed a lot to this radical change by highlighting the gendered and unequal treatment of the law and focusing on non-discrimination. The animated debate on rape in general, or anyone of its elements, has not yet died out though many changes were introduced into the law either by legislatures or courts.

An attempt to write on rape as a subject naturally raises many questions than answers. This is so mainly due to the multitude of issues that surround the crime, and the divergent views held by proponents of this or that line of argument. As mentioned above, almost every element of the classical definition of rape is challenged and changed. Accordingly, the gendered outlook that has so far focused on a male perpetrator and a female victim is made gender neutral[1]; the force element which was a central issue in the past no more exists at present; consent, which has triggered almost every relevant discourse has moved from passive acquiescence to "no means no" and explicit oral expression; and marital rape which was not an offense in the past is now made a crime. Moreover, the instrumentalities of rape, i.e., genital organs or

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[1]Rape can be committed by a male upon a female or by a female upon a male or between individuals of the same sex, as in the case of homosexuals. Despite such variations in perpetrators and victims, the main form of rape that is committed quite frequently is the first type, i.e., a male upon a female. It is also this variety of rape that has given rise to the divergent gender issues covered in this article. Just for this purpose, unless and otherwise specifically mentioned, the following discussions will mainly focus on a male upon a female rape only.

others; the manner of perpetration, i.e., copulation or other forms; types of punishments on rapists; date raping wherein consent may be given tacitly; and statutory rape are some of the issues that have occupied most of the literature. These issues and changes are just the tip of the ice berg as a result of which, an attempt to cover the whole gamut of the subject matter in an article with a limited space amounts to doing injustice to the subject matter. Accordingly, this article attempts to cover major issues of the subject matter alone. In line with this I will attempt to compare and contrast the different positions held on the subject in other jurisdictions[2] with that of Ethiopian law and practice.

The article has two parts. Part One discusses major issues of rape law, mainly drawn from literature that emanated from the US. Part Two, following the structure of Part One, will compare the laws and practices of other jurisdictions with that of Ethiopia. These will be followed by a brief conclusion and recommendations.

1. Definitions and Major Elements of Rape as a Crime

1.1 Definition

A non-legal definition provides that rape is "the crime of having sexual intercourse, usually forcibly, with a person who has not consented; specifically, this crime is committed by a man upon a woman or a girl."[3] At common law, rape is defined as "the carnal knowledge of a woman forcibly and against her will".[4] These definitions share the following elements: the act has to be an act of sexual intercourse/carnal knowledge, it has to be done - if not always, but usually - forcibly, the victim has to oppose the sexual advance - not consented/against will - and that the victim has to be a female while the perpetrator should be a male.

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[2] Almost all the literatures found on the internet as well as in hard copies in the Law Library and accessible to this writer have their origin in Common Law jurisdictions. Thus, an attempt to check the position of the crime of rape in other jurisdictions, more importantly in Civil Law jurisdictions, could not meet success.

[3] Webster's New World Dictionary, Third College Edition, Webster's New World, New York, (1988)

[4] W. Blackstone, Commentaries*210 as quoted by Wayne R. LaFave, Substantive Criminal Law, 2006 Thomson / West, S 17.1- 17.5, Rape overview, Current through the 2007 update. The current edition is written by David C. Baum (hereafter, Baum). Of all the materials that were accessible to this writer, this book stands first in comprehensiveness. Accordingly, the structure of this article has followed that of this book. Nonetheless, since the soft copy that is in file with this writer has no page numbers, but only section numbers, the latter are shown in all appropriate places. (Except in few instances, foot notes are omitted.)

Though these definitions appear to be simple and leave no room for interpretation, recent developments have proved that the law as well as the definitions cannot accommodate the different legal issues that arose in rape trials. The instances that called for legal amendments and the developments achieved in this regard are discussed hereunder.

1.2 Major elements

1.2.1 The act

According to the traditional definitions, quoted above, the act requirement of the crime is sexual intercourse/carnal knowledge. This naturally means the penetration of the female sex organ by the male sex organ (genital copulation). The act requirement is now expanded to include, anal and oral copulation, as well as digital (finger) and mechanical penetration.[5] These varieties are also known as cunnilingus, fellatio, and anal intercourse. Some writers include any intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of another person's body, into this category.[6]Though it is clear that the latter varieties are added to the list after reform, none of the sources indicate whether they were unknown to the ancient people or not. It may, however, be presumed that these are new cultures that grew within a "free society".

The criminal act, alias, *actus reus*, in criminal law parlance, has raised some collateral issues, such as: the degree/depth of penetration, the requirement of emission and capacity of procreation. According to the contemporary position, at least in the US,

> …slight penetration is enough… and it is sometimes elaborated that penetration between the labia… or of the vulva will suffice.…Entry of the vagina… or rupturing of the hymen…is not necessary. Despite rare suggestions to the contrary...emission is not necessary for the requisite act to be completed. Moreover, proof of emission is not a substitute for showing penetration.[7]

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[5] Ibid.

[6] Meredith J. Duncan, (hereafter, Duncan) Sex Crimes and Sexual Miscues: the need for a clearer line between forcible rape and nonconsensual sex, Wake Forest Law Review, Vol. 42, 2007, p.1096, Quoting S. C. Code Ann. Sec. 16- 3. 651(2003). The act is expressed as: sexual penetration, penetration, vaginal intercourse, sexual act, sexual battery, sexual intrusion, sexual conduct, and sexual abuse. For the sake of consistency, however, the act will be called as sexual intercourse, in this article.

[7] Baum, supra note 4, Sec. 17.2

Moreover, lack of capacity regarding emission is not a defense because it is not part of the definition of the crime, and impotency is similarly not a defense, for the crime can be committed by an erect or non-erect penis.[8]

1.2.2 Mental state

Under the Common Law, rape was a general intent crime. Accordingly, for the purpose of prosecution, once it is shown that the act was committed voluntarily - by the rapist - it does not matter whether he believed that the victim has consented. The current position is that [a reasonable] mistake of fact can serve as a defense unless held negligently or recklessly.[9]

1.2.3 Force

Though the word "force" appears to be simple, its role in the prosecution and conviction of rape defendants is not as simple as one may imagine it. Thus, it is one of the controversial elements of the crime and these controversies are discussed below.

1.2.3.1 Intrinsic and extrinsic force

Intrinsic force refers to the act that is inherent in the act of the nonconsensual intercourse, while extrinsic force refers to, use of force or threat of force above and beyond the intrinsic force, and courts in the US employ both standards depending on circumstances.[10] What sets apart the latter from the former is the requirement of more evidence that force in general or physical force was employed during the intercourse. This issue of additional evidence has called for a variety of issues, such as the degree of force required to be employed.

As the story of the bogeyman described above tells, what he has used is a direct or actual physical force against the victim. However, force is not necessarily limited to such overt acts only, and rapists can use different methods to intimidate their victims. Such constructive forces can take different forms such as: threat, and coercion. Moreover, even when force is not required to be employed in order to achieve the victim's submission, a rapist may

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[8] Ibid.

[9] Id. Mistake refers to a reasonable mistake on the part of the rapist that the victim has consented to the act. See also, Duncan, supra, Note 6, at pp. 1094 and 1095. Duncan argues that rape at Common Law was a general intent crime, for there was no specifically identified state of mind and that holding a morally blameworthy state of mind suffices for prosecution or conviction. With regard to mistake of fact, what matters is the reasonableness or unreasonableness of his belief in the consent. At present, however, many jurisdictions require a specific mental state, such as: knowingly, recklessly, or negligently doing the act. ibid, at pp.1096, 1097 and 1103.

[10] Baum, Supra note 4, Sec.17.3

employ fraud, or make use of drugs or intoxicants. In all these situations, the victims submit to the demands of rapists, because, submission is the lesser evil under the circumstances. As the sexual intercourses consummated in these situations are nonconsensual, they fall under the general rubric of rape. Each instance further calls for collateral issues and these are discussed below.

1.2.3.2 Threat

It is well known that threat is one of the grounds that can invalidate obligations, for valid consent cannot be given in the presence of a threat. So also under rape law, a sexual intercourse, done under threat proves the absence of consent. Despite such simplicity, it is interesting to note that the degree of force to be imposed on the victim has become a subject of intense disputes. Accordingly, the degree of force was required to be such as that cannot be resisted under the circumstances, which requires the victim to put up utmost resistance and should induce in the victim fear of death, or serious bodily harm, personal injury, a fear that so overpowers her that she dares not resist, and so on.[11] Moreover, it was also required that the victim's fear has to be "reasonable" and the actor should have present capacity to inflict the harm.[12] Such qualifications, as it is apparent, place unnecessary burden on the part of the victim and are unjustifiable. This is aptly expressed in Baum's book as follows:

> ….such limitations are… inappropriate…one who takes advantage of a woman's unreasonable fears of violence should not escape punishment any more than a swindler who cheats gullible people by false statements which they should have found incredible. Neither the blameworthiness of the actor nor the gravity of the insult to the victim is ameliorated by a finding that the threat was implausible or that the actor lacked capacity to carry it out.[13]

As far as the issue of threat is concerned, the threat can be express or implied from the intimidating behavior of the actor and that implied threat is greater when the victim and the defendant are strangers and lesser when they are not. Moreover, according to the contemporary standards, the threat should not be directed at the victim or anyone related to her, but against any other person.[14]

1.2.3.3 Coercion

It is again well known that coercion like threat vitiates consent and that sexual intercourse done under coercion amounts to rape. Coercion may take place

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[11] State v. Hoffman, 228 Wis. 235, 280 N.W. 357 (1938) in id.
[12] Model Penal Code Sec.213.1, Comment at 308 (1980) in id.
[13] Id.
[14] Id.

