



AN APPRAISAL OF THE LEGAL FRAMEWORKS ON THE OFFENCE OF RAPE IN NIGERIA AND INDIA

APPOLOS Dimas, *LLM, BL*.¹

&

BARDE, Joel (Prof.)²

&

LONGPOE, William W (Prof)³

ABSTRACT

This work examined the legal framework on the of the offence of rape in Nigeria and India. The objectives of the work among others were to evaluate the legal framework on the offence of rape in Nigeria and India as well as interrogating the shortcomings from the legal framework. In doing so, the research examined the extant laws on the offence of rape in both jurisdictions by way of a comparative analysis with a view to bringing out the loopholes in these laws. The method used in this research was doctrinal and it involved the analysis and review of statutes, regulations, case laws and other secondary materials such as textbooks, journals and internet materials. The findings of the research showed that that there is need to have a broader definition of rape in Nigeria that will encompass the various forms of rape that are committed through other mediums other than the traditional penetration of the vagina by the penis. The research ended with conclusion and recommendations.

Keywords: Rape, Penetration, Intercourse, Consent, Nigeria, India.

1. INTRODUCTION

Rape is a heinous crime that has become a global phenomenon⁴. It is a violation of an individual's bodily integrity, dignity, and right to self-determination. In Nigeria and India, rape is a pervasive problem that affects people of all ages, genders and social classes. This work will consider the legal framework on the offence of rape in Nigeria and India. First, the Constitution of the Federal Republic of Nigeria, 1999 (As amended) as well as other legislation will be examined. Second, the legal framework on the offence of rape in India will also be examined before drawing up a comparative analysis of the legal framework in both jurisdictions with a view of drawing up lessons for Nigeria.

2. LEGAL FRAMEWORK FOR RAPE IN NIGERIA AND INDIA

2.1 Violence Against Persons (*Prohibition Act*), 2015

¹ Lecturer, Nigerian Law School, Yola Campus, Adamawa State, Nigeria

² Faculty of Law, Dept of International Law and Jurisprudence, University of Jos, Nigeria

³ Dept. of Private Law, Faculty of Law, University of Jos, Nigeria

⁴ Mosunola S, 'No Rapist will go unpunished' available at [www.https://guardian.ng/news/no-rapist-will-go-unpunished-by-ogun-cj/](https://guardian.ng/news/no-rapist-will-go-unpunished-by-ogun-cj/) accessed 1/5/2023.

The Violence Against Persons (Prohibition) Act (VAPP) was enacted in Nigeria in 2015, to provide for a comprehensive legal framework for the prevention and prohibition of violence against all persons in Nigeria. The VAPP Act provides for a radical departure from the traditional concept of rape, that it could be committed only a male alone. It is a realization that rape, could be committed by females against male, a realization of the campaigns wedged by male groups in the last decades⁵.

The Act defines rape as any intentional penetration into any part of the human body either through the vagina, anus or mouth of another person with any part of his or her body or anything else without consent or where such is obtained by force or means of threat or intimidation of any kind or by fear of harm or means of false and fraudulent representation as to the nature of the act or the use of any substance or addictive capable of taking away the will of such person, by impersonating him or her spouse⁶. The Act widened its horizon to cover several ways in which rape can occur and it adequately gave appropriate punitive measures to curb the menace. It is pertinent to note that both sexes, can be raped. Moreso, this evinced different ways through which rape occur. It can occur by penetrating: the vagina, anus, mouth and any part of the body by anything else which can be dildo, a rod, fingers or anything else. The provisions of rape under the Violence Against Person (Prohibition) Act 2015, is laudable. Even though, a lot of states are yet to adopt same. However, it is gratifying to note that some states such as Plateau, Ekiti, Ondo, Lagos, just to mention a few have adopted the Federal Law which is limited only to the Federal Capital Territory.

2.2 Criminal Code Act

The Criminal Code was enacted in 1904 and was then the criminal legislation that was applicable to the Northern protectorate.⁷ It is important to state that the Criminal Code became applicable to both the North and South in 1916⁸; thereby making the operational criminal justice system in the Nigerian colony to be uniform.⁹ The uniform application of the Criminal Code in all parts of Nigeria continued until the 30th day of September, 1960 when the Penal Code was passed and made applicable to only the Northern part of Nigeria.¹⁰ The implication of this development is that, the Criminal Code now has restrictive application to only the Southern part of Nigeria.

