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XV.

Carnal Knowledge in Sexual Offenses: Contentious Issues on the Criminal Liability of a Female Procurer

Okey Onunkwo & Ikenga Oraegbunam[1]

Abstract

The terminus ad quem *of this essay is to bring to light a latent absurdity in the last paragraph of s.7 of the Nigerian Criminal Code. While s.7(d) creates criminal liability for procuring a criminal offense, the last paragraph of s.7 appears to qualify it in a situation where the actual perpetrator himself is not criminally responsible for his acts or omissions. This qualification can, in some instances, exclude altogether the criminal liability which ought to be imposed on an offender who has procured a criminal offense. The essay finds sexual offenses involving a female procurer a convenient instance of such exclusion. It argues that in a situation where such female is charged with procuring a person not being criminally responsible, to commit a sexual offense, neither the actual perpetrator nor the procurer can be criminally liable therefore. This exclusion of criminal liability by reason of non-satisfaction of the requirements of the said last paragraph of s.7 is clearly an unjustified inhibition on the imposition of criminal liability for procuring an offense prescribed in s.7(d).*

In light of the foregoing, the essay suggests an amendment of the last paragraph of s.7 in such a manner as would eliminate the absurdity therein and preserve, without qualification, the criminal liability imposed by s.7(d) on an offender who has procured the commission of a criminal offense.

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1. Introduction

SEXUAL OFFENSES IN THEIR AGGREGATION CONSTITUTE an outrageous, grave and revolting onslaught on the dignity of the human person. As a result, they are viewed with utter revulsion in all decent human societies the world over. This is vividly reflected both in their condemnation as an unacceptable behavioral pattern and in their criminalization in penal laws of sovereign states. The Nigerian society and its penal laws are also in accord with this predisposition. Penal laws punish sexual offenses by prescribing custodial sentences on offenders, which sentences are, in certain aggravating situations, very severe.

In the Criminal Code,[2] the bulk of such sexual offenses is contained in chapter 21.[3] They include the offense of *having carnal knowledge* of any person against the order of nature,[4] or of an animal,[5] or permitting a male person to have carnal knowledge of him or her against the order of nature,[6] offense of having unlawful carnal knowledge of a girl under the age of 13 years,[7] a householder inducing or knowingly permitting a girl under the age of 13 years or between 13 and 16 years to resort to or be in or upon such premises for purposes of being unlawfully carnally known by any man,[8] the offense of having unlawful carnal knowledge of an idiot or imbecile,[9] the custodian of a girl under the age of 16 years causing or encouraging unlawful carnal knowledge of such a girl,[10] and so on.

The offense of rape, which ranks as the most severe sexual offense in the Code and punishable with life imprisonment,[11] is itself defined as having unlawful carnal knowledge of a woman or girl without her consent or with her consent where the same is, in law, nullified by the presence of prescribed vitiating el-

2 Cap. C38, Laws of the Federation, 2004. The Criminal Code, with its 521 sections, is a schedule to the Criminal Code Act, which itself is the principal legislation. The Act has only 7 Sections and being a federal legislation is deemed to have been enacted by the National Assembly. The schedule itself forms part of it. See Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (pt. 498) 124 at 162; Board of Customs & Excise v. Barau (1952) 10 SC 48. It operates throughout the states comprised in Southern Nigeria. However, save provisions in the Code having effect as federal offenses, offenses in the Code has effect as state offenses. For this reason, there is also in operation in states comprised in Southern Nigeria, Criminal Code Laws, which are laws deemed to have been enacted by various Houses of Assembly in the states. In Northern Nigeria, the Penal Code Law, Cap 532, Laws of the Federation, 1990, apply in states in that geographical area and has effect as a law made by relevant States Houses of Assembly. However, some Northern states at the inception of constitutional democracy in 1999, have since passed the Sharia Penal Code Law, also intended to take effect as state laws. See for example the Sharia Penal Code Law No. 10, 2000, of Zamfara State.