under different circumstances, such as: extortionate behaviors, understood to be unprivileged and illegitimate, those that arise out of institutional and professional relationships and via economic pressures.[15] The current trend towards combating such behaviors is criminalizing behaviors that lead to sexual intercourse between victims and those that hold positions of trust or authority, such as psychotherapists and patients, sexual extortion in employment, threats to retaliate, or expose the victim to public humiliation and disgrace, exposing secrets or harming another in health, business or reputation.[16]

1.2.3.4 Fraud

In the case of a sexual intercourse obtained through fraud, the victim can technically give consent to the act, but the ground that led her to give consent was misrepresented. Put, differently, had the victim known the true nature of the circumstances she would not have given the consent. According to Baum,[17] fraud can be divided into two and these are: fraud in factum and fraud in inducement. In the former case, usually expressed within the context of the acts of doctors, the defendant has had sexual intercourse with the patient but has managed to conceal from her the fact that it occurred by representing the event as nothing more than a routine pelvic examination. In the latter case, the doctor has had achieved intercourse with his patient by fraudulently misrepresenting that such intercourse was a necessary medical treatment for some real or pretended malady. The former was understood to qualify for rape charge while the latter does not, for the victim knew that she was engaging in sexual intercourse. The legal response has been towards abolishing such dichotomy, either by totally forbidding such relationships between patients and physicians, clergy and those under their care, or totally overriding such a distinction and making consent ineffective if obtained by "deception".[18]

The distinction between the two forms of fraud has resulted in divided positions, and the current trend appears to be that:

> …the traditional dividing line is about the best that can be hoped for because what is customarily characterized as fraud in the inducement "is too difficult to distinguish …from many instances of

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[15] Schulhofer, Taking Sexual Autonomy Seriously: Rape Law and Beyond, 11 Law and Phil. 35, 79, 85 (1992) in id.

[16] Id.

[17] Id.

[18] Model Penal Code, Sec.213.1, Comment at 331 (1980) and Falk, Rape by fraud and Rape by Coercion, 64 Brook. L. Rev. 39 (1998), in id.

> ordinary seduction,".... The difficulty, of course, is in drawing clear lines without giving protection to interests not worthy of being protected by criminal sanctions, such as "the cheated expectations of women who sought to sleep their way to the top but discovered, too late, that they were dealing with swindlers.[19]

Fraud has also raised the issue of those that have given consent as a result of husband impersonation, i.e. when the rapist tells or pretends to be the victim's husband and sham weddings.[20]

1.2.3.5 Drugs and intoxicants

There is no doubt that consent given under the influence of alcohol or other intoxicants cannot be taken as legitimate. But the issue is not as simple as that, for these substances may be administered by the defendant or another person or by the victim herself. Moreover, the degree of intoxication or lack of control may vary depending on circumstances. The usual consumption of such items in ritual courtship and the resulting sexual relationship being labeled as rape has prompted the following reaction:

> The traditional routine of soft music and wine or the modern variant of loud music and marijuana implies some relaxation of inhibition. With continued consumption, relaxation blurs into intoxication and insensibility. Where this progression occurs in a course of mutual and voluntary behavior, it would be unrealistic and unfair to assign to the male total responsibility for the end result.[21]

As far as intercourse after intoxication is concerned, it appears that there is a consensus among writers that if intoxicants are administered by the defendant for the same purpose, then this amounts to rape. However, the issue gets complicated when the defendant merely takes advantage of the intoxication, though he took no part in the affair. The legal position depends on whether the defendant was aware of the incapacity. Depending on circumstances, recklessness or negligence might suffice to constitute rape. To sum up, the position with regard to self imposed intoxication is not yet settled, for some hold that the defendant should not be made liable in particular when intoxicants are self administered, while others argue that the defendant

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[19] Berger, Not So Simple Rape, 7 Criminal Just. Ethics 69, 76 (1988) in id.

[20] See footnotes 82-85 id, for the position of states' laws and court decisions on this specific issue.

[21] Id.

should not take advantage of the victim's intoxication, depending on the requisite *mens rea*.[22]

1.2.4 Consent

It may be said at the outset that of all the elements of the crime of rape, consent is the most controversial issue. The major controversies revolve around, the manners of its expressions, the interpretation of silence, withdrawal, and capacity to give consent more importantly, in cases of minors, and whether a wife has a legal right to say "no" to a sexual advance by her husband. These issues have generated volumes of literature and the gendered outlook of the ancient and the present day society is reflected more on this issue than others. Leaving that as it may, I will, in the following sections, give a bird's eye view of the issues involved.

1.2.4.1 Proof of lack of consent

It is shown above that rape is a nonconsensual sexual intercourse. Thus, the absence or presence of consent matters a lot in determining guilt. That is to say that if it is proved that there was consent on the part of the two adult participants, what took place is a consensual intercourse not subject to any liability except where the participants are incapable. As aptly noted by one writer, "rape…is the only form of violent criminal assault in which the physical act accomplished by the offender is an act which may, under other circumstances, be desirable by the victim".[23]

According to the traditional standard, it was required that the woman should be compelled and resist the sexual advance to the utmost, the resistance should not abate during the encounter and she should be overcome. These were later changed into a requirement of earnest or reasonable resistance. The more recent position is that physical resistance is not a requirement.[24]

As far as resistance is concerned, a victim can resist a sexual advance physically or verbally. In the former case, it appears that this is no more a requirement, for physical resistance may invite danger of death or bodily injury and that a rapist should not be excused on the ground that the victim has failed to resist as a reasonable person. With regard to verbal resistance, however, whether or not a "no" means "yes" or "no" has remained a controversial issue for a long time. According to the traditionalists, it is so

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[22] Regarding the requisite mental state, most sources quoted in Baum, supra note 4, Sec.17.4 refer to the Model Penal Code, though some state laws are quoted in some instances.

[23] Model Penal Code, Sec.213.6, Comment at 428 (1980) in id.

[24] For further details, see Baum, ibid at Sec. 17.4 (a).

common among women to say no, so as not to be taken as promiscuous, even when they are interested in engaging in the conduct. The current view is that a woman's "no" response to sexual advances should be taken as a sincere response.[25]

A related issue is whether silence amounts to acceptance of a sexual offer or not. In the US, at least, it appears that there is no consensus on this issue. Accordingly, some argue that it is only in rape that silence is not taken as refusal and that this is a sexually biased position.[26] Others, however, argue that, though silence is sometimes the product not of passion and desire, but of pressure and pain,[27] non-consent should not be presumed from silence in particular in sexual activities between acquaintances. A writer advocating for the presumption of silence as consent - in particular among intimate partners - has aptly described this position as follows:

> ....sexual encounters ought not to be lived or analyzed as sequences of particular touches. In practice couples do not discuss in advance each specific sex act that one or another might initiate, and there is no strong reason why the law should attempt to compel them to do so.... If uncertainty and spontaneity can enhance the pleasures of love-making, people of either sex might prefer not being asked--so long as they can be sure that behavior they don't like will be stopped on demand.[28]

Apart from the above, rape law has raised a very unique issue, and that is whether or not consent is required in cases of sexual intercourse between a husband and a wife. This issue, like the other controversial issues identified above, has become the subject of intense discussions. This, therefore, calls for a relatively expanded treatment here.

1.2.4.2 Marital Rape

Under the traditional view, it was held that it was impossible for a husband to rape his wife. This position was justified under various theories: the theory of implied consent, the theory of unities of persons, and the theory of property.[29]

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[25] Id. For more on this issue, see Nicholas J. Little, From No Means No to Only Yes Means Yes: The Rational results of an Affirmative consent Standard in Rape Law, Vanderbilt Law Review, Vol. 58, 1322-1364 (2005)

[26] Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev.at 1792 n.41(1992); Comment, 141 U. Pa. L. Rev. 1103, 1111 (1993) in id.

[27] Estrich, Rape, 95 Yale L. J., 1182 (1986) in id.

[28] Id.

[29] Fus, Theresa, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, Vanderbilt Journal of Transnational Law, Vol.39,(2006), pp. 481 –

The implied consent theory is structured around contract law. It is said that it was enunciated by Sir Matthew Hale in the seventeenth century. According to Hale, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and the contract the wife hath given up herself in this kind unto her husband, which she cannot retract". This view was later ameliorated by a requirement that such consent can be revoked if the marriage is suspended, such as in the case of separation.[30]

Under the theory of unity of person, a wife is not recognized as a separate being capable of being raped, for when two people marry, they become one. Put differently, the being of the woman is incorporated into that of the husband such that the existence of the woman is effectively suspended during marriage. Marital rape is thus impossible because a husband is not capable of rapping himself.[31]

The property theory holds that, by marriage a woman becomes the property or chattel of her husband. The goal behind is to inspire and perpetuate marital harmony as a result of which sexual intercourse can never be rape because the husband is merely making appropriate use of his property.[32]

According to Fus, these positions violate the "equal protection" clause that is enshrined in so many constitutions and international human rights conventions. Hence, though this does not amount to discrimination based on race, color or sex, the differentiation of treatment is not reasonable or objective and is not for the purpose of obtaining a legitimate goal, and thus

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517.This part heavily draws from this article, written wholly on the subject. Fus's discussions are summarized.

See also, Baum, Supra note 4, Sec. 17.4 for further information on this particular issue. According to Baum, as recently as 1985, marital exemption existed in about thirty five states in the US but, currently, no state retains an absolute version of the old rule.

[30] Sonya A. Adamo, Note, The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries, 4 Am. U. J. Int'. L. & Pol'y, 555, 557-60 (1989); Sir Mathew Hale, The History of The Pleas of the Crown 629 (Law book Exch. 2003) (1736) in Ibid, at p. 483.