The Criminal Code from 1960 to date, remains the major legislation on substantive criminal law in Southern states of Nigeria. However, some states in the south, have enacted their individual Criminal Code Laws that will be applicable within their own boundaries¹¹, while other states still apply the Criminal Code. However, these individual state Criminal Code Laws, are more often than not an outright adoption of the provisions of the Criminal Code.

⁵ Alubo, O, *'Modern Criminal Law'* (Jos: Jos University Press Ltd, 2022) at 280

⁶ Section 1 Violence Against Persons Prohibition (Prohibition) Act, 2015, Haladu v FRN (2022) LPELR (CA)

⁷ Chukkol K, *'The Law of Crime in Nigeria'* (A.B.U Press Limited, Zaria, 1988).

⁸ Ibid

⁹ Ocheme P, *'The Nigerian Criminal Law'* (Liberty Publications Limited, 2006) 6

¹⁰ ibid

¹¹ For example, Oyo State Have enacted the Criminal Code Law of Oyo State, 2000.

By 1990, the Criminal Code was encapsulated in the Laws of the Federation of Nigeria¹². It was later reviewed and further enacted as Laws of the Federation of Nigeria, 2004.¹³ The Criminal Code Act, provides for the crime of rape in its section 357. The section provides:

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

For the crime of rape to be committed, there must be the act of having carnal knowledge by the defendant. The Code itself states that. 'Where the term 'carnal knowledge' or 'carnal connection' is used in defining an offence, it is implied that the offence, so far as regard that element of it is complete upon penetration"¹⁴. It follows, therefore, that carnal knowledge in the context of its usage in section 357 of the Criminal means the act of sexual intercourse wherein penetration is involved. Section 6 of the Criminal Code only states the fact of penetration as the basis of establishing the fact of carnal knowledge or carnal connection.¹⁵ The section did not state the nature of penetration that should suffice for carnal knowledge. (Whether it should be the vagina, anus or even mouth of the woman or girl).

Ordinarily, logic may convince us that the penetration envisaged by law as satisfying the requirement of having carnal knowledge, may simply mean penetration of the vagina, as was held in *R v kufi*¹⁶ where the court held that the shortest penetration of the vagina could amount to rape. The court further held that there cannot be rape without penetration of the vagina. It is submitted that; this logical reasoning may be sufficient at a point in the past; but it may not be sufficient and conclusive in our modern time where the act of sexual intercourse has gone beyond penile-vagina penetration to include other forms of penetration.¹⁷ That is why in some jurisdictions, the definition of rape is now wider to accommodate the penetration of the mouth and the anus.¹⁸

The carnal knowledge required to satisfy the requirement of the offence of rape as provided in section 357 of the Criminal Code, must be an unlawful carnal knowledge. Unlawful carnal knowledge, has been described as carnal connection, which takes place otherwise between husband and wife.¹⁹ This invariably means that carnal connection between husband and wife cannot be unlawful; as such, it cannot satisfy the requirement of rape under the Criminal Code.

¹² Criminal Code Act Cap 77, Laws of the Federation of Nigeria (L.F.N) 1990.

¹³ Criminal Code Act Cap C38, Laws of the Federation of Nigeria 2004.

¹⁴ Section 6 Criminal Code Act.

¹⁵ Atidoga F, 'A Comparative Assessment of the Legal Framework for the Crime of Rape under Nigerian Laws', *Kogi State University Bi-Annual Journal of Public Law*, Vol. 1, 2009.

¹⁶ (1960) WNLR 1

¹⁷ *ibid*

¹⁸ Section 1(1) of the English Sexual Offences Act, 2003.

¹⁹ Section 6 Criminal Code

This impliedly means that under the criminal Code, a person cannot be guilty of raping his wife.

The section also implies that “unlawful carnal knowledge”, that is, carnal connection otherwise than between husband and wife, may not amount to rape if the woman or the girl consent to the act. Even though the section describes the act itself as unlawful, true consent of the woman or the girl to the act neutralizes the unlawfulness of the act. Consent, therefore, makes the act lawful. The section, however, is not unmindful of the fact that consent of a woman or a girl to sexual intercourse, may be obtained in a coercive and unlawful circumstance, either by force, fraud threat, intimidation or by impersonation. Consent obtained under any of these circumstances, is not true consent and, consequently, cannot suffice as consent for the purpose of determining culpability under section 357 of the Criminal Code. Further still, the act did not take into consideration the fact that consent can be withdrawn midway into the act and any sexual intercourse that takes place after such a withdrawal, will amount to rape. There are several limitations with the Criminal Code with respect to the prosecution of rape in Nigeria. Some of the limitations are:

- (a) The current Criminal Code, only recognizes rape as a crime committed against women and girls. This means that men who are victims of rape are not recognized under the law and cannot seek justice for the crime committed against them. Therefore, it is not gender sensitive.
- (b) The Criminal Code in Nigeria, does not recognize marital rape as a crime. This means that a husband can have sexual intercourse with his wife without her consent and it will not be considered rape under the law.
- (c) The Criminal Code requires the prosecution to prove that the victim did not consent to the sexual act. This can be difficult to prove in cases where there is no physical evidence or witnesses.
- (d) The Criminal Code did not define what is consent. One would have expected that consent being a key element for the prosecution of the offence would be defined. In India, consent is expressly defined in the Code.
- (e) The punishment for rape in Nigeria under the Criminal Code, is relatively lenient, with a maximum penalty of life imprisonment. This may not be enough to deter perpetrators from committing the crime. We suggest if the punishments are death and castration, perpetrators will be deterred from committing the offence.

2.3 Penal Code

The Penal Code Law, emerged in 1959 to replace the Criminal Code, which was applicable in the Northern part of Nigeria.²⁰ The Penal Code was based on a Code, which had been working successfully in an Islamic community, namely, the Sudan²¹. By this, the Penal Code had link with the English law because the Sudanese Code was modeled after the Indian Penal Code of 1860, which was drafted almost entirely from Lord Macaulay, an Englishman. It has however been observed by Okonkwo and Naish that:

²⁰Okonkwo & Naish, ‘*Criminal Law in Nigeria 2nd edition*’ (Ibadan: Spectrum Books Limited, 1988) p.9

²¹ *ibid*

... of all the Codes derived from the English Law, the Indian Code exhibits considerable deviation from the common law, but the Northern Nigeria Penal Code goes further. The Penal Code represents, in fact, a compromise between the reformers and traditionalists²².

In September 1960, when the Penal Code came into force in Northern Nigeria, the application of the Criminal Code was ousted.²³ The implication of this is that the Penal Code becomes operative in the administration of criminal justice in Northern Nigeria, which includes the law of rape. It follows, therefore, that Criminal Code relating to the crime of rape, by the operation of the Penal Code, became obsolete and inapplicable²⁴. The Penal Code, provides for the crime of rape in section 282 (1) and (2). The section provides as follows:

1. A man is said to commit rape who save in the case referred to in subsection 2, has sexual intercourse with a woman in any of the following circumstances-against her will:
 - a) Without her consent;
 - b) With her consent, when her consent has been obtained by putting her in fear of death or hurt;
 - c) With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or without her consent, when she is under fourteen years of age or of unsound mind
2. Sexual intercourse by a man with his own wife, is not rape if she has attained puberty.

Before assessing the import of the above provision, it is important to observe that the former Northern Region of Nigeria, where the Penal Code applies, has now been split into about 19 states; and years after the 19 Northern states have been created, most of the Northern states are still applying the Penal Code, while few states have amended the Penal Code to be in line with the contemporary trends on the offence.²⁵ Despite the introduction of Sharia Penal Codes in some Northern States, the new Sharia Codes do not seek to abrogate the provisions of the Penal Code. They still remain applicable *mutatis mutandis*.²⁶ It is important to note that the individual state Penal Code legislation as amended, are mere reproduction of the provisions of

²² Ibid pp. 9-10

²³ Section 3 (2) Penal Code law replaced the operation of Customary Criminal Law. The Section provides: "After the commencement of this law, no person shall be liable to punishment under any native law and custom". This provision ousting the provision of customary Criminal Law also finds expression in Nigerian Constitution from 1960 to date. See, for instance the provisions of section 32(12) of the 1979 Constitution of the Federal Republic of Nigeria, which is similar with the provision of section 35(12) of the 1999 Constitution of the Federal Republic of Nigeria, which prohibits punishment for any crime that is not stipulated in a written law. These provisions have the efficacy of ousting the operation of Customary Criminal Law, which was predominantly unwritten.