3 This chapter is headed "offenses against morality" and contains offenses from ss.214 to 233A.

4 S.214(1).

5 S.214(2).

6 S.214(3). The acts constituted as offenses in S.214(1) and (3) are acts that qualify as anal *coitus* or intercourse. Such acts, involving males, are appropriately referred to as the offense of sodomy. They are sad reminders of the account rendered in the Bible depicting *peccatum sodomiticum*, a specie of the depth of moral depravity that attended the irredeemably sinful people of Sodom and Gomorrah, for which God annihilated them. See the Bible, *Revised Standard Version*, Genesis 18 and 19. In our world of the 21st Century, sodomy or homosexuality is still being practiced and indeed has been legitimized in some states of the U.S.. It is a criminal offense in Nigeria, although prosecutions are very rare indeed. An attempt in 2011 to clothe it with legitimacy was roundly rejected by the Senate.

7 S.218. This offense is appropriately referred to as the offense of defilement.

8 S.219.

9 S.221(2).

10 S.222(A)(1).

11 S.358.

ements.[12] In all these sexual offenses adumbrated, one basic feature is common to each. It is the fact that in each, the offender must commit the offense by having carnal knowledge.[13] Carnal knowledge or carnal connection therefore necessarily characterizes all sexual offenses. If this proposition is correct, it would also follow that criminal liability for each sexual offense would, in law, *inter alia*, require admissible evidence proving "carnal knowledge" or "carnal connection" as a material ingredient of the charge. In law, such "carnal knowledge" or such "carnal connection" is provable by evidence showing that the offender penetrated the victim's vagina. Further, save offenses of sodomy and of having carnal knowledge of an animal, the victim in each sexual offense in the Code, requiring proof of carnal knowledge, is a female. Consequently, the questions which naturally arise, in light of the legal meaning of the terms "carnal knowledge" or "carnal connection," and the fact that sexual offenses are defined in such a way as to show that only females can constitute the victims of such offenses, are:

i. Can a female, who by law is always a victim of a sexual offense in the Code, be charged herself as a principal offender in a sexual offense involving another female victim?

ii. If it is possible to constitute such female a principal offender in (i) above, can she fit into s.7(a) of the Code, regard being had to the fact that by her morphology, she does not have a penile organ capable of inflating and achieving penetration and thus legally disqualified from being a person capable of doing the very act that constitutes the *actus reus* of a sexual offense?

iii. Can she be charged and convicted for procuring a male child of 11 years, who has factually matured before attaining the age of 12 years,[14] to commit a sexual offense involving proof of carnal knowledge, in light of the last paragraph of s.7 of the Code?

The above posers constitute the conundrum in respect of which our arguments would gravitate. Our essay therefore would oscillate around a very narrow compass. It would,

12 S.357.

13 The expression used is either "carnal knowledge" or "unlawful carnal knowledge." Each constitutes the *actus reus* or physical element of each of the offenses. The term "carnal connection" is also used in some of the provisions. "Unlawfulness" is an intrinsic attribute that must characterize "carnal knowledge" or "carnal connection." The term "unlawful carnal knowledge" is defined as carnal connection which takes place otherwise than between husband and wife. See S.6 of the Code. It follows therefore that all *coitus* that takes place between persons who are not spouses are, *prima facie*, unlawful. Further, the terms "carnal knowledge" or "carnal connection" is defined in terms of their inception. It is reckoned as having commenced at the point when penetration is achieved. See again S.6. Therefore, penetration of the female vagina by an erect or turgid penile organ of a male marks the starting point from which to count the attainment of the *actus reus* of a sexual offense. Acts occurring thenceforth, like ejaculation of semen up to the withdrawal of the penis from the vagina, are an integral part of the *actus reus*. Cf. *R v. Mayberry* (1973) Qd. R. 211.

14 By S.30 of the Code, a male child under the age of 12 years is presumed to be incapable of having carnal knowledge. This presumption is one of law and cannot therefore be rebutted by evidence showing that the child in question developed secondary sexual characteristics and therefore attained puberty before 12 years. There is no justification for the continued retention of this provision, which has existed for nearly 100 years in Nigeria. It is outdated and the present realities of modern science belie its retention. Evidence abound that most male children these days attain puberty long before they celebrate their 12th birthday. The effect of S.30 is that such male child cannot be guilty of any sexual offense involving proof of carnal knowledge. Therefore strictly legally, he is not capable of having an erection of his penile organ and hence cannot achieve penetration.

in effect, entail our response to the above posers with the aid of s.7(a), (d) and the last paragraph of s.7. Indeed, in our respectful view, the latent absurdity contained in the last paragraph of s.7 becomes manifest when it is called in aid to resolve the poser contained in (iii) above. Again, in our respectful view, although the last paragraph of s.7, *ex facie*, presents an innocuous picture of retention of clear criminal liability of a procurer already prescribed by s.7(d), a latent landmine capable of nullifying the said criminal liability, is embedded in that provision. We have therefore deliberately crafted the poser in (iii) above to bring out clearly the ludicrous nature of the provision.