[31] Constance Backhouse & Lorna Schoenroth, A Comparative Study of Canadian and American Rape Law, & CAN. US. L. J. 174, Adamo, supra note 30, at 560; Note, To have and to Hold: The Marital Exemption and the fourteenth Amendment, 99 HARV. L. REV. 1255,1256 (1984) in id.

[32] Melisa J. Anderson, Note, Lawful Wife , Unlawful Sex- Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland, 27 GA. J. INT'L & COMP. L. at 146-47 (1998) and Adamo, supra note 30 at p.56 at id.

unconstitutional. In the case of marital rape, marital exemption classifies unmarried rape perpetrators differently from rape perpetrators. A man who rapes his wife is not guilty of rape while an unmarried man who commits the same act is guilty.[33]

In addition to the above, Fus argues that none of the justifications forwarded to support differential treatment is reasonable and objective and is in furtherance of a legitimate goal.[34] Accordingly, the argument that permitting criminal charges against a man who rapes his wife requires impermissible government intrusion in the privacy of marriage and hinders reconciliation is untenable because:

a. It is unthinkable to extend marital privacy to nonconsensual acts. Just as a husband cannot invoke a right to marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy.
b. With regard to impediment to reconciliation, if a woman is ready to press charges against her husband, the marriage has already passed a stage of reconciliation.
c. The concern over the prevention of fabricated accusations is criticized on the ground that it can hardly be the case that marital rape is the only claim that is prone to being fabricated, for claims of theft, and arson for insurance purposes are at least as susceptible to fraudulent claims.
d. The argument that marital rape is not as serious an offense as non-marital rape and can be handled under assault statutes is criticized on the ground that there is no reason to believe that a wife who is raped by her husband is harmed any less than a woman raped by a stranger. It is further argued that being raped by one's spouse is worse than being raped by a stranger because the offending spouse was in a position of trust.[35]

1.2.4.3 Withdrawal of consent

What have been discussed so far are situations that can make one criminally liable for rape in the absence of consent. Thus, if consent is secured in these situations, there is no liability. However, another troubling issue is the time when consent should be given. Theoretically, it may be argued that consent shall be given before the commencement of the sexual relationship and that suffices for all intentions and purposes. A related issue is whether consent given just before commencement can be withdrawn before consummation.

[33] Ibid, at p.512.
[34] Ibid, at p.513.
[35] Ibid, at 513 – 514 (footnotes are omitted).

Some argue that such withdrawal suffices, provided it was communicated to the male who thereafter ignored it. "[A] court found no support for the defendant's "primal urge" theory, and added that in any event there was no language in the rape statute lending any support to the notion that the defendant is entitled to persist in intercourse once his partner withdraws her consent".[36]

1.2.4.4 Incapacity

Incapacity here refers to lack of capacity to give a legally valid consent. The legal position either in the law of obligation, marriage or others is simply that a person afflicted with any form of incapacity cannot give a legally binding or valid consent, or put differently, the consent given under such situations cannot lead to a legally valid transaction, or relationship. The situation is the same in cases of sexual intercourse, i.e. consent given by an incapable person is invalid. Incapacity is mainly brought about by two factors, namely, age and mental disease. This section will first deal with incapacity due to mental problems and then due to age.

1.2.4.4.1 Incapacity due to mental problems

Under the traditional formula, forcible intercourse with a woman in a state of unconsciousness at the time was unlawful. Currently, phrases, such as: unconscious, asleep, physically incapable of resisting, unaware that a sex act is being committed, incapable of consent, substantially limited in the ability to resist, physically helpless, physically unable to communicate non-consent, etc.,[37] are employed to express incapacity. Despite such variations, the central issue is whether or not the defendant has knowledge about the state of incapacity. There is no consensus again with regard to the requisite mental state. Accordingly, all mental states, namely, intent/knowledge, recklessness and negligence can be requisite mental states.[38] The degree of mental disease or deficiency is another issue that causes trouble in this area. Accordingly, many alternatives are seen in different laws, such as: mental defect or disease which renders a person incapable of appraising the nature of his conduct, severe mental incapacity, etc. Whatever the standard, the logical standard

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[36] Re John Z., 29 Cal. 4th 756, 128 Cal. Rptr. 783, 60 p. 3d 183 (2003) in Baum, Supra note 4,Sec. 17.4 Foot Note No. 7. In an earlier version of Baum's book, the former authors seem to argue that "consent by the woman to sexual intercourse negatives an element of the offense….unless the consent is withdrawn before penetration occurs". It, therefore, appears that consent once given before penetration cannot be withdrawn, thereafter. See, Wayne R. LaFave and Austin w. Scott Jr., Criminal Law, Second Edition, West Publication Co., St. Paul, Minn. (1986), p.487.

[37] Ibid, Foot Note 46-53.

[38] Id, Foot Note 55-58.

"should not be so broad as to cover persons suffering from only a relatively slight mental deficiency, not so narrow as to protect only those in a state of absolute imbecility".[39]

1.2.4.4.2 Statutory rape

Statutory rape refers to a situation wherein an adult engages in a sexual intercourse with a minor. Accordingly, this is a situation of lack of capacity to give a valid consent due to the victim's being underage. This variety of rape came to be known as "statutory rape", apparently because it was originally engrafted onto the common law by statute, and that term is used even today notwithstanding the fact that now statutes everywhere encompass the totality of the crime.[40] Though the rationale behind this form of incapacity is well known, there is no uniformity in the upper age limit within which a minor can give a valid consent. Accordingly, the age limit varies, between 11 and 14 or even higher than this, in the US.[41] Two outstanding issues in this regard are: whether or not sex with an adolescent female is dangerous or morally undesirable[42] and whether there should be a range of age differences between the adolescent participants inside of which sexual intercourse is lawful, which wisely excludes sexual experimentation between contemporaries from the penal law.[43] Whatever the argument, the current position is justified by the need to prevent: teenage pregnancy, consent to sex in an uninformed manner, thereby exposing minors to physical and emotional harm and deterring men from preying on young females and coercing them into sexual relationships.[44] Though statutory rape was a strict liability offense till quite recently, it is now possible to raise mistake of fact as a defense. Accordingly, a reasonable mistake is a defense when the age at issue is a higher age setting the very upper limits of the crime, but is not a defense when the age at issue is a lower age.[45]

Probably, one of the major reasons that prompted the gender neutrality of rape law is the abuse of minor males in the hands of adult females.[46]Originally it was thought that the male body is impenetrable and males were encouraged to present themselves as invulnerable in order to live up to this expectation.

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[39] Williams v. State, 125 Tex. Crim. 477, 69 s.w. 2d 418 (1934) in id.

[40] Ibid, Sec. 17.4(c).

[41] Model Penal Code Sec.213.1, Comment at 324 (1980) in id.

[42] Comment, 65 U. Chi. L. Rev. 1251, 1254 (1998) in id.

[43] Modal Penal Code Sec.213.1 Comment at 326 (1980) in id.

[44] Supra note 42 at 1259-60 in id.

[45] Model Penal Code in id.

[46]The following heavily draws from, Levine, Kay L, No Penis, No Problem, Fordham, urb.L.J. Vol.33, 2005 – 2006, pp. 357 – 405.

Moreover, it was also thought that if a boy physiologically responds to sexual overtures, he must be a willing and happy participant.[47]

Despite all these, researches made in the field amply demonstrate that young males are equally vulnerable to sexual abuse committed on them by adult females. Accordingly, male victims feel humiliated and angry when an older woman takes advantage of them sexually, and significant negative aftershocks, such as substance abuse, suicidal thoughts, sexual disorders, and violent behavior, are quite common after effects of such behavior.[48] Based on these findings, statutory rape laws are at present gender neutral.

Before closing this sub section, it helps to note that some feminist legal scholars are against the prohibition of sexual acts by minor females. One such scholar is Marsha Greenfield,[49] who argued that

> The simple need to control women is endemic to our socio - economic system and our society fears that giving females freedom to engage in sexual activity would probably destroy society as we know it. In response to that fear, the government withholds from the underage female the legal right to define her sexuality and punishes the male for violating the state's power to control the female's sexual activity. In fact the gendered law renders the minor girl literally incapable of having lawful sexual intercourse until she reaches the statutory age. The same is not true of minor boys, who are authorized to have lawful intercourse as long as their partners are not underage girls. Such presumptions reinforce the male sense of sexual adventure without consequence while stifling adolescent girls' sexual freedom or women's sense of their power in society.

1.2.5 Issues pertaining to procedure and evidence laws

Apart from the above discussed controversies, rape trials have raised so many other issues that pertain to the procedures in trials and evidences that need to be submitted to courts. It is alleged that rape claims are ridden with false accusations and therefore need special scrutiny. Accordingly, under the

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[47] Catherine Waldby, Destruction: Boundary Erotics and refiguration of the Heterosexual Male Body, in Sexy Bodies: The Strange Carnalities of Feminism 266, 268 (1995), Michael Thomson , Masculinity, Reproductively and Law, Emory Univ. Law School, Feminism and Legal Theory Project presentation, Working paper, (2005) in ibid, at p.385, 386.

[48] Ibid, at p. 397.