²⁴ Atidoga, F.D, "A comparative Assessment of the Legal Framework for the Crime of Rape under Nigerian Laws" *Kogi State University Bi-Annual Journal of Public Law*, Vol. 1 part 1, 2009 p.113

²⁵ Ocheme P, 'The Nigerian Criminal Law', (Liberty Publications Limited, 2006) p.16

²⁶ Ibid, p.17

section 282 of the Penal Code, with little or no changes²⁷. Unlike the Criminal Code Act²⁸, the Penal Code Law criminalizes as rape, the act of nonconsensual sexual intercourse with a person under fourteen years.²⁹

The definition of rape as stipulated by the provision of the Penal Code, presumes only penetration of a vagina by a penis. Even though the Code did not expressly state that; the act of sexual intercourse as commonly understood means the penetration of the male organ of the woman's vagina,³⁰ by the provision of section 282, the Penal Code does not recognize as rape, any form of sexual intercourse which includes penetration of the vagina other than with the penis. This means that penetration of the vagina by the fingers, by the tongue (*cunnilingus*), or by the other parts of the body or by object, without the consent of the victim, cannot amount to rape within the meaning of the provision of the Penal Code.

2.4 Indian Penal Code 1860

The Indian Penal Code (IPC), 1860, is the primary legal framework for addressing rape in India. Section 375 of the IPC defines the crime of rape, and Section 376 provides for the punishment for the offence. Initially, the Indian Penal Code, defines rape as sexual intercourse with a woman against her will, without her consent, or with her consent obtained through coercion, deception, or threat.³¹ This definition, is so narrow and it has caused a lot of hardship and injustice to rape victims particularly in the Mathura rape case, the *Kathua* rape case and the *Delhi* rape case. The perceived injustice caused as a result of the definition, led to mass protests and the code was amended through the several Criminal Law Amendment Acts. These amendments were made in 1983, 2013 and 2018. After these several amendments, the Indian Penal Code, comes up with a comprehensive definition of rape is to cater for the modern trends on the offence of rape. The code defines rape in the following words: "A man is said to commit rape if he-

- a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b) Inserts, to any extent, any object or part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under circumstance falling under any of the following descriptions:
 - i. Against her will.

²⁷ Alubo, O, 'Modern Nigerian Criminal Law Revised Edition' (Jos University Press Limited, 2022) p.278

²⁸ Cap 38 Laws of the Federation of Nigeria 2004, Sexual Intercourse with a girl under 13years. The criminal Code Act referred to it as "defilement" and it is not categorized as Rape, but offences against morality. See section 218 Criminal Code.

²⁹ Section 282 (1) (e)

³⁰ Chukkol K, 'The Law of Crime in Nigeria' (A.B.U Press Limited, Zaria, 1988) p.189

³¹ Section 375 Indian Penal Code

- ii. Without her consent.
- iii. With her consent, when the consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
- iv. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- v. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
- vi. With or without her consent, when she is under eighteen years of age.
- vii. When she is unable to communicate consent³²”.

The Indian Penal Code, listed seven circumstances under which there will be lack of consent. These circumstances are so broad and comprehensive because, consent is a key element in proving the offence. The circumstances under which lack of consent will be inferred under the various legislation in Nigeria is narrow. It makes so many defendants to get acquittal instead of conviction. Circumstance of unsoundness of mind, circumstance of administration of substances that makes the victim unable to understand the nature and consequences of his act, and circumstance of inability to communicate one's consent is not expressly stated in the Nigerian Criminal Codes. Aside the seven circumstances under which there will be lack of consent, the Indian Penal Code also defines what 'consent' is and it defines consent to mean “an unequivocal voluntary agreement when the woman by words, gestures or form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that, be regarded as consenting to the sexual activity”. The definition of consent is not expressly stated in most of the legislation in Nigeria on rape and it will go a long way if this definition is incorporated into the laws in Nigeria.

The Supreme Court of India, while interpreting the provisions of the law on rape in the case of *State of Maharashtra v. Madhukar Narayan Mardikar*³³, issued very comprehensive guidelines that will aid courts in determining rape cases. The guidelines are:

- i. Consent: The Supreme Court of India, has held that consent must be voluntary, informed, and conscious, and that the absence of physical resistance does not necessarily indicate consent. The court has also held that a woman's past sexual history, cannot be used to infer consent.
- ii. Evidence: In cases of rape, the courts have held that the victim's testimony should be given weightage and that corroboration is not essential. However, corroboration may be required in cases where the victim's testimony is unreliable or inconsistent.
- iii. Sentencing: The courts have held that the punishment for rape should be commensurate with the gravity of the offence and the circumstances of the case. The courts have also issued guidelines for sentencing in cases of rape, including taking into account the age of the victim, the nature of the injuries, the use of weapons, and the degree of violence.