In this essay, we respectfully intend to exclude the niceties of the concept of principal offenders as contained in the whole of s.7 and the ascription of vicarious criminal liability on the basis of ss.8 and 9.[15] We must therefore, as far as is practicable, resist every temptation at reverting to them or where this is impracticable, making detailed comments and analysis thereon.

The criminal liability prescribed in s.7(d) construed alone, and s.7(d), and the last paragraph of s.7 construed jointly, have almost always been taken for granted. On a critical assessment, both provisions were not designed by the draftsman of the Code to apply to the same situation. They apply in different situations determined by the legal capacity or incapacity of the actual perpetrator of the criminal act to be criminally responsible therefore. Although it was not expressed in many words, we are of the view that there is a correlation between s.7(d) and (a). But the actual doer of the criminal act in the situation envisaged in the last paragraph of s.7 would not fit into s.7(a) for the reason that in law, he is not criminally responsible for doing the act or making the omission constituting the offense. For that reason, we are of the view that no correlation exists between s.7(a) and the last paragraph of s.7. That is why the focus of the last paragraph of s.7 is only on the imposition of criminal liability on the procurer. In doing so the provision prescribes two requirements that have the tendency of materially qualifying or nullifying altogether the criminal liability of the procurer already prescribed in s.7(d). Yet, it is always assumed that the procurer of a criminal offense is *always* liable whenever he knowingly procures a criminal act, and the same is committed by the person procured.[16] Herein lies the latent absurdity, which our exposition here will soon demonstrate in clearer terms.

2. Exegesis of Section 7(d) and the Last Paragraph

In the adversarial system of criminal justice which we operate in Nigeria, the concept of parties to offenses serve as a yardstick or benchmark for the assessment and hence ascription of criminal liability. The concept, by its provisions,[17] assists the court and

15 Although vicarious liability as a basis for the ascription of criminal liability has been roundly rejected, see *Hunt v. Maloney* (1959) Qd. R. 164. Ss.8 and 9 of the Code, by their provisions, incorporate it as a basis of criminal liability.

16 It must be noted that the procurer must intend the commission of the offense procured, since the words "counsel or procure" import the idea of such intention. If a person counsels or procures another to commit an offense, the counselor or procurer is liable only for the actual offense he has consciously counseled or procured. See Philip, J. in *R v. Solomon* (1959) Qd. R. 123 at 128. See also Okonkwo, C. O., *Criminal Law in Nigeria*, 2nd ed. (London, Sweet and Maxwell, 1980), 168. Criminal liability for procuring the commission of an offense is contingent on the actual commission of the offense procured.

17 In the Criminal Code, the provisions dealing with "Parties to Offences" are contained in chapter 2. The said chapter covers ss.7–10. By force of s. 2(4) of the Criminal Code Act, the provisions of chapters 2, 4 and 5 of the

criminal-law practitioners to evaluate and determine culpability by gauging alleged acts or omissions of accused persons proved in evidence in a criminal trial against the background of statutorily prescribed acts or omissions in the code constituting the offender a party to the particular offense charged. Barring any successful exculpatory or extenuating defenses proved or available on the record, criminal liability is then imposed on such offender where the acts or omissions alleged and proved are located within the confines of such statutorily prescribed acts or omissions constituting him a party to the offense charged. As earlier indicated, we seek in this essay to demonstrate the latent absurdity embedded in the last paragraph of s.7. The absurdity will manifest when the said provision is dissected and related to the conundrum we pose in the introductory part of this essay as (iii). Now, rather than summarize s.7(d) and the last paragraph of s.7, we shall, for the brevity of the entire provisions of s.7, allow the said section, *sese ipse*, to talk.

Section 7 of the Criminal Code provides as follows:

> When an offense is committed, each of the following persons is deemed to have taken part in committing the offense and to be guilty of the offense, and may be charged with actually committing it; that is to say:
>
> a. every person who actually does the act or makes the omission which constitutes the offense;
> b. every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offense;
> c. every person who aids another person in committing the offense;
> d. every person who counsels or procures any other person to commit the offender.