[49] Marsha Greenfield, Protecting Lolita: Statutory Rape Laws in Feminist perspective 1 Women's L.J. 1, 3(1977) in ibid, p.365.

traditional view, complainants were required to report the incident as soon as possible, or within a specific short period,[50] the victim's statements should be corroborated by other supplementary evidences[51] and the prior sexual conduct of the victim either with the defendant or any other person should be admitted to impeach her.[52]

As mentioned above, it is often said that rape is unique because it is premised on a conduct that under other circumstances may be welcomed by the victim so that the outcome will often turn upon a central fact difficult to resolve after the fact, what the woman's state of mind was at the time of the sex act. Accordingly, it is argued that victims will be tempted to fabricate complaints in particular, when pregnancy follows or bitterness at a relationship that has gone sour; or simply to blackmail the defendant;[53] and so on. Thus, it was assumed that a victim will speak out about the incident soon after the act or report this to the authorities, in the absence of which it will be presumed that her claim is fabricated. Because this presumption is unique to rape claims and premised on a non-logical ground, it is now abolished through reform.[54]
The corroboration requirement was premised upon the belief that, stories of rape are frequently lies or fantasies in that a woman may accuse an innocent man …because she is mentally sick and given to delusions; or having consented to intercourse, she is ashamed of herself and bitter at her partner; or because she is pregnant, and prefers a false explanation to the true one; or simply because she hates the man.[55] This position is criticized on the ground that fabrication of claims is not unique to rape and such difficulties can be managed through the standard of proof beyond reasonable doubt in which case, any doubt will favor the accused. This requirement is abolished through reform.[56]

The requirement of admission of prior sexual conduct of the victim was premised on the belief that it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent, than one whose past reputation was without blemish.[57] The other justification is presumed on the fact that in rape prosecutions, the inducement

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[50] Baum, supra note 4, Sec.17.5 (a).
[51] Ibid, at (b).
[52] Ibid, at (c).
[53] Model Penal Code, Sec.213.6, Comment at 421(1980) in Baum, supra note 50.
[54] Graham, The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence, 19 Willamette L. Rev. 486, 504-5 (1983) in ibid.
[55] Note, 67 Colum. L. Rev. 1138 (1967) in ibid (b).
[56] Model Penal Code, Sec.213.6, Comment at 428 (1980) in id.
[57] People v. Johnson, 106 Cal. 289, 39 p.622 (1895) in id.

to perjury and revenge is so great that it is of the highest importance that the motive and character of the prosecutrix should be rigidly investigated.[58] This position has been criticized on many grounds, such as it makes it appear that the victim rather than the defendant is standing trial and it is also one of the major causes for underreporting in the face of compelling evidences.[59] Currently, rape shield laws[60] are enacted with the view that such requirements should be limited and applied in rare situations that compel submission of evidences under evidence law, of course without impinging on the right of the accused.[61]

1.2.6 Gradation of the offense of rape and its punishments

There is no doubt that rape is one of the most serious crimes, as a result of which, it was punishable by death in the past.[62] Rape is now viewed simultaneously as a crime of violence, a sex crime, and a privacy offense. Today, the crime is properly classified as a crime against the person, one which hopefully protects the female's freedom of choice and punishes unwanted and coerced intimacy. As regards the punishment, though death sentence is criticized for being disproportionate and contrary to the constitutionally recognized right against cruel and unusual punishment, it is still made punishable by the severest forms of punishment, such as long prison terms.[63] Because of the concern over sex predators, there are now laws, that demand sex offenders who have already served their terms of imprisonment to: register in their jurisdictions, which may be for life; or require such individuals not to live within a certain distance of schools and childcare centers; not change their addresses or leave their state of residence without notice; register their place of employment; be prohibited from unsupervised parenting time or acquiring legal custody of their own children,

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[58] Kidwell v. United States, 38 App. D.C. 566 (1912) in id.

[59] Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 763 (1986); Hanford & Botching, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544 (1980) Tuerkheimer, A Reassessment and Redefinition of Rape Shield Laws, 50 Ohio St. L. J. 1245 (1989), Note, 27 U. Tol. L. Rev. 217 (1995) in id.

[60] A typical clause of the Criminal Law of Ireland provides that, "if at trial any person is for the time being charged with a rape offence to which he pleaded not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience of a complainant with a person other than the accused". Criminal Law (Rape) Act, 1981 of Ireland, Sec.3.1, www.legislationonline.org. Accessed on July 18, 2009.

[61] Baum, supra note 4, Sec.17.5(d).

[62] Ibid, at Sec.17.5(e).

[63] Duncan, supra note 6, at p.1104.

as well as allowing registration information to be available on the internet and in occasional circumstances not to use an emergency shelter with their own families, and to be tracked by satellite.[64]

It appears that the severity of the sentence to be awarded to rapists across the board has been found to be untenable as a result of which rape as a crime is now divided into degrees. The typical case is that of the Model Penal Code, wherein punishment depends on the severity of the injury inflicted and the type of force if any, used. Accordingly, when the defendant inflicts serious bodily injury upon anyone, this will be a crime that needs to be met with the severest punishment, then follows the case when the victim was not a voluntary social companion of the defendant on that occasion and had not previously permitted him sexual liberties, and at last gross sexual imposition, covering in the main cases where deception or lesser threats were utilized.[65]

2. Rape in Ethiopia: The Law and the Practice

It goes without saying that, rape is undoubtedly one of the rampant crimes in Ethiopia. At the social level, it can easily be noticed that sexual matters are so private, so much so that, individuals including those that may be considered as "modern and educated" by the society's standard, are not free to discuss such matters with anyone except with close associates. This culture of introversion has bred disincentives not only to seek advice from others but also report sexual crimes to the concerned authorities.

Contrary to such deep - seated culture of silence, there is a nascent trend that promises to propel the issue of sexual violence to the forefront and make it one of the burning issues of the time. Accordingly, civil society organizations, particularly those engaged in gender issues have done their best to sensitize the issue using different fora. As a consequence of this development, there is media hype on such issues wherein shocking incidents of grave violations of sexual integrity, particularly on minor children are reported, probably every week, if not every day. It appears that as a result of such sensitization, the agencies of the country's criminal justice system have given a special attention to such matters, as a result of which, many criminals are sent to prison, to serve their sentences and special benches are established in some courts to deal with rape cases.

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[64] Ibid, at pp. 1104 – 1108.

[65] Baum, supra note 4, Sec.17.5 (e). See also Model PC, Sec. 213.1. Note that such gradations are actually shown in many state laws, and the Model PC's position is also criticized. (The author's sources are by and large, state laws. Given the great number of laws cited therein, all footnotes are omitted.)

As indicated at the introductory part, the scope of this article is limited to highlighting the major issues of rape, but not to go any further. In line with this limitation, the following part discusses first, the treatment of rape under the Criminal Code and other relevant laws and then the practice, albeit very briefly.

2.1 Rape under the Criminal Code of Ethiopia[66]

The current Criminal Code of Ethiopia was enacted on 9th of May, 2005.[67] The code places rape under, Part II (Special part), Book III, Title IV, "Crimes against Morals and the Family", and more particularly, under Chapter I –

[66] The current Criminal Code of Ethiopia is a revised version of the Penal Code of the Empire of Ethiopia, Proclamation No.158 of 1957. The revised code, however, does not add any new element into the definition of the crime of rape as a result of which most of the elements of sexual crimes of the new code are verbatim copies of the former law. It should, however, be noted that the new code has aggravated the punishments and made minor changes here and there. One of its major contributions is making the crime of rape gender neutral. Accordingly, a female upon male rape is introduced for the first time with the enactment of the new law. Moreover, perpetration of other sexual crimes by females is given express recognition. It should be noted that under the 1957 Penal Code as well as the Criminal Code, females could be made liable through participation when the crimes are committed materially by male, See, Art.33 of both codes.

The 1957 code is, however, very different from its predecessor, i.e., The Criminal Code of Ethiopia, 1930. The latter code was inspired by its predecessor, i.e., the Feteha Negest, which is an amalgam of religious and secular rules. That section of the 1930 code had heavily drawn from the Feteha Negest – which came into effect in the 13th Century - so much so that the section that deals with "illicit sexual intercourse" directly quotes and cites the former law in so many instances. The two instances where the 1930 code provided for illicit sexual intercourse without consent are, when a man forces this act on a married woman –Art.387 and when a man has a sexual intercourse with a girl who has not reached the age of puberty without the consent of her parents – Art.395. In the latter case, it does not matter whether the girl has consented or not. Another article that comes close to the subject at hand is, Art. 398, which criminalizes sexual intercourse between a teacher and his student and a person and a girl whom he is teaching, or a man with a girl entrusted to his charge whom he received to bring up. All other articles deal with incest, adultery, seduction, etc. It will be interesting to note that all these crimes were punishable upon complaint unless done in public. As shown above, nonconsensual sexual intercourse was criminalized under two instances only. Accordingly, all other nonconsensual acts of sexual intercourse were not recognized.

[67] The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Proclamation No. 414/2004, (hereinafter, the Criminal Code).

"Crimes against morals" and Section I – "Injury to sexual liberty and chastity".

Rape as a crime, is legally defined under Art. 620(1) of the code as an act of,

> [Compelling] a woman to submit to sexual intercourse outside of wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance.

As per the definition in the above provision, the constituent elements of rape are:

- The act has to be an act of compulsion, and the purpose behind is, naturally to have a sexual intercourse with the victim;
- The perpetrator can be anybody – female or male – because the word " whosever" is gender neutral, though it appears that the lawmaker has male perpetrators in mind, for rape between or by homosexuals is treated independently.[68]
- The victim has to be a woman;
- The act has to be committed outside of wedlock, which means that marital rape is not a crime;
- The manners of compulsion are: use of violence, grave intimidation, rendering the victim unconscious, or incapable of resistance.

The full scope of the constituent elements of rape are given under this sub article and the other articles that deal with similar offences make use of the same elements or emphasize on absence of consent. For this reason alone, the following part discusses, these elements in light of the major issues identified and discussed in Part One.

2.1.1 The Act

Material act, as a prerequisite to criminal liability, takes on two forms, i.e. a positive behavior/ physical act or negative behavior, omission.[69] Rape falls under the former, i.e., physical act. It is implicit under Art.620 (1) that a rapist

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[68] Art.629 and the following. It is interesting to note here that the equivalent of Art.620 (1) under this section, i.e., Art.630 (2) (a), that deals with sexual deviation, alias, 'homosexual acts', reads as "[using] violence, intimidation or coercion, trickery or fraud, or [taking] unfair advantage of the victim's inability to offer resistance or to defend himself or his feeblemindedness or unconsciousness". Note that though rape proper under Art.620(1) and the crime defined under Art.630(1)(A) are identical except for the gender of the partners, the latter article has added extra elements such as coercion and fraud and different forms of incapacity are lumped together with violent acts.