³² Section 375 of the Indian Penal Code

³³ (1999) 1 SCC 57.

- iv. Medical examination: In cases of rape, the courts have held that a medical examination of the victim is essential to establish the offence and to determine the nature and extent of injuries. The courts have also issued guidelines for conducting medical examinations in cases of rape, including the need for sensitivity and confidentiality.
- v. Burden of proof: In cases of rape, the burden of proof lies on the prosecution to establish that the sexual intercourse was non-consensual. However, the courts have held that in cases where there is evidence of sexual intercourse, the burden of proof may shift to the defendant to establish that it was consensual.
- vi. Age of consent: The age of consent for sexual intercourse in India is 18 years. Sexual intercourse with a minor below the age of 18 years is considered statutory rape, and the offender can be punished under the IPC provisions related to rape.

The guidelines are apt in the prosecution of the offence of rape in India, if the same guidelines are adopted in Nigeria, either by legislation or practice direction by the Supreme Court, it will go a long way in assisting the courts in dispensing justice to the victims of the offence. The Indian Penal Code, provides for the punishment for the offence of rape³⁴. The punishment for rape can range from seven years of imprisonment to life imprisonment. In cases where the victim is a minor or is mentally or physically disabled, a minimum sentence of ten years of imprisonment up to life imprisonment can be imposed. The death penalty can also be imposed in cases of aggravated rape, such as rape that results in the victim's death or leaves the victim in a persistent vegetative state.

The Indian Penal Code also includes other provisions related to rape, such as Section 354, which criminalizes sexual harassment and assault, and Section 509, which criminalizes the use of words or gestures intended to outrage the modesty of a woman. Apart from the Indian Penal Code, India has several other laws and policies addressing rape. The Protection of Children from Sexual Offences (POCSO) Act, 2012, is a special law that provides for the protection of children against sexual abuse and exploitation. The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, is a law that addresses sexual harassment in the workplace. The National Commission for Women is a statutory body that works towards the protection and promotion of women's rights in India.

2.5 The Criminal Law (Amendment) Act Of 1983

It was in 1972 that the Mathura, a tribal girl was raped by two policemen, within the premises of the police station.³⁵ The trial Court had acquitted the defendant, but on appeal, the Bombay High Court, convicted the defendant persons. An appeal was made to the Supreme Court of India and the defendant persons were acquitted. The Supreme Court held that since there were no injuries on the person of the victim, it could be said that it was a 'peaceful affair' and that since the victim habituated to sexual intercourse³⁶. The court also held that due to the absence of injuries it cannot be said the girl offered resistance, and therefore her claim is not right.³⁷ The court also erred in interpreting consent as given under section 375 of Indian Penal Code

³⁴Section 376 of the Indian Penal Code

³⁵ *Tukaram v State of Maharashtra* (1979) 1 S.C.C. 143

³⁶ Ibid at 146

³⁷ Ibid at 148

1860. The decision of the court led to massive outrage and protest from legal scholars³⁸ as well. The condemnation of the decision led to the amendment of the Indian Penal Code of 1860 in 1983. The Indian Penal Code Amendment Act of 1983, made significant changes to the legal framework on rape in India. Prior to the amendment, the definition of rape in the Indian Penal Code 1860 was limited to non-consensual vaginal intercourse between a man and a woman. This definition was based on a narrow understanding of rape and excluded many forms of sexual violence against women, including marital rape, anal and oral rape, and rape by objects.

The 1983 amendment expanded the definition of rape to include all forms of non-consensual sexual intercourse, regardless of the gender of the victim or perpetrator. It also introduced several new offenses related to sexual assault, such as sexual harassment, stalking, and voyeurism. The amendment also increased the penalties for sexual offenses and made certain forms of sexual assault punishable with life imprisonment. However, despite these changes, the legal framework on rape in India, remains controversial and has been criticized for not doing enough to protect victims and punish perpetrators. There have been calls for further reforms, including the recognition of marital rape as a criminal offense and the inclusion of more comprehensive provisions for the protection of victims and witnesses. This led to a further amendment in 2018.

2.6 The Criminal Law (Amendment) Act of 2013

Just like the criminal law amendment that took place in 1983, the Criminal Law (Amendment) Act of 2013, was reactionary in nature. It was as a result of the massive outrage from the public over the cruel and gruesome case of gang rape that took place in Delhi, in 2012. In the case of *Jhaku*³⁹, where it was alleged that the defendant had forced his penis into the mouth of his daughter, however, he could not be charged with the offence of rape because the offence of rape in the Indian Penal Code was only defined to include penile-vaginal penetration and the act of the defendant did not fall within the ambit of the definition. Thus, he was charged under section 354 of the Indian Penal Code, which provides for outraging the modesty of the woman. This lacuna led to the amendment of the Criminal Law in 2013.

