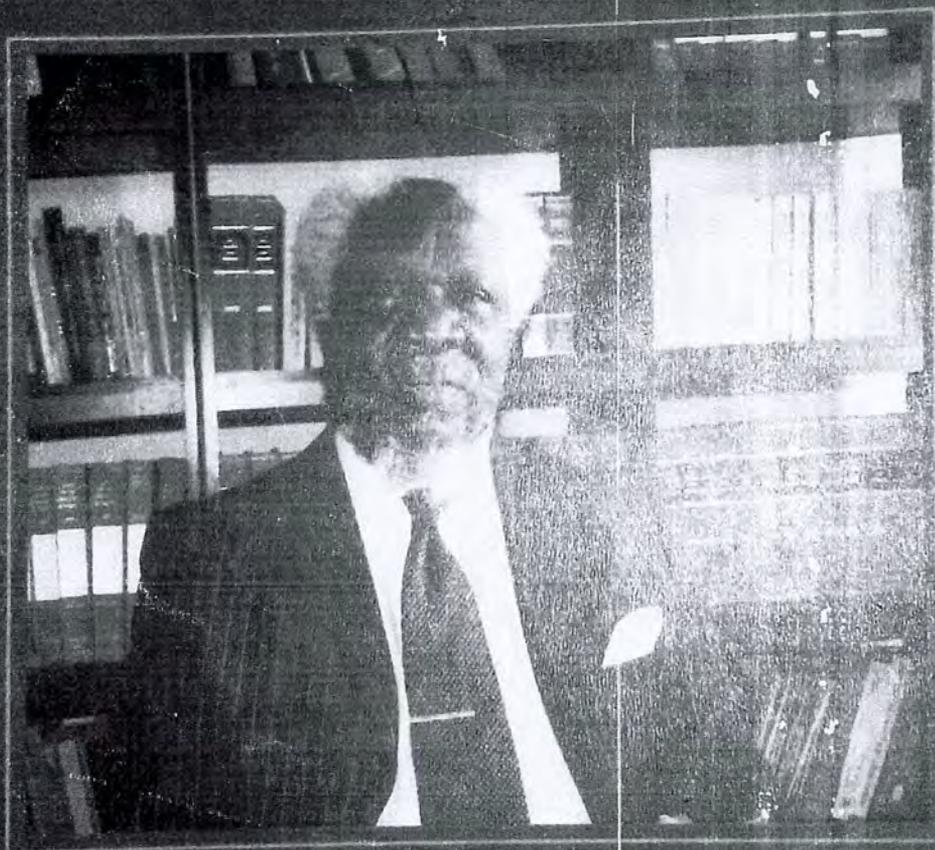


DISSECTION OF CONTEMPORARY ISSUES IN PUBLIC LAW IN NIGERIA

Selected Essays in Honour of
Professor Michael Olu Adediran



Edited by
Daniel O. Odeleye | Elijah A. Taiwo | Adejoke O. Adediran

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The Different Faces of Rape: A Jurisdictional Issue

by Olujemisi Bamgbose*

1.0 Introduction

Rape is the most serious kind of assault¹; it is also referred to as unlawful carnal knowledge. It has been defined as a crime of aggression, power and control in which one person forces, coerces, or manipulates another person to have sexual intercourse without their consent.² The offence of rape has been identified as one of the most under-reported crimes³ and one of the commonest crimes of personal violence. According to the Women at Risk International Foundation, Africa has the highest prevalence rate of child sexual abuse which is around 34.4%.⁴ Findings from a national survey carried out in 2014 on violence against children in Nigeria confirmed that one in four females reported experiencing sexual violence in childhood with approximately 70% reporting more than one incident of sexual violence. In the same study, it was found

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¹ Olujemisi Bamgbose and Sonia Akinbiyi, *Criminal Law in Nigeria* (Ibadan: Evans Brothers Nigeria Publishers, 2015), 175. See C.O Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria* (2nd ed.) (London: Sweet and Maxwell, Publishers, 1980), 271.

² <<https://www.vanguardngr.com/2017/09/lets-talk-rape/>> Accessed 18th April 2018.

³ C.M.V. Clarkson and H.M. Keating, *Criminal Law: Texts and Materials* (London: Sweet and Maxwell Publishers, 1984), 469.

⁴ <http://warifng.org/rape-stats-in-nigeria/>> Accessed 18th April 2018.

that 24.8% of females between ages eighteen (18) to twenty-four (24) years experienced sexual abuse prior to age eighteen (18) of which 5.0% sought help, with only 3.5% receiving any services.⁵

In some African societies, including Nigeria, the victims of rape do not only suffer the emotional trauma from the experience, they also suffer the shame of identification associated with it in those societies. The societies blame them for being the cause of their own ordeals; they are stigmatized and treated as immoral and unclean. These contribute largely to the refusal of most victims to report cases of rape and invariably the continued perpetration of the criminal act.