[69] See, Art.23(1) of the Criminal Code.

has to do a physical act, such as the very act of sexual intercourse, or an additional act/s to compel the victim.

Given the remarks made with regard to intrinsic and extrinsic forces, above - 1.2.3.1- it appears that Art.620(1) demands extrinsic force, but not only intrinsic. This is so, because, a rapist is required to use violence or grave intimidation and then render the victim unconscious or incapable of resistance before raping her. Thus, a simple sexual intercourse without these qualifications cannot make one a rapist.

As shown above, under Sec. 1.2.1, sexual intercourse may take different forms, such as: anal, oral, digital, mechanical, etc. Moreover, the degrees of penetration as well as lack of capacity regarding emission and impotency may determine whether one is a rapist or not. Notwithstanding the remarks made under the next paragraph, the code, however, says nothing about these issues and it remains to be seen whether Ethiopian courts will take into account these factors to determine guilt.

In addition to rape proper, the code provides for a definition of another crime known as "sexual outrage accompanied by violence," under Art.622 and it reads as follows:

> Whoever, by use of violence or grave intimidation, or after having in any other way rendered his victim incapable of resistance, compels a person of the opposite sex, to perform or to submit to an act corresponding to the sexual act, or any other indecent act…is punishable…

The difference between the two articles is that in the case of rape proper, the act has to be an act of sexual intercourse, while in the case of sexual outrage it has to be an act "corresponding to" a sexual act or an indecent act. A look at their respective punishments shows that the former is a serious offence compared to the latter. Despite this difference, the code makes use of all these acts alternative elements of certain crimes, such as: sexual outrage on unconscious or deluded persons, or on persons incapable of resisting – Art.623; sexual outrage on persons in hospital, interned or under detention – Art.624; and taking advantage of the distress or dependence of a woman – Art.625, though here the term "corresponding to a sexual act" is missing. In all other cases, though, the three different acts are elements of other crimes, the punishments are different, i.e., the punishment provided for sexual acts is more sever compared to that of a corresponding act or an indecent act.[70] It may be argued that, if the two crimes are different in degree, then, in those

[70] See, Arts.626 (1) and (3); 627(1) and (3).

instances where they are provided as alternative elements, at least for the sake of consistency, the punishments should have been different too. Thus, lumping them under one crime, as alternative elements is not a wise choice, to say the least.

Be that as it may, the crucial issue here is what are these offences? Are they any different from sexual intercourse? In the absence of a source material, it may be reckoned that the law maker has in mind non-genital copulation - such as anal, oral, digital, mechanical, etc - and these may be taken as acts corresponding to a sexual act. One may surmise here that the difference between the two acts is the lawmaker's fixation on pregnancy which may be brought about by genital copulation alone but not through the other forms. Such fixation can , however, be criticized for failing to take into account the trauma that follows from the other forms of rape which may be equally or even more disastrous than rape committed through genital organs.

As regards, indecent acts, - though very vague - the probable act that may come to mind is touching or kissing, if at all these may be taken as indecent by societal standards. Such broad terms will naturally pose serious problems of interpretation on the part of the judiciary and it remains to be seen how this issue will be handled in the future.

2.2 Requisite criminal mentality.

Under the Criminal Code of Ethiopia, the requisite criminal mentalities, alias, the moral elements, for liability are intention and negligence.[71] Intention may either be direct or indirect. A person commits a criminal act through direct intention, when he did the act with full knowledge and intent (will and voluntariness) and through indirect intention, alias, *dolus eventualis*, when he did the act being aware, that his act may cause illegal and punishable consequences, regardless that such consequences may follow. Moreover, intentional acts are always punishable save in cases of justification or excuse expressly provided by law. Negligence also takes two forms, i.e. advertent and inadvertent. In the former case, an actor does an act by imprudence or in disregard of the possible consequences of his act while he was aware that his act may cause illegal and punishable consequences and in the latter case, through lack of foresight or without consideration while he should or could have been aware that his act may cause illegal and punishable consequences. Unlike in the case of intentional acts, however, negligent acts are liable to punishment only if the law so expressly provides.[72] It should be noted here,

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[71] Arts.57-59.

[72] See, Arts.23, 58 and 59.

that recklessness as a criminal mentality is unknown to the Criminal Code, though it falls in between indirect intention and advertent negligence.[73]

As far as sexual crimes are concerned – Arts. 620 – 628, as well as 629 – 633 - none of the articles of the code provides negligence – expressly – as a requisite criminal mentality. Thus, all crimes have to be committed intentionally in order to bring about criminal liability. It may be argued in this regard that, the different provisions that define the offences seem to demand direct intention, than indirect, for the terms employed appear to indicate purposeful acts rather than the opposite.[74]

As mentioned above - Sec.1.2.2 - a reasonable mistake can serve as a defense in rape trials. This defense is also recognized under Art.80 (1&2) of the Criminal Code. Accordingly,

> Whoever commits a crime under an erroneous appreciation of the true facts of the situation shall be tried according to such appreciation.
>
> Where there is no criminal intention the doer shall not be punishable. Where he could have avoided the mistake by taking such precautions as were commanded by his position and the circumstances of the case…he shall be punishable for negligence in cases where such negligence is penalized by law.

Since all sexual crimes under the code are required to be committed intentionally, then, a person who is mistaken negligently cannot be convicted. Thus, in order to fully avail this defense, a defendant has to show that, though he had done the act under a mistaken impression, he did not do it intentionally.

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[73] See, Sklar, Ronald, "Desire" , " Knowledge of Certainty" and dolus eventualis, Journal of Ethiopian Law, Vol. VII,No.2,pp.373-416, for further explanations on this point.

[74] As shown above, acts of violence, intimidation, etc. are required prior to or accompanying the sexual act. Thus, the reason for doing these acts is undoubtedly to secure sexual service from the victim. If so, such acts should be done for the same purpose and the mentality is more likely direct intention than indirect, which needs to be committed regardless that consequences may follow. Furthermore, though knowledge/awareness is implicit in all articles, Art.623 expressly requires knowledge, by providing that the criminal has to do the act "knowing of his victim's incapacity". If full knowledge as opposed to probability that consequences may follow is required, then the requisite criminal mentality has to be direct intention.

Before we leave this discussion, it helps to note that rape is a gender neutral crime under the Criminal Code.[75]The relevant article, i.e., Art.621 reads "A woman who compels a man to sexual intercourse with herself …is punishable." Though the punishment prescribed for this crime is much lower than the case of a male raping a female,[76] it is interesting to note that except for compulsion, other elements of rape proper are not required for this offence. There is no explanation given for such a difference in the *expose des motifs*.[77] In the absence of this, it appears that the law maker is much concerned with pregnancy or the psychological trauma that may follow. But these factors are taken into account to aggravate the punishment, under Art.628. Then the basis for the difference in punishments is something else. Whatever the rationale, this opens the door for a constitutional issue of unfair discrimination.

2.3 Threat, coercion, drugs and intoxicants

To begin with, none of these elements are employed in the code. This does not, however, mean that they have no relevance. This is so for the following reasons:

- The word "intimidate" under Art.620 (1) is defined as "to frighten or threaten someone, usually in order to persuade them to do something that you want them to do".[78] Accordingly, a rapist who employed intimidation to secure sexual submission from the victim is undoubtedly, liable to punishment. Apart from this, it is not clear whether the victim has the duty to resist the threat in earnest, as discussed above, under Sec.1.2.3.2. It, however, appears that the law demands a high level of intimidation, but not the ordinary one, for it is required that the degree of intimidation has to be "grave", and the victim should be made unconscious, or incapable of resistance. Thus, any threat short of this, may lead to a conclusion that the victim could have resisted the intimidating force and the actor cannot be held liable. Since this stringent qualification is highly criticized in other jurisdictions, it remains to be seen whether Ethiopian courts will disqualify them. Moreover, whether the threat should be posed against the victim or

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[75] See, Supra note 66.

[76] Under Art.620 (1) the punishment is rigorous imprisonment from five years to fifteen years, while under Art. 621, it is rigorous imprisonment not exceeding five years.

[77] This is a document issued by the legislature, though not officially published. It attempts to explain the reasons why changes are made on the repealed law. It is printed in Amharic (the working language of the Federal Government of Ethiopia). The only reason given in this regard is that "a new article is added due to the increase in the number of such crimes".

[78] Cambridge, Advanced Learners' Dictionary, soft copy, in file with the writer. No date given.

someone else related or unrelated to her is an issue that demands a judicial interpretation. It may, however, be suggested that as far as there is intimidation, it should apply to all situations, for the law has not limited this circumstance to any specific person or relationship.

Coercion is very similar to threat in definition. Accordingly, it is defined as "to persuade someone forcefully to do something which they are unwilling to do".[79] This issue is, however, discussed in light of institutional or professional relationships between a victim and the perpetrator of the crime.

Institutional and professional relationships are reflected under two articles of the code on sexual offenses.

> Art. 624: Whoever, by taking advantage of his position, office or state, has sexual intercourse or performs an act corresponding the sexual act or any other indecent act with an inmate of a hospital, an alms house or an asylum, or any establishment of education, correction, internment or detention, who is under his direction, supervision or authority…is punishable….
>
> Art.625: Whoever, apart from the cases specified in the preceding article, procures from a woman sexual intercourse or any other indecent act by taking advantage of her material or mental distress or the authority he exercises over her by virtue of his position, function or capacity as protector, teacher, master or employer, or by virtue of any other like relationship…is punishable [upon complaint]. [80]

It will be interesting to note here, that the victim in the former case can be anyone of the genders, while in the latter case, it should be a woman. Moreover, though educational institutions are mentioned in the former case, the term "teachers" is mentioned again in the latter case. Though, it will be difficult to explain such disparities in the absence of authority, it appears that the law's fixation on female victims has contributed to this legal position, in

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[79] Ibid.