The Indian Penal Code Amendment Act of 2013, made significant changes to the legal framework on rape in India. This amendment was introduced in response to the public outrage following the brutal gang-rape and murder of a young woman in Delhi in 2012. The 2013 amendment broadened the definition of rape to include several new forms of sexual violence against women, such as penetration with any object, non-consensual touching, and other forms of sexual assault. It also introduced stricter penalties for rape, including the possibility of the death penalty for certain cases of rape resulting in the victim's death or leaving her in a persistent vegetative state.

³⁸ The legal luminaries include Professor Uppendra Baxi, Professor Vasudha Dhagamwar, Professor Raghunath Kelkar, and Professor Lothika Sarkar, all wrote open letters to the Supreme Court condemning the decision, as being violative of the basic fundamental human rights, and the liberty Mathura.

³⁹ *Sudesh Jhaku v K. C.J* (1996) S.C.C online (Del) 397.

The amendment also made several other important changes, such as criminalizing the trafficking of persons for the purpose of sexual exploitation, and including acid attacks and stalking as specific offenses under the law. The amendment also provided for the establishment of special courts for the speedy trial of sexual offenses. One of the major changes after the amendment of 2013 to the Indian Penal Code that Nigeria can draw lesson from is the definition of the word “consent” which is lacking in the laws on rape in Nigeria. In the amendment, the word “consent” is defined to mean: “unequivocal voluntary agreement when the woman by words, gesture or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. Provided, that a woman who does not physically resist to the act of penetration shall not by reason of that fact, be regarded as consenting to the sexual activity”⁴⁰. The definition of consent in the Indian Penal Code by virtue of the 2013 amendment is quite commendable and Nigeria should learn from it. The definition eliminates the possibility leaving the meaning of consent to the implication of the Courts as it is the case of Nigeria. The gap in the definition of consent has led to a lot defendant being acquitted because of the lack of the definition of consent in the law that is left only to the conjectures of the courts. However, despite these changes, the legal system in India, continues to face challenges in effectively implementing and enforcing the law on rape. There are ongoing concerns about the low conviction rates for sexual offenses, the treatment of victims by the criminal justice system, and the social stigma that often prevents women from reporting incidents of sexual violence.

2.7 The Criminal Law (Amendment) Act of 2018

Just like the earlier two amendments, the Criminal Law (Amendment) Act of 2018, was also reactionary and responsive in nature. The public outrage over *Kathua’s*⁴¹ rape case led the government to promulgate the Criminal Law (Amendment) Act of 2018. The Act made changes to the Indian Penal Code, and also added certain new offences. The Criminal Law (Amendment) Act of 2018, was passed by the Indian parliament in April 2018⁴² and it introduces several changes to the existing legal framework on rape in India. One of the most significant changes was the introduction of the death penalty for the rape of girls under the age of 12, and the increase in the minimum sentence for rape from seven to ten years. The amendment also introduced new offenses, such as the rape of a child under the age of 16, and provided for the introduction of a new section on the rape of a woman by her husband.

The 2018 amendment also introduced the provision of a time limit for the completion of the trial of rape cases, mandating that the trial must be completed within two months of the filing of the charge sheet⁴³. It is quiet striking that rapes cases can be concluded in two months unlike in Nigeria that the trial of rape cases go on for years without being concluded, Nigeria should leran from this innovation. Additionally, the amendment provided for the

⁴⁰ Section 375(D) Indian Penal Code

⁴¹ The Kathua rape case refers to the alleged rape and murder of an 8-year-old who was abducted. The incident took place in a village named Rasana situated near Kathua in Jammu and Kashmir. The girl was not to be seen for around a week, after which her dead body was recovered. The Supreme Court transferred the trial to Pathankot district, so as to keep the trial fair, and save it from political or social influence.