However, in Nigeria, the need to bring the perpetrators to justice has been emphasized over the years, and laws have been and are being enacted to ensure that the offence is defined and punishment prescribed for it. Initially, the existing laws on the offence were the Criminal Code⁶ and the Penal Code⁷ governing the southern and northern parts of Nigeria respectively, which were also adopted as laws in the 36 states and the Federal Capital Territory. Both laws as well as their municipal representations define the offence and stipulate the punishments to be meted out on offenders. However, as the perpetrators of rape in its various forms increased, the inadequacies of the existing laws on rape became more apparent so that it became necessary to enact more laws in order to bring perpetrators to book and to make provision for the compensation and protection of the victims of this heinous crime. It is in a bid to satisfy this need that more Federal and state laws such as Administration of Criminal Justice Act, 2015 and Laws; Violence Against Persons Prohibition Act, 2015; Violence Against Women Law and so on, on the crime of rape were enacted in Nigeria. Ironically, the multiplicity of the laws may have, instead of solving the problem of rape in Nigeria, compounded the problem. This is because the law of rape now seems to be different in various jurisdictions in Nigeria such that it is difficult to specifically say with specificity what the law of rape is, in the country.

This chapter considers the law of rape in Nigeria, in view of some of the laws governing the offence and the attendant effect of the differing

⁵ *Ibid.*

⁶ CAP C38, LFN 2004.

⁷ CAP P3, Vol. 13, LFN 2004.

provisions in the laws on the offender, victim, witness, the legal practitioner and the Nigerian legal system.

2.0 Meaning and Ingredients of the Offence

2.1 Meaning of Rape

Section 357 of the Criminal Code and Section 282 Penal Code define the offence of rape. According to Section 357 of the Criminal Code⁸:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representations 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.

In Section 282 of the Penal Code⁹, rape is defined as follows:

A man is said to commit rape which save in the case referred to in subsection (2) has sexual intercourse with a woman in any of the following circumstances:

- (a) against her will.
- (b) without her consent.
- (c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt.
- (d) with her consent, when the man knows that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- (e) with or without her consent, when she is under fourteen years of age or of unsound mind.¹⁰

The definitions above show that the offence of rape is committed when a person engages in sexual intercourse with a woman or girl without her consent or with her consent where such consent is obtained by force or fraud.

⁸ CAP C38, LFN 2004.

⁹ CAP P3, Vol. 13, LFN 2004.

¹⁰ See generally *Ogunbayo v. State* (2007) 8 NWLR (Pt. 1045) 157; *Upahar v. State* (2003) 6 NWLR (Pt. 816) 230.

2.2 Ingredients of the Offence under the Criminal Code Act in Nigeria

From the above cited provisions, the following are the ingredients necessary to prove rape:

(i) Sexual intercourse (carnal knowledge)

The physical element of the offence of rape which must be proved is that a person had unlawful carnal knowledge or sexual intercourse with a woman. Carnal knowledge is complete upon penetration. According to the law, penetration is when the male organ reaches the labia minora outside the vagina of the woman.¹¹ In other words, rape is an offence under the criminal law that can only be committed by a male as an offender, and on a woman as a victim.¹² Penetration must be through the vagina and not through the anus.¹³

It is not necessary to prove that the hymen was ruptured or that there was an emission of semen¹⁴, the slightest penetration of the vagina with the penis would suffice.¹⁵ This distinguishes the present position of the law in Nigeria under the Criminal Code Act from the English law where penetration could be vaginal or anal.

In the Ugandan case of *Mukasa Evensto v. Uganda*¹⁶, the Ugandan Court of Appeal held that it is trite law that penetration however slight will suffice, the vagina need not be fully penetrated and proof of rupture of hymen is not necessary. The Court pointed out that although the victim's hymen was not broken, there was penetration. Again, in *Muzeeyimana Phillipa v. Uganda*¹⁷, the Ugandan Court of Appeal held that it is trite law that the slightest penetration is sufficient. In that case, sexual intercourse was proved by the

¹¹ *R. v. Kufi* (1960) WRNLR 1.

¹² *Ahmed v. Nigerian Army* (2011) 1 NWLR (Pt. 1227) 89 CA; *Ogunbayo v. State* (2007) 8 NWLR (Pt. 1035) 157; *Iko v. State* (2001) 14 NWLR (Pt. 732) 221; *Jegade v. State* (2001) 14 NWLR (Pt. 733) 264.

¹³ *Iko v. State* (2001) 14 NWLR (Pt. 732) 221.

¹⁴ *R. v. Marsden* (1891) 2 Q.B. 14, *R. v. Hughes* (1841) 9 C&P 752.

¹⁵ *C.M.V. Clarkson and H.M. Keating* (n 3); *People (Att.-Gen.) v. Dermody* (1956) I.R. at 32; Criminal Code (n 5).

¹⁶ C/A 53/99.