In the fourth case, he may be charged either with himself committing the offense or with counseling or procuring its commission.

> A conviction of counseling or procuring the commission of an offense entails the same consequences in all respects as a conviction of committing the offense.

Code are invested with extraterritorial operation. This implies that the application of those provisions is not limited only to the offenses in Code where they are resident, but also apply to offenses constituted under other penal laws, unless the language of such other penal legislations expressly or by necessary implication, exclude their operation. Sections 7–10 are indeed intended to impose criminal liability on offenders for actual offenses committed by them. But a careful assessment of s.10 shows that the liability it imposes is a liability arising subsequent to the commission of the main offense. Therefore, the offender envisaged in s.10 bears a different criminal liability *dehors* that of the principal offender. Sections 7–9 do not have the same effect. The criminal liability imposed by these sections is in respect of the main offense. To that extent, we submit with profound respect that it was wrong of the draftsman to have included s.10, which deals with the concept of accessory after the fact to offenses in chapter 2 dealing with parties to offenses. An accessory after the fact to an offense is *not* a party to the main offense to which he is an accessory. Before such a person comes into the picture, the main offense *must* have been done with. His liability as an accessory arises because he, with knowledge that the person he received or assisted, is *guilty* of an offense received or assisted such person to enable him escape punishment. If his act of assistance came *during* the commission of the main offense, then he becomes an aider, a principal offender under s.7(c), and thus criminally liable for the main offense. The adoption of the word "guilty" by the draftsman of s.10 is most inappropriate, for how could an accessory at the time of receipt or assistance know that the person so received or assisted is *guilty* of an offense? Guilt or otherwise is a finding returned by a court of law following the trial of an offender for an offense. The elements of the alleged offense must also have been proved. How does an accessory determine guilt at the time of receipt or assistance?

> Any person who procures another to do or omit to do any act of such a nature that if he had himself done the act or made the omission, the act or omission would have constituted an offense on his part,[18] is guilty of an offense of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission, and he may be charged with himself doing the act or making the omission.

Section 7 of the Code creates four categories of persons who are *participes criminis* in respect of the offense committed. As each offender in each of the category is a principal offender, he bears the same criminal liability prescribed for the offense. Thus, the actual doer of the criminal act, the accessory before the fact, the aider, the enabler, the counselor, the procurer, are each of them liable for the offense. But the offense actually committed by the offender in s.7(a) *must* be the offense intended by persons in each of the other categories; otherwise if an offense not willed or intended by such other persons is committed, then no criminal liability arises in respect of such other persons by virtue of the provisions of s.24 of the Code.[19] The words "the offense," which appears in each of the paragraphs of s.7, signify the actual offense committed by the offender envisaged in s.7(a) and it is this actual offense that *must* be willed or intended by the other principal offenders falling within the ambit of the other paragraphs of s.7.

Therefore s.24 of the Code has a direct application to s.7.[20] An accused person cannot by reason of s.7 become criminally liable for an unwilled act arising out of a concert or plan.[21] Further, to be guilty as an aider under s.7(c), there must be clear evidence that either prior to or at the time of committing the offense, the aider did something to facilitate its commission.[22] The aider *must* additionally, by aiding, intend to aid the offense actually committed by his confederate.[23]

Further, on a calm view of each of the paragraphs of s.7 following s.7(a), it is clear that the draftsman envisages two principal offenders. The words "another person" or "any other person" used in those provisions relates to the offender who actually commits the criminal offense and thus located in s.7(a). The other offender recognized in

18 Italics is for emphasis.

19 Section 24 of the Code contains a very lucid statement of the principle of no liability without fault, wider than the English concept of mens rea. It has two limbs which effectively oust criminal liability when the alleged act or omission occurs independently of the exercise of the will of the accused, or when the consequences that eventuated on the accused person's act, whether willed or unwilled, is fortuitous or accidental in that he neither subjectively intended it nor subjectively foresaw it, nor is it objectively foreseeable. See Oputa, JSC, in Adelumola v. State (1988) 1 NWLR (pt. 73) 683 at 692–693. See generally Nnamah v. State (2005) 9 NWLR (pt. 929) 147; Maiyaki v. State (2008) 15 NWLR (pt. 1109) 173; Uzoka v. State (1990) 6 NWLR (pt. 159) 680; Ijeoma v. State (1990) 6 NWLR (pt. 158) 567; Umoru v. State (1990) 3 NWLR (pt. 138) 363; Timbu Kolian v. R (1968) 119 C.L.R. 47; R v. Solomon, supra; Vallance v. R (1961) 108 C.L.R. 56; Stephens Digest of Criminal Law, 9th edition, 230.