⁴² <https://www.bbc.com/news/world-asia-india-43869711> accessed 5/5/24

⁴³ Under Section 309A of the Code of Criminal Procedure, a trial court is required to complete the trial of rape cases within two months from the date of filing the charge sheet.

establishment of special courts to hear cases of sexual offenses against women and children. The amendment was introduced in response to a series of high-profile rape cases that had sparked widespread outrage across the country, including the *Kathua* and *Unmao* rape cases. The amendment was widely welcomed by women's rights activists and advocacy groups, who had long been calling for stronger legal protections for women and children. The establishment of special courts for rape cases in India is another lesson for Nigeria. In Nigeria, rape cases are delayed for years because rape cases are tried in regular courts that civil and political cases are being tried and priority is usually not being given to the rape cases because the victims in most cases are financially poor. Nigeria should establish this special courts to try the offence of rape just like India.

3. COMPARATIVE ANALYSIS OF THE LAWS ON RAPE IN NIGERIA AND INDIA.

Flowing from the consideration of the various laws on rape in Nigeria and India, it is pertinent to make some comparative analysis of the laws in both jurisdictions. It should be noted that both Nigeria and India, have a federal system in which legislative powers are divided between the central and state governments. Article 246 of the Indian Constitution⁴⁴, demarcates legislative powers between the Centre and states⁴⁵.

Matters enumerated in the Union and State Lists, are within the exclusive legislative competence of the Union Parliament and State Legislatures, respectively. Both the Parliament State Legislatures, are competent to legislate on matters in the concurrent list. However, in the event of repugnancy between a state and central law, the central law prevails to the extent of the repugnancy.⁴⁶ Criminal law and Criminal procedure finds itself in the concurrent list. The Indian Penal Code 1860 with the several amendments remains the primary statute dealing with substantive criminal law.

The law applicable in the whole of India. In Nigeria, both the federal and state governments have legislative competence to legislate on criminal law and criminal procedure. Unlike in India, that the entire country applies a uniform criminal law known as the Indian Penal Code, in Nigeria, there is no uniformity of the criminal law from states to state and this has posed a lot of challenges in the prosecution of the offence of rape in Nigeria. It is submitted that Nigeria should adopt a single criminal law just like India if we are to succeed in the fight against rape.

The Criminal law (Amendment) Act 2013 in India, revolutionized the issue of rape. The definition of rape, has been expanded to mean “ a man penetrating his penis to any extent into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other persons, or inserts, to any extent, any object or part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person,

⁴⁴ The constitution of India has 395 Articles and 12 Schedules. The schedules to the constitution elaborate on some of the constitutional provisions. The VII Schedule is read with Article 246. Article 246(1) for instance states that parliament has the sole power to legislate on matters in List I of Schedule VII. List I enumerate 97 matters on which the parliament may exclusively legislate. The Schedule can be roughly compared to Rules that are framed under a statute.

⁴⁵ The powers of the local government are not relevant for the purpose of discussion on criminal law and sentencing.

⁴⁶ Article 254 Constitution of India.

or manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes to do so with him or any other person; or applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person under the circumstances such as against her will, without her consent and when consent is fraudulently obtained.⁴⁷

Prior to the above amendment, there has been contention on whether any act of sexual intercourse which did not involve penis penetration in the vagina will constitute rape. The expansion of the definition of rape came as a result of the suggestion of the Supreme Court of India in *Sakshi v Union of India & Ors*⁴⁸ wherein the court made suggestion for the parliament to expand the definition following an upsurge in the offence. The amendment of the Indian Penal Code, also gave birth to more severe punishment against sex offenders and it also provides for compensation for the victim. Thus, any person who is convicted of rape by the court, is liable to be imprisoned for not less than seven years and may extend to imprisonment for life with option of fine.

The Supreme Court of India has also laid down a standard principle to guide courts handling rape cases on what amounts to consent being a key element in the establishment of the offence. One of the criticisms of the amendment to the Indian Penal Code is that there is no provision criminalizing forceful intercourse committed under matrimonial arrangement. Also, the Act is not gender neutral.

In Nigeria we are still grappling with what is the standard definition of rape. This is because the criminal law applicable in the various states, are not uniform. While some states have either amended or re-enacted their either penal or criminal codes respective to be in line with global best practice, some other states are using the criminal laws with the old traditional definition of rape. There should be a uniform criminal legislation to cure some of these inadequacies.

Unlike in India, other new sexual related crimes like, the use of object to penetrate vagina, applying of mouth, disrobing or stalking a lady, invading woman's privacy to look or capture her nakedness are not prohibited under the old Criminal and Penal Codes that are applicable in some states. The Violence Against Person Prohibition Act made some interesting changes in relation to sexual crimes in that regard. The Violence Against Person Prohibition Act, is gender neutral and it has expanded the definition of rape to accommodate the new sexual crimes. Unlike in India that the Indian Penal Code is applicable in the entire country, the Violence Against Person Prohibition Act has a territorial limitation. Though it adapts to the modern conception of rape, the act can only apply in the Federal Capital Territory, Abuja except if has been adopted by a state.