[80] Note that "an act corresponding to the sexual act" is missing here. It will be interesting to note here, that Art.596 of the former Penal Code, entitled as " Seduction" and which reads as " Whosoever, by taking advantage of the inexperience or trust of a female minor between fifteen and eighteen years of age, induces her to have sexual intercourse with him, whether by promise of marriage, trickery or otherwise, is punishable, upon complaint, with simple imprisonment" is repealed on the ground that it is made a constituent element of Art.626 of the Criminal Code, which is not so in fact. See, the *Expose de Motif,* Supra note 77.

particular the latter position. As mentioned above, however, sexual crimes are by and large made gender neutral under the revised code and the same position should have been reflected under Art.625. Moreover, though the crime defined under Art.625 is named as "taking advantage of the distress or dependence of a woman", it is an old equivalent of "sexual harassment," though it does not include the modern element of "hostile working environment" and other expressions. Given modern institutional relationships between individuals, and the current trend of females holding important institutional positions, the crime should have been made gender neutral.

Another interesting aspect of the difference between the two articles is the punishments provided for the two crimes. Here, while the punishment for the former crime is simple imprisonment for not less than one year, or rigorous imprisonment not exceeding fifteen years, the punishment for the latter is simple imprisonment.[81] Moreover, the latter crime is punishable upon complaint, meaning charges cannot be instituted without complaint and the victim can condone the act while this is not so in cases of the former crime. Though it may not necessarily be a warranted position, it appears that in the former case, victims are taken as helpless individuals who cannot bargain over their sexual conducts, while in the latter, the bargaining power is relatively stronger. In addition to this, given the fact that in both cases, the sexual intercourse that took place are technically consensual, but not extorted through violence, intimidation etc., the punishment provided for under Art.624 is almost equivalent to rape proper.[82] It should be noted here that when rape proper is committed against those individuals listed under Art.624, the punishment ranges from five years to twenty years under Art.620(2). Though, aggravation under sub two may appear to be logical, the initial punishment for consensual intercourse seems to be disproportionate.

So far, the Ethiopian law seems to accord to the standards discussed above - Sec.1.2.3.2 and 1.2.3.3 - except for threats to retaliate, exposing the victim to public humiliation or disgrace, etc. These situations are not covered under that section of the code that deals with sex offences, but rather blackmail is provided as a crime against right in property under Art.714.

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[81] Simple imprisonment normally extends from ten days to three years. – Criminal Code, Art.106

[82] The punishment provided for rape proper is rigorous imprisonment from five years to fifteen years, while in the case of Art.624 it is simple imprisonment for not less than one year, or rigorous imprisonment not exceeding fifteen years. Though the lower limits are different, the upper limits are identical and this is the point that needs to be highlighted.

As regards fraud, within the context of rape, - discussed above, under Sec. 1.2.3.4 – none of the sex offenses in the code contain an element that may lead one to conclude that a sexual intercourse secured through fraud is a crime. So, it may safely be concluded that this act can be done with impunity unless and otherwise the law is to be amended in such a way as to include fraud.[83]

As far as drugging a person so that he should lose feelings or consciousness is concerned, it may be argued that one of the elements provided under Art.620(1), i.e. "rendering the victim unconscious or incapable of resistance", can be taken to mean, drugging or intoxicating a victim, provided that the intention or purpose is to secure sexual intercourse. It also appears that the provision requires that a rapist should administer the drug or intoxicant. With this in mind, it is very unlikely that a person who took advantage of an intoxicated person for sexual ends will be made criminally liable.[84]

2.4 Consent in general

It is noted above, - Sec.1.2.4 - that consent as an element of rape raises so many collateral issues. Given the controversial nature of these issues, the debates over them have not yet abated. This section will attempt to show whether anyone of the issues are reflected under Ethiopian law.

To begin with, the word consent does not appear anywhere in those sections of the code that deal with sexual crimes. It may, however, be said that it is implicitly provided in all articles. The general drafting style of the relevant articles evinces that such crimes are divided into two, i.e., those that require use of violence, grave intimidation, and rendering a victim unconscious or incapable of resistance and those that do not require these qualifications. The latter types of crimes are provided as having sexual intercourse only, and mainly the victims are those who cannot give valid consents. Thus, since violence, intimidation, etc. are circumstances which compel a victim to submit to sexual advances without consent, then such acts are naturally nonconsensual, and the rest are consensual.[85]

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[83]Art.591(2) and 596 of the repealed code had provided that sexual intercourse with unconscious or deluded persons or those incapable of resisting secured through misrepresentation and a minor between the ages of fifteen and eighteen through trickery are punishable. These two come closer to fraud, but they no more exist in the revised code.

[84] Deprivation of powers of decision against one's wills by administering alcohol, narcotic, etc. is a punishable act, under Art.583.

[85] Arts.620 – 622 belong to the former group, while all the rest of the articles under the section belong to the latter.

With regard to the requirement of resistance, it appears that this is an important element of the crime of rape under the law, for the degree of intimidation has to be grave and it should be so strong so much so that the victim has to be incapable of offering resistance. So, if it was possible to put up resistance, then the victim has to exhaust this before submitting to the demand of the rapist. Whether or not the victim should show her non-consent verbally or whether an oral resistance suffices, is just a matter of opinion, though it appears that the code's requirement of violence, grave intimidation, etc. seem to suggest that the intensity of coercion has to be very great and the victim should not give in to average or minor threats and that she should fight the force coming from the rapist as far as she could, or in earnest and that the resistance should be physical. Thus, a mere "no" may not necessarily be taken as an expression of resistance. This forecloses any discussion about verbal resistance and for stronger reasons, silence, for the law has provided in clear terms that the victim has to be deprived of her power of resistance. Such requirements, as shown above, have been subject to criticisms, as a result of which they are now modified or made useless *in toto*. The Ethiopian law maker should also take into account this development and amend the law accordingly, for the presence of this requirement can expose rape victims to further damages and victims' expression of non-consent should be allowed to be made in any form. What is required at the end of the day is whether the victim has expressed her rejection in any form, but not necessarily physically.

As regards, withdrawal of consent, though the Ethiopian law has no clear stand on this position, what matters is the type of coercion exerted on the victim under the circumstances. So, it may be argued that a victim has the right to withdraw her consent but the rapist has to employ the necessary force, - mentioned above – to continue with the sexual intercourse. If no such force is employed or the victim has failed to put up resistance, then under the existing law, such an act cannot amount to rape.

Marital rape, as explained above, - Sec.1.2.4.2, - has remained as a defense for a long time in the law books. At present it no more exists as an exception in so many jurisdictions. Despite this, it still exists as an exception under Ethiopian law.[86] The reasons for maintaining this exception were premised on different theories that reflect the moral values of different societies, which are undoubtedly discriminatory against women. To the best knowledge of this

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[86] The term "outside of wedlock" under Art.620 (1) expresses this exception. It should be noted that marital rape is not a constituent element of Art.621, i.e. a female upon rape male rape as a result of which a female cannot be made criminally liable if she rapes her husband.

writer, the issue is still mute, for it is nowhere discussed as an issue.[87] Probably, the only time when the issue was raised, though in passing, was when a gender based NGO published its research on violence against women, in 2004.[88] Interestingly enough, the research does not show a strong condemnation of marital rape among the sample groups singled out for response. The different data collected by the researchers or quoted by them do not bode well for any effort to delete the exception from the law. Here are some of the major statistics: one in two women believes that a husband is justified in beating his wife if she refuses to have sex with him;[89] the incidence of marital rape is 14.9%, though many respondents were hesitant to be frank; 5.4% females were raped when they refused to have sex; and 10.4% of student respondents agree that a woman deserves some form of punishment if she refuses to have sex with her husband;[90]

Moreover, the researchers' reaction is lukewarm, to say the least, for in those instances in which they attempted to show their disapproval, they were so general so much so that one may be tempted to conclude that they were passionless.[91] Against this background, it may be difficult to forecast that the exception will be removed soon. Gender based civil societies have to work a

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[87] Though the presentations under the above sections deal strictly with the law and legal elements, the writer has opted to deal with the practice for this sub section only, for it is intended to show the social perception of this particular act as a departure. Accordingly, this writer had attended a few workshops organized by different bodies to collect suggestions to revise the old penal code. As member of the drafting committee for some time, he had also the opportunity to read recommendations submitted by different bodies, such as gender based NGOs. Though these groups have expressed their disagreement with this legal position, they were not passionate enough to arouse public support, as they did with regard to other crimes such as abortion. The general mood of participants of the different workshops tends to show that removing the exception is "contrary to our culture", it disrupts the bond that needs to exist between spouses, etc. So, the exception that was seen in the repealed law is allowed to continue.

[88] Original Welde Ghiorgis, Emebet Kebede, and Melesse Damte, (hereafter Orignal et al.) Violence Against Women in Addis Ababa, Berchi, the Annual Journal of Ethiopian Women Lawyers Association, 2004.

[89] Ibid, at p.126, quoting, Ethiopian Demographic and Health Survey 2000, Central Statistics Authority, Addis Ababa, Ethiopia.

[90] Ibid, pp.144, 148 and 152, respectively.