20 But the language of ss.8 and 9 exclude the application of s.24 by necessary implication. Therefore under ss.8 and 9, criminal liability will arise even in respect of an unwilled and unintended act. See, for example, Okosi v. State (1989) 1 NWLR (pt. 100) 642; (1989) 1 CLRN 29; Alarape v. State (2001) 5 NWLR (pt. 705) 79; Oyakhire v. State (2006) 15 NWLR (pt. 1001) 157; Okonofua v. State (1981) 6–7 SC 1 at 23–24; Eyerokoromo v. State (1963) 3 SC 228; Digbehin & Ors. v. Queen (1963) 1 All NLR 388; Gyang & Nafam v. Queen (1954) 14 WACA 584; R. v. Grant & Gilbert (1954) 38 Cr. App. R. 107; R. v. Betts & Ridley (1930) 29 Cox C.C. 259; 22 Cr. App. R. 148; Atanyi v. R. (1955) 15 WACA 34; Emeka v. State (2001) 14 NWLR (pt. 734) 666.

21 See *R. v. Solomon*.

22 See R. v. Enweonye (1955) 15 WACA 1. See also Iyaro v. State (1988) 1 NWLR (pt. 69) 256.

23 *R. v. Solomon*.

each of the other paragraphs is the offender, who is either an accessory before the fact or the aider or the counselor or procurer. What this observation comes to, then, is that, in the whole of s.7, the draftsman recognizes the complicity of each principal offender and by imposing criminal liability on each acknowledged their criminal responsibility. Although this fact is not expressly declared in the provision, that is the legal implication of enacting in the opening words of the provision that each of them is—

> deemed to have *taken part* in committing the offense and to be guilty of the offense . . .[24]

If the draftsman had not intended that the offenders should bear criminal liability for their acts or omissions, he would not have imposed criminal guilt on each offender for the criminal offense committed by each of them.

Section 7(d) imposes criminal liability on the procurer or counselor when the person counseled or procured to commit the offense actually commits it. It involves a positive act of encouragement.[25] Given its ordinary meaning, the word "procure" imports efforts, care, management or contrivance towards the obtaining of a desired end.[26] To be criminally liable, there must be evidence showing that the procurer or counselor willed the commission of the particular offense actually committed. A counselor or procurer is therefore liable *only* for those offenses he has consciously counseled or procured.[27] If X procures Y to commit a criminal offense and Y thereafter commits it, X is liable as if he actually committed the offense himself.[28] This is on the basis that a person who does an act through another, does it by himself.[29]

Further, both s.7(d) and the last paragraph of s.7 envisage a situation where an offender has procured a criminal offense. Under s.7(d) such offender becomes automatically criminally liable once the offense procured is actually committed by the person procured and who is in law criminally responsible for his acts or omissions. But the legal capacity to commit an offense as it relates to the actual perpetrators in both provisions differ. In s.7(d), such actual perpetrator is criminally responsible for his acts or omissions. He is thus located in s.7(a). But in the last paragraph of s.7, the language of the provision implies that the actual perpetrator is not criminally responsible for the

24 Italics is for emphasis.

25 See *Idika v. R.* (1959) 4 FSC 106.

26 See *State v. Mukoro-Mouce* (1973) 3 SC 183.

27 Again, see *R. v. Solomon*.

28 Cf. *Ajao v. Alkali Amodu* (1960) *NRNLR* 8.

29 The Latin maxim is *qui facit per alium facit per se*. In criminal law, the actual perpetrator is also a party under s.7(a). But where for any reason he is not criminally responsible, in law, for his act, he escapes liability. But the person who procured him would be liable if two conditions are met. This is the situation which is envisaged in the last paragraph of s.7. It should be noted that although ss.7(d) and 9 talk of counseling, the circumstances for invoking each provision differ. Where the offense counseled is of the same class as that actually committed, there will be liability under s.7(d), notwithstanding that the particular offense counseled was not committed. For instance, where A counsels B to burn House 5 and B burns House 6, A would be liable because the offense actually committed is of the same class as that counseled. But where the offense actually committed is radically and fundamentally different from that counseled, s.24 would apply to exculpate the counselor from criminal liability under s.7(d). Therefore, liability ought in that case to arise under s.9 and the said section will apply to affix criminal liability on the counselor and thus exclude s. 24 where the offense actually committed was a probable consequence of carrying out the counsel. That is why criminal liability will arise under s.9, even in respect of an unwilled act. See generally *Mohammed & Anor. v. State* (1980) 3–4 SC 84.