Just like in India, the Nigerian Criminal laws did not provide for marital rape as was held in *Posu & Anor v State*⁴⁹. In Nigeria, there is no guidelines on what is the definition of consent, what amounts to consent and what does not amount to consent. Unlike in India, the Supreme

⁴⁷ Section 375 Indian Penal Code

⁴⁸ AIR 2004 SC3566, 2004

⁴⁹ (2011) 2NWLR (Pt. 1234)393

Court has issued guidelines on what is consent, what amounts to consent and what does not amount to consent. This has gone a long way in guiding the courts to achieve a just determination of rape cases brought before it. The Supreme Court of Nigeria, being a court of policy should issue a practice direction on what consent or non-consent should be.

In terms of punishment, there are provisions in Nigeria's Criminal Law, which criminalize this offence and prescribe punishment for its commission⁵⁰. In Kaduna state, the Kaduna State Penal Code (Amendment) Law 2020 wherein a penalty for the offence of rape ranges from castration, removal of fallopian tube and death sentence where the victim is a child. On the other hand, the punishment prescribed for in India does not include castration, removal of fallopian tube and death sentence probably because of the by human rights activists who oppose the death penalty being a violation of the right to life.

Another striking difference between the rape law in Nigeria and India is the non-provision for compensation for victims of rape in the Nigerian Criminal laws. The primary focus of Nigeria's criminal law is the offender, the imposition of punitive sanctions and rehabilitation measures against him or her, appropriate⁵¹. No consideration is spared for the victims of the offence in an adequate manner. For instance, under the Criminal Procedure Act, there are only three provisions in the Act; all three provisions seem inadequate both in scope and quantum with regards to compensation and remedy or restitution.⁵² Nigeria should draw a lesson from India by amending the criminal laws to adequately provide compensation for the victims of rape rather than focusing on punishing the offender.

4. CONCLUSION AND RECOMMENDATIONS

The laws regulating the offence of rape in Nigeria, seem to be inadequate for the purpose of combating the emerging trend of the crime, particularly in states that are still applying the old Penal and Criminal Codes. The definition of rape under the old codes, are insufficient. Secondly, the provisions of rape under the Violence Against Person (Prohibition) Act 2015, is laudable. However, a lot of states are yet to adopt same. States that are yet to adopt the Violence Against Person (Prohibition) Act 2015, and states that are also yet to amend the provisions of the old Criminal Code that is applicable to the South and the old Penal Code that is applicable in the North, are still grappling with definitional issues of rape which has made the prosecution of the offence difficult. States should periodically review these laws to accommodate changes that are necessary, to be in tune with evolving societal orientation and practices.

The Indian legal framework on the offence of rape is more comprehensive than the Nigerian legal framework. Some of the guidelines established by the Supreme Court of India in the case of the *State of Maharashtra v. Madhukar Narayan Mardikar*, is highly recommended for future legislation in Nigeria as well as a future guide for Nigerian judges in handling rape cases as follows:

⁵⁰Section 357 of the Criminal Code Act, Section 282 of the Penal Code, section 283. The Shariah Penal Code of Zamfara. Section 34 Constitution of Federal Republic of Nigeria 1999 as amended.

⁵¹Nwadialo F, 'Compensating Victims of Arson and other offences to property' Malthouse Press, Lagos (2010) p.201

⁵²Section 435 Criminal Procedure Code Act, Cap C. 30 L.F.N 2004.

- (a) Consent should be voluntary, informed and conscious.
- (b) The absence of physical resistance should not be regarded as consent.
- (c) A woman's past sexual history cannot be used to infer consent.
- (d) A victim's testimony should be given weightage and need no further corroboration. Corroboration should only be required where the victim's testimony is unreliable or inconsistent.
- (e) The punishment for rape should be commensurate with the gravity of the offence and the circumstances of the case. The courts should take into account the age of the victim, the nature of the injuries, the use of weapons, and the degree of violence.
- (f) Where there is evidence of sexual intercourse, the burden of proof should be on the defendant to establish that the sexual intercourse was consensual.

© 2024 *African Journal of Law & Criminology (AJLC)*

TopJournals, England, United Kingdom

<http://www.topjournals.co.uk>