[91] In the two instances wherein they showed their position, their expressions are limited to saying that "the failure of the law to protect the wife from marital rape contributes towards weakening her position to negotiate safe sex" at p.120 and "the [Criminal Code] fails short of international standards in according women adequate protection. For example, [ ] marital rape … [is] not considered as [a] crime", p.254.

lot in order to propel this issue to the public agenda, for the issue as discussed above, provokes serious constitutional issues such as those discussed above under Section 1.2.4.2. Incidentally, it helps to note that Ethiopia's position on 'marital rape' had been raised as a cause for concern, by the UN, Human Rights Committee when it considered Ethiopia's report in 12 July, 2011, but the country's representatives did not respond to the request.[92] Hence, it remains to be seen whether such societies or any other stakeholder will do something to amend the law any time soon in the future.

2.5 Incapacity

Incapacity as shown above, - Sec.1.2.4.4, - takes two forms, i.e. those that emanate from mental disease or defect and those that arise out of age. These factors are well taken into account under the Criminal Code of Ethiopia and these will be discussed hereunder.

Art.620 (2) (c) provides that

> Where rape is committed on a woman incapable of understanding the nature or consequences of the act, or of resisting the act, due to old age , physical or mental illness , depression or any other reason…[the act will be considered as an aggravated form of rape][93]-[underline added].

Another facet of rape, i.e., sexual outrage, which is required to be done without violence or intimidation, but to be done against unconscious or deluded persons incapable of resisting, is also a punishable act.[94]

It is here, interesting to note that though there was an attempt to make all sexual offences gender neutral, in the case of rape, the victim has to be a female while it is not so in the other case. Moreover, though all sexual crimes require intention as a criminal mentality, sexual outrage expressly, requires "knowledge", which may be taken arguably, to mean, direct intention. In both cases, the degree of incapacity, i.e., total or partial is not indicated sufficiently, though it appears that the wordings of the relevant articles demand total incapacity. All these shortcomings call for a reconsideration of the relevant

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[92] http://www.unog.ch/80256EDD006B9c2E, last visited on August 23, 2012.

[93] Normally rape is punishable by rigorous imprisonment from five to fifteen years, while aggravated rape is punishable by rigorous imprisonment from five years to twenty years.

[94] The article reads as follows: "whoever, knowing of his victim's incapacity, but without using violence or intimidation, performs sexual intercourse, or commits a like or any other indecent act, with an idiot, with a feeble-minded or retarded, insane or unconscious person, or with a person who is for any other reason incapable of understanding the nature or consequences of the act ….is punishable – Art.623.

articles in light of the development of the issue in other jurisdictions. The gender specific crime under Art.620 (2) in particular, is not justifiable under any condition.

With regard to rape or sexual outrage against minors, alias "statutory rape", it appears that the code has given sufficient protection against these acts. Accordingly, rape committed against a young woman between thirteen and eighteen years of age, is an aggravated crime under Art.620 (2) (a); per Art.626(1&2), sexual outrage with a minor of the opposite sex – under the same age bracket – is made a crime, though the punishment varies when the act is done by a male and a female;[95] and performing an act corresponding to the sexual act or any other indecent act, as well as, *deliberately performing such acts in their presence*,– against minors in this age group – is a punishable act, under Art.626(3). [Emphasis added]. Moreover, per Art.626 (4), the respective punishments are made more sever, when the victim is the pupil, apprentice, domestic servant or ward of the criminal. According to Art.627, all these crimes when committed against minors who are below the age of thirteen are made punishable with more severe penalties, compared to those provided for sexual outrage. At last, per Art.628, unless and otherwise a more severe penalty is provided, the penalty will be aggravated where: the victim becomes pregnant; the criminal transmits to the victim a venereal disease which he knows himself to be infected; or the victim is driven to suicide by distress, shame or despair.

The dividing line in all the provisions is thirteen years of age. Though, whether this uniform threshold age, is scientific or not is a matter of opinion, the relevant articles mentioned above, raise some critical issues. Accordingly, given the fact that sexual intercourse with a minor of tender age, say, ten years or less - which is not uncommon in this country - causes more harm than the same act committed on a thirteen to eighteen years of age minor, the law had failed to take this as a special aggravating circumstance. What is provided in this regard is sexual outrage, not rape.[96] In addition to this, the law's fixation

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[95] The act when committed by a male is punishable with rigorous imprisonment from three years to fifteen years, while it is rigorous imprisonment not exceeding seven years, when it is committed by a female- Art.626(1) and (2).

[96] Sexual intercourse with a minor under thirteen years of age is taken as sexual outrage only, and this is a consensual intercourse, according to the definition given to the act under the code, for no violence or intimidation is required. Though the punishment for sexual outrage on such minors is more severe than rape against those who are between thirteen and eighteen – rigorous imprisonment from thirteen years to twenty five years for the former and from five years to twenty years for the latter – it would have been preferable to separate the acts into rape proper and sexual outrage

on pregnancy or chastity – presence of hymen - has made the punishments different when the victim is a female and a male. Given the consequences of rape or sexual outrage on male minors, more particularly, the psychological harm, this point appears to demand reconsideration. At last, the alternative form of sexual act provided under Art.623 (3), i.e. performing acts that correspond to the sexual act or an indecent act *in the presence of a minor* is quite different – in the extent of consequences - from doing the acts themselves on the minor. Thus, its inclusion as an alternative element is unwarranted, to say the least, for the extent of harm that may ensue as a result of being a victim of the physical act and simply watching sexual partners perform the act or even engage in indecent acts are obviously quite different. Whether or not the age limit discourages sexual experimentation between minors or is an impediment to free sexual expression is a matter opinion, but needs reconsideration.

2.6 Issues of Procedure and evidence

As noted above, - Sec. 1.2.5,- rape trials have developed their own unique issues and solutions, most of which were solved after reform. Such issues pertain to, *inter alia*: false accusations that emanate from pregnancy, sour relationships after the affair, blackmail, etc. Accordingly, rape victims were required to report the incident within a short time, their testimonies should be corroborated by additional evidences and their prior sexual conducts should be admitted for the purpose of impeachment.

Such issues are more academic than practical in the present day Ethiopia, for at least one reason, and this is the absence of an evidence law that governs the area. Ethiopia, has not yet enacted an evidence law, as a result of which evidence provisions are scattered in other laws, either substantive or procedure laws. These scattered provisions do not help much in addressing the multifarious issues that arise in rape litigations. Thus, it is common among professionals to grapple with such issues and litigate cases based on a draft evidence law – which has no binding force – but is taught in law schools, and may arguably be taken as a persuasive sort of law. This draft, of course contains provisions that deal with admissibility of evidences, relevance of

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and provide appropriate punishments at least for the sake of consistency. It is well known that a minor – under eighteen – cannot give a legally valid consent, but consent, nonetheless. Despite this, those who are between thirteen and eighteen are minors, and their consent, though invalid in the eyes of the law makes the crime committed against them a less serious offence, i.e., sexual outrage, but not rape proper. So in the case of those who are under thirteen years of age too, the same formula should have been followed and it should have been left for the defendant to prove that there was consent, which will be hard to prove as the age in question decreases.

evidences, etc. But, given its nature, i.e., that it is just a non - binding draft law, it will be of no help here. Accordingly, no discussion is offered here regarding issues of evidence. The Criminal Procedure Code also does not offer much help here, for its provisions are very general so much so that an attempt to search for precise solutions to the above issues simply leads to a dead end. Nonetheless, this code provides that both the prosecution and the defense have rights to submit their own evidences, call witnesses, put questions to witnesses, in the form of examination in chief, cross examination, and reexamination. Moreover, as the country follows the inquisitorial system as opposed to the adversarial, courts may also call any witness whose testimony it thinks is necessary in the interest of justice. Both parties have the right to object the admission of any evidence or the putting of a question to a witness and the court has to the duty to decide forthwith on the admissibility of such evidence.[97] Given such a lacuna, it may be argued that parties to rape litigation, more particularly, the defense, can raise all the issues mentioned above, and it will be difficult for the prosecution to oppose the submission of evidences provided that they are relevant. Given the difficulties that arose vi`s a vi`s these issues in other jurisdictions, Ethiopia has to enact an evidence law and take these factors pertaining to rape litigations into account. The enactment a rape shield law should also be considered.

2.7 Punishment

Rape is naturally considered as one of the most serious crimes under the code. This can be gleaned from the different punishments provided for rape proper and its other facets. Accordingly, rape proper is punishable with rigorous imprisonment from five to fifteen years; from five years to twenty years when the victims are those that are incapable to give valid consent; and life imprisonment when the act has caused grave physical or mental injury or death.

These punishments are comparable with those provided for other well known serious crimes such as homicide and robbery. Comparative punishment scale also shows that rape is more serious than grave willful injury, for the punishment for the latter is rigorous imprisonment not exceeding fifteen years under Art.555.

By way of conclusion, though the different mechanisms that have developed in other jurisdictions to track rape offenders are not put in place in Ethiopia,

[97] See, Arts. 136 - 147 of The Criminal Procedure Code Proclamation 1961, Extraordinary Issue No.1 of 1961, on evidence. The code, however, does not provide how the court can rule on such issues.

for the economic development does not allow their presence, policy makers should, however, consider their implementation if not now, but in the future.

2.8 The practice

2.8.1 Court cases

Seventeen court cases decided in 2006/7, 2008/9 [1999 and 2001 E.C][98] and one case in 2012 are analyzed in the following section. Two of the cases were entertained by the Federal High Court, while the rest were entertained by the First Instance Court.