act done, or omission made by him which he was procured to do or omit to do.[30] That is why the provision seeks to determine the criminal liability of the procurer in relation to the assumed facts constituting the offense. This approach differs materially from a situation where the actual perpetrator could have been criminally responsible if after he was procured he committed the criminal act. In such a situation, the criminal liability of the procurer would be automatic under s.7(d) and not amenable to determination by reference.

The consequence of the above consideration therefore is that the last paragraph of s.7 has unwittingly introduced a stricture on the criminal liability of a procurer who has procured the act or omission constituting a criminal offense where the doer of the act is himself not criminally responsible for the act or omission. This constitutes an abridgement of the amplitude of criminal liability of a principal offender under s.7(d). A community reading of the provisions shows that criminal liability which ought immediately to arise under s.7(d) for procuring, is put on hold where the actual perpetrator of the criminal offense is not himself criminally responsible therefor. It is put on hold until a determination is made whether the procurer could still have been criminally liable assuming he had himself *done the act or made the omission* constituting the *actus reus* of the offense charged,[31] and also assuming the doing of the act or the making of the omission could itself *have constituted an* offense *on his part*.[32]

It follows therefore that the liability of a procurer, who has procured a person who is not criminally responsible for the criminal act he committed, can only arise under s.7(d) where there are affirmative answers to the assumed references in the last paragraph of s.7. Where the answers are not in the affirmative, it would also follow that no liability for procuring under s.7(d) would arise. Put rather nakedly, no criminal liability will arise on the part of a procurer charged with procuring a person, who is not criminally responsible, to commit a criminal offense if it is shown:

i. that the act such procurer allegedly procured and which act constitutes the physical element of the alleged offense is not of a nature that the procurer himself could have done or omitted to do, or

ii. that such act or omission, even if it could have been done or omitted to be done by the procurer, would in any event not have constituted an offense on his part.

30 Circumstances in criminal law in which criminal responsibility for an act is negatived or is nonexistent are not difficult to find. Under chapter 5 of the Code, dealing with general defenses, certain provisions are enacted removing criminal responsibility for offenses in respect of certain persons. For instance, under s.36, subject to the exceptions prescribed, a husband and wife of a Christian marriage are each not criminally responsible for dealing with each other's property in circumstances which would have constituted an offense against property if they were not husband and wife. Again, under s.28, an insane person within the meaning of the provision is not criminally responsible for his acts or omissions. Under s.30, a male child under 12 years is not capable of having carnal knowledge and therefore is not criminally responsible for a sexual offense involving proof of carnal knowledge as an element. But what of the case of a castrated male or a permanently impotent man? Surely he is criminally responsible for his actions, but can he be charged for procuring a person who is not criminally responsible to commit a sexual offense involving proof of carnal knowledge, in view of the first requirement contained in the last paragraph of s.7?

31 In other words, the circumstances must be such that the *procurer* himself could have been brought under s.7(a) if the facts were assumed that he was the actual perpetrator. This therefore imposes a requirement as to factual or physical capacity of the procurer to commit the offense in that assumed state.

32 This second requirement signifies capacity for criminal responsibility or liability in that assumed state. From the language of the last paragraph of s.7, both requirements must mutually coexist in that assumed state of affairs before the liability of the procurer can arise under s.7(d).

We now respectfully ask, What is the *raison d'etre* for including the last paragraph of s.7 when the concept of procuring, as a basis for the ascription of criminal liability, has already been dealt with in s.7(d)? Does that not constitute a material qualification of the criminal liability of the procurer prescribed in s.7(d)? In our respectful view, it so constitutes. In our view, respectfully of the law, as we have endeavored to demonstrate above, we conceive that the draftsman, in his wisdom, considered it expedient to introduce the said last paragraph to forestall a situation where a procurer may attempt to avoid criminal liability by arguing that the person he procured, not being a person who could be criminally responsible for his act or omission, cannot by committing the offense ascribe criminality to the procurer. It is in our view to avoid the argument that any criminal liability that might arise by the fact of such procuring is vitiated by the fact that the actual perpetrator is not criminally responsible for the act or omission that the draftsman introduced the last paragraph. But in an attempt to avoid that type of situation, the draftsman prescribed two requirements, which negatively impact on an already prescribed criminal liability under s.7(d), assumed to be automatic. Having made this analysis, we must at this stage relate it to a situation where a female procurer is charged with procuring a person who is not criminally responsible to commit a sexual offense.

3. Liability of a Female Procurer in Sexual Offenses

Having come thus far, we must now seek a resolution of the questions posed as (i) and (ii) in the introductory part of this essay. Clearly, s.7 proclaims that an offender falling within any of the paragraphs of the provision is to be guilty of the offense and *may be charged with actually committing it*.[33] The word "may" in the provision imports a directory or permissive meaning. It is not mandatory, obligatory or peremptory.[34] In our view, it gives the prosecution the liberty of either charging the offender with actually doing the very act or making the very omission that constitutes the offense in the wise of s.7(a), or charging the offender with reference to the part he played in the criminal enterprise. But notwithstanding this discretion, it would be incongruous and revolting to common sense to charge, for instance, a female who has aided or procured X, a mature male, to commit a sexual offense against Y, with doing the very act that constitutes the sexual offense. As we have seen earlier, sexual offenses involve proving the fact of having carnal knowledge as part of the elements of such offenses. To prove carnal knowledge, the prosecution must prove the fact of penetration.[35] The female anatomy does not contain a penile organ capable of becoming erect and penetrating the vagina. This therefore renders a female permanently incapable of doing the act that constitutes the physical element of any sexual offense. *A fortiori*, a female cannot herself accomplish the *actus reus* of a sexual offense. That being so, she cannot be charged as a party under s.7(a), notwithstanding the discretion allowed the prosecution in s.7 to charge such offender as such. But it does not follow that such a female offender will be exempted from criminal liability. Consequently, in resolving the posers in (i) and (ii) in the introductory part of this essay, we contend, with profound respect, that a female offender who has aided or procured a male criminally responsible for his acts, to commit a sexual offense can herself be charged with aiding such offense or procuring such offense and not with doing the act that constitutes the physical element of such sexual offense. In law, a female procurer of a sexual offense is a principal offender under s.7(d) and is liable to be proceeded against. We therefore resolve the first poser in the affirmative and the second in the negative.

33 Italics is for emphasis.

34 On the different meanings of "may," "shall" and "must" in statutory provisions and adjectival laws, see Akpata, JSC, in Katto v. CBN (1999) 6 NWLR (pt. 607) 390.

35 See s.6 again, which defines "carnal knowledge" or "carnal connection" whenever the terms appear in the prescription of sexual offenses.

i. Where the actual perpetrator is criminally responsible for his acts

Where the offender who actually committed a sexual offense is a male criminally responsible for his acts, such male offender becomes a party under s.7(a) to such sexual offense committed by him. Similarly, if he was procured by a female to commit the offense actually committed by him, such female offender becomes a party under s.7(d) to such sexual offense. In effect, both of them become principal offenders, and a conviction for procuring the offense entails the same consequences in all respects as a conviction for committing the offense. The same result would ensue if the female is an accessory before the fact to the sexual offense,[36] or where she is an aider to the offense.[37] But a different consideration applies where she is charged with procuring a person who is not criminally responsible to commit the same sexual offense. This forms the subject of our next consideration.

ii. Where the actual perpetrator is not criminally responsible for his acts

Where such offender mentioned in (i) above is by law not criminally responsible for his acts, then a different consideration applies to the criminal liability of a female procurer. In sexual offenses prescribed in the Criminal Code, proof that there was carnal knowledge of the victim or carnal connection is material to liability. Such carnal knowledge is achieved once it is shown that a male offender penetrated the female victim with his penile organ.