Profiles of the cases

- Defendants were represented in two of the cases in the First Instance Court and one case in the Appellate Court only.
- The rate of conviction was 12/15 and nil at the First Instance, and at Appellate Court, it was 12/13, respectively.
- The age of victims ranges from 9 months to 25 years. Four of these are adults, i.e., above eighteen years of age, while the rest are minors and infants, i.e., below thirteen years of age.
- Sentences passed on convicts range from 1 year of rigorous imprisonment up to life. Only one out of the fifteen defendants was acquitted by the First Instance Court, while two of the appellants – who were sentenced to 5 years of imprisonment – are set free by the Appellate Court[99]. In two cases of attempted rape,- Cases NO.69602

[98] Courtesy of judges Kedir Mhammed and Maria Kahsay. File Numbers of these cases are: First Instance cases: 85118, 83089, 64260, 57206, 70125, 69602, 144610, 137377, 108791, 124402, 131807, 144573, 146952, and 150068 and 68086 and 71034 from the appellate court. All the cases were decided between 2007 and 2009.
Court decisions are not normally published in Ethiopia. Despite this, the Federal Supreme Court more particularly, its Cassation Division has started publishing its decisions quite recently. To the best knowledge of this writer, it is only one case that pertains to rape that is reported in this publication and this case does not help much in elucidating anyone of the issues treated in this article. In all other cases, court files are stored in archives and researchers have to sift through many box files to locate cases of their interest. The cases discussed here do not in any way represent the cross section of issues or decisions of courts, but these are mere samples. The writer believes that those cases discussed hereunder throw light on the critical issues that need to be covered and show judicial trends.

[99] In Case No.144573, the First Instance Court acquitted the defendant who allegedly inserted his penis, fingers and a scissor into the vagina of a 3 years old female on the ground that medical examination was sought five months after the first incident, though the parents claimed that they had forgiven the first act, but forced to seek examination when the defendant repeated the act soon before the examination. The medical report shows that though some lacerations are visible, the hymen is intact. The Appellate Court reversed the two cases in which defendants were convicted and

and 131807 - wherein the victim raised hue and cry and saved by those who heard that and a victim who noticed that the defendant was attempting to rape her while asleep, but managed to escape, the court awarded a 5 years and 1 year imprisonment, respectively

- Typical acts of violence were proved to have been employed in at least five of the cases. Accordingly defendants had muffled the mouths of their victims, tied and pulled their arms, threatened them with knives, dragged them into toilets and closed doors behind victims, took off their clothes and in some cases victims were seen lying unconscious after the acts. In those cases that involved infants consent was not required to prove, while in the other cases it is not clear whether the acts were done violently or otherwise.
- As regards defenses raised by defendants, two defendants argued that the acts were done upon consent – cases NO.83085 and 71034 – discussed above. In the former case, the defense was rejected by the court, for victim was seen lying unconscious after the act and the second case, the decision of the lower court was reversed on the ground that the act was done consensually. Two defendants raised an oblique defense of absence of resistance in which they denied doing the act and argued that had they done it, victims would have raised hue and cry – cases NO.144610 and 146952. Interestingly enough, victims were 9 and 10 years old and a grand and a step daughter of the rapists, respectively.
- The severest injury inflicted was permanent gynecological problem in Case NO.8510 in which the victim was a 9 months old child. The next

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punished with 5 years of imprisonment on the following grounds: The defendant – a visitor to the home of the victim's parents – requested the victim- who is only 13 years of age - to give him a glass of water and then asked her to kiss him. Then after he pushed her onto a nearby chair, threw himself on her, attempted to take off her clothes and started to struggle. The victim, however, managed to escape the attack by pushing him off herself and crying for help in which case he desisted from going any further. The Appellate Court, argued that what were done in the case amount to preparation, but not attempt, for there should be further acts that need to be done by the defendant, so that the acts could have amounted to attempted rape. Note that per Arts.26 and 27 of the Criminal Code, "preparatory acts are not usually punishable, unless in themselves they constitute a crime defined by law or they expressly constitute a special crime by law… and an attempted crime is always punishable save as is otherwise provided by law". In the second case, defendant took the victim – a 17 years old female - to his house promising to marry her and she stayed there for a single night. A medical report proved that an old defloration is observed. The court argued that the victim has contradicted her testimonies. The prosecution cannot prove violence and the act amounts to seduction, but not rape. Cases NO.68086 and 71034, respectively.

severe injury was inflicted on a 10 years old female by her step father who deflowered her and repeated the act at a later time. The victim's injury was communicated to the mother through the former's instructors. The rapists were awarded a life and 25 years of imprisonment, respectively.

- Incidental issues – the First Instance Court took prompt reporting as a factor to convict a rapist in Case NO.57206 and acquitted a defendant on the ground that medical examination was sought five months after the incident. In Case NO.137377, the Court rejected the defendant's plea to have a reduced punishment on the ground that the medical report shows that the victim's hymen is intact and what was proved was the presence of a recovering laceration. The Court reasoned out that partial penetration of the penis suffices for the purpose of conviction.
- The only case in which a female was convicted for raping a 2 years old male infant is the one reported in Ethiopian Reporter[100]. The convict caused the infant to have sexual intercourse with her as a result of which he started to raise the skirts of and show acts of sexual intercourse on other maids who were employed by the family after the termination of the contract of employment of convict. Medical evidence proved that the kid has suffered from psychological trauma and referred to a specialist. The convict is sentenced to a five and a half years of imprisonment.

The sample cases presented above may lead one to conclude that rape cases do not call for any sophisticated legal issues and can be disposed with ease. The rate of conviction may also be indicative of the fact that suspects have little opportunity to escape the harsh consequences of criminal liability. Though these may not necessarily be the only conclusions that may be drawn from the practice, it appears that Ethiopian lawyers – at every level – need to give full effect to the letters of the law by raising critical issues and resolving rape disputes according to the spirit of the law. It can be easily gleaned from the above cases that necessary elements of the law were not applied in all cases.[101] Though the absence of defense counselors might have contributed to this state of affair, judges should also do their best in handling delicate issues that determine innocence or guilt, and the severity of sentences passed by them and provided by the law for such crimes call for extra vigilance.

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[100] Ethiopian Reporter, Amharic Version, June 3, 2012. No case number is shown in the report.

[101] It should be noted that all the court decisions are not beyond criticism. Given the scope of this article, however, no attempt is made to do so.

2.8.2 Other researches

Contrary to the above presentation, wherein the majority of defendants were found guilty and sentenced to prison terms, a study conducted in 2004,[102] draws a gloomy picture of rape cases handled by different agencies of the criminal justice system. According to this research, which has studied 123 files of rape cases at different police stations, offices of the prosecution and courts, "even if it is not proved whether it is due to the actual increase in the rape numbers or the number of reports, the trend shows that there is an increase in the crime of rape rate that has been reported, prosecuted, and adjudicated.[103]"

The research also shows that different forms of sexual intercourse, such as anal, oral and digital are not uncommon in the country.[104] This may not be surprising given the uncontrolled circulation of pornographic materials, not only in the capital city wherein the study was conducted, but all over the country. Sadly enough, most of the victims were infants – in the wording of the law – and most of the rapists were those known to them, such as biological fathers, and step fathers.

The researchers lament about the deplorable state of handling rape cases at the different agencies and in particular the fixation of officials on the presence or absence of hymen to prove or disprove that a rape has taken place. Moreover, though consent, is mentioned incidentally in the research, it is shown that prosecutors and courts tend to treat rape cases as cases of sexual outrages even when these are committed against infants below the age of ten, provided that no force is employed. The abuse of bail rights, the short sentences given by the courts, and fake marriages[105] that are concluded after the cases are reported to the authorities are some of the major shortcomings of the justice system identified by the researchers. The researchers also opine that "the difficulty to prove the offence beyond reasonable doubt, pressures created by the offenders or their families against the victim or her family members…economic dependency of the victims on the offenders (e.g. step

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[102] Original W/Ghiorgis, et al. Supra, Note 88.

[103] Ibid, p.251.

[104] Id.pp.167, 217,218,224,227 and 242.

[105] An article under the repealed law had provided that "where the victim of rape, indecent assault or seduction or abuse of her state of distress or dependence upon another, freely contracts a marriage with the offender, and the marriage is not declared null and void, no prosecution shall follow. Where proceedings have already taken place, and have resulted in a conviction, the sentence shall terminate forthwith" - Art. 599. This article was highly criticized for giving a shelter to those who want to escape liability in the name of marriage which may be dissolved upon minor pretexts and prejudicial to females. Accordingly, it is now repealed.

fathers and employers)…fear, embarrassment, self-blame, confusion and ignorance of their rights" have contributed to the underreporting of rape case.[106]

Conclusion

There is no denying the rampancy of rape crimes as well as their consequences in Ethiopia. These are mainly caused due to legal loopholes, the male chauvinist culture that has deep roots in the cultures of many societies, the inefficiency of the different agencies of the criminal justice system and lack of awareness on the part of victims. It may also be added that lack of knowledge on the part of lawyers regarding the legal requirements necessary to handle rape cases is undoubtedly another predicament in this regard. The fact that many legal issues that include constitutional interpretation are not yet tested in the country bears witness to this fact. The close to total absence of the exercise of the right to defense counsel, has led to a vacuum to raise such intricate legal points mentioned in this article. Given the severity of punishments prescribed for sexual offenses, however, all defendants should have been given this opportunity.

The Ethiopian rape law is definitely in need of a rethinking for it leaves much to be desired. Accordingly, the law needs to incorporate the different standards that have developed in other jurisdictions. In this regard, it is recommended that in the future rape law: All sex crimes should be made gender neutral and their punishments should be similar if not necessarily identical; the distinction between rape and sexual outrage accompanied by violence should be made clear; or alternatively, the two crimes should be merged. Moreover, the lumping of these crimes as alternative elements of certain crimes should be done away with.

Moreover, the future law should also address the reconsideration of marital exemption; appropriateness of punishments for the crime of rape and its variants; and enactment of rape shield law.

Civil society organizations should also endeavor to create awareness among the general public in general and potential victims of rape in particular. Sensitization of the law among law enforcement agencies should be considered as well. With these recommendations, it will be hoped that the future rape law of Ethiopia will serve all in equality.

[106] Id. at p.251.