In law *vide* s.30 of the Code, a male child under the age of 12 years is presumed to be incapable of having carnal knowledge. This presumption being one of law is irrebuttable. It follows that the law is not concerned with the fact that there may be instances where some male children may attain puberty even before attaining the age of 12.[38] Assume, *argumento*, that such situation were to occur and such male child is procured by a deviant female to commit a sexual offense on a female victim, the male child in this situation, not being criminally responsible for the act committed by him, cannot be tried for the offense. The culpability of the female procurer under s.7(d) must, in this situation, be determined in light of the last paragraph of s.7. One of the requirements that must be satisfied under that provision, in order for liability to be ascribed to the procurer, is to show that the female procurer could, herself, have done the very act which constitutes the physical element of the offense. Such act, with reference to the offense in this situation, is the act of penetration. Yet, the female constitution is such that it is impossible

36 S.7(b).

37 S.7(c).

38 Changes in the environment and enhancement in medicare and some genetic factors have contributed to cases of male children attaining puberty before the age of 12 years. The provision of s.30 being outdated and out of tune with the realities of the world of the 21st Century is in dire need of legislative amendment.

for a female to have a penile organ that is capable of penetrating the vagina. The sum effect is that such female offender, because of the last paragraph of s.7, cannot be charged or convicted for such offense. An offense has been committed, a female victim has been sexually assaulted, but nobody, in law, can be charged or convicted for the offense. It is more disheartening to observe that this anomaly was created by the law itself! From our analysis therefore, it is a correct proposition of law to assert that a female procurer who procures a male child below the age of 12 years to commit a sexual offense involving proof of carnal knowledge, *is not guilty of such* offense. This is ludicrous. But unfortunately, that is the position under the last paragraph of s.7, which in this type of situation materially qualifies the criminal liability created in s.7(d) of the Criminal Code.

4. Suggestions for Reform

The absurdity of the last paragraph of s.7, which we have demonstrated above, was exposed with the aid of the irrebuttable presumption contained in s.30 of the Code. That presumption is to the effect that a male child under the age of 12 is *legally* incapable of having carnal knowledge. But the law, in so prescribing, has not denied or pretended to deny that such a male child may be *factually* imbued with capacity to have carnal knowledge. The time is long overdue for the law to shift ground permanently and abandon this archaic position. This presumption is as old as the Criminal Code itself and should be abrogated. If abrogation is not a feasible option, we recommend a review of the provision by downgrading it to the status of a rebuttable presumption of fact. That being so, in every case where a male child is shown to attain puberty before the age of 12 years, such can be given in evidence to rebut the presumption that he is incapable of having carnal knowledge. The consequence will entail a reversal of position in the situation discussed above and such child becomes criminally responsible for his act under s.7(a), whereas the female procurer is held liable under s.7(d), and the last paragraph of s.7 will become inoperative to the facts.

Further, we suggest an amendment of the last paragraph of s.7. Obviously, the latent absurdity contained therein stem from the way in which the provision was drafted. The provision can be amended by redrafting it in such a way as would eliminate completely all manner of controversy afflicting it. We propose an amendment in the following terms that would effectively remove the absurdity latent in it. The proposed amendment reads thus:

> Any person who procures another, not being criminally responsible for his acts or omissions, to do or omit to do any act which would ordinarily constitute the offense procured, is deemed to have committed the offense.

The amendment of the provision proposed in these terms would be in tandem with the criminal liability of a procurer prescribed in s.7(d) and would not in any way derogate or modify or alter it when it is sought to hold a procurer criminally liable for procuring another person who is not criminally responsible for his acts or omissions, *to commit any* offense *whatever* in the Criminal Code.

5. Conclusion

In the Criminal Code operating in Southern Nigeria, as well as in other penal laws operating in Nigeria, sexual offenses of different kinds are created and penalized in sundry sections. That fact demonstrates the acknowledgment of the Code and such other penal laws that sexual offenses constitute an infraction of the dignity of the human person. Although those specie of offenses are of different kinds, one material element is common to all; that element is depicted in carnal knowledge or carnal connection and the same must be established before criminal liability can result.

In connection with sexual offenses in the Criminal Code, an absurdity exists in the provisions of the last paragraph of s.7, when it is sought to assess the culpability of a female procurer who procures a male person who is not criminally responsible for his acts or omissions, to commit a sexual offense. This situation affords the best tool to expose the absurdity inherent in the provision. As the situation stands, the material qualification of the liability of a procurer introduced by the provision of the last paragraph of s.7, nullifies the liability of a female procurer in the situation discussed above by imposing a requirement that must be shown to exist before criminal liability can be activated. That requirement constitutes an impossibility and can never be satisfied in the case of a female procurer. Her morphology is such as to render her permanently incapable of accomplishing the *actus reus* of such sexual offense.