¹⁷ C/A no. 85/1999.

inflammation of the vestibule. Evidence was led to the effect that that such inflammation usually follows an act of sexual intercourse.

Moreover, it has been established that ejaculation is not one of the requirements of the offence of rape.¹⁸ Thus, without penetration, the offence of rape has not been committed and although the offence is complete upon penetration, the other acts of sexual intercourse which may follow are parts of the offence itself and it has been held that aid given after penetration makes the aider a party to the offence.¹⁹

Furthermore, it must be shown that the sexual intercourse was unlawful. Unlawful carnal knowledge has always been taken to refer to intercourse outside the bonds of marriage; this is because a woman is deemed to consent to the act of sexual intercourse by the marriage ceremony.²⁰ This is also shown in Section 6 of the Criminal Code that provides that "When the term 'carnal knowledge' or the term 'carnal connection' is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration. 'Unlawful carnal knowledge' means carnal connection which takes place otherwise than between husband and wife." Therefore, in Nigeria, a husband cannot be found guilty of rape, even where the wife does not consent. However, this privilege or immunity for the husband has exceptions, where a court of competent jurisdiction has dissolved the marriage or there is a judicial separation order stating that the wife is no longer bound to cohabit with the husband, any sexual intercourse by the husband with the wife without her consent would amount to rape.²¹ Furthermore, a husband can be guilty of aiding and abetting to commit rape by virtue of Section 7(b) of the Criminal Code²² for husband cannot transfer his implied consent to sexual intercourse with his wife to another person.²³

¹⁸ Halsbury Laws of England, (Vol. 10, 3rd edn) (Butterworth, 1954) para.1438 at 746.

¹⁹ *R v. Mayberry* (1973) Q R. 211 (Skerman J. dissenting).

²⁰ Section 6 of the Criminal Code.

²¹ *Oluyemisi Bamgbose and Sonia Akinbiyi* (n 1) 184.

²² *DPP v. Morgan* (1975) 2 AER 347; *R v. Waite* (1892) 2 Q B 6

²³ *R v. Morgan* (n 22); *R v. Shivpuri* 1987 AC 1; *R v. Seymour* 1983 2 AC 443.

(ii) Lack of consent

This element is very crucial as it is the lack of consent that transforms normal sexual intercourse into rape. The prosecution has to prove that the accused had carnal knowledge of a woman or girl, despite her age, without her consent.²⁴ It has been held that it is no excuse that the complainant is a common prostitute, that she had consented to intercourse with the accused on other occasions or that she is the accused person's concubine.

According to law, consent obtained by force or by means of threats or intimidation or fear of harm is no consent. Consent given because of exhaustion after persistent struggle and resistance would appear to be no consent and to have carnal knowledge of a sleeping woman or by personating her husband is rape. Also, submission by a person of weak intellect or a person who is too young to understand the nature of the act done is not consent.²⁵

Furthermore, it is important in proving the offence of rape, to show that the accused intended to have sexual intercourse with the victim without her consent.

3.0 The Different Faces of the Offence of Rape

As it has been established already, rape is an offence under the Nigerian criminal law in which case, it is a crime defined in the Criminal Code and Penal Code, with punishments prescribed for it. The need to curb the offence of rape has led to the enactment of other laws in addition to the earlier Criminal Code and Penal Code. It is worthy of note, that the Criminal and Penal Codes have their municipal representations in form of laws passed by the different state Houses of Assembly.

This section deals with an analysis of the Nigerian law of rape in view of the earlier laws on the subject and some of the newly enacted federal and state laws.

3.1 The Nigerian Criminal Code Act²⁶

The Criminal Code Act is the federal law regulating criminal conducts in southern Nigeria. The Act first became law in Nigeria in 1916, initially

²⁴ n 11.

²⁵ C.O. Okonkwo (n 1) 274.

²⁶ CAP C38, LFN 2004.

standing as the only federal Act on the subject and being applicable to the whole of the federation. The Code is contained in the Schedule to the Act establishing the Criminal Code of Criminal law in Nigeria. The Code defines rape and stipulates the punishment to be meted out on offenders. The provision and requirements has been partially discussed above.

In addition to the discussion above, the Act provides for the punishment of offenders in Section 358 which states "Any person who commits the offence of rape is liable to imprisonment for life, with or without caning."

The Criminal Code also provides for the unlawful carnal knowledge of under aged girls and people with unsound mind. The offence is tagged "defilement" in the Act and it provides in this regard that:

218. Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without caning ...
220. It is a defence to a charge of any of the offences defined in the last preceding section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of sixteen years.

The punishment where the girl defiled is above thirteen years but below sixteen years of age or is an imbecile is however different. According to Section 221:

Any person who:

- (1) has or attempts to have unlawful carnal knowledge of a girl being of or above thirteen years and under sixteen years of age; or
- (2) knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her; is guilty of a misdemeanour, and is liable to imprisonment for two years, with or without caning.

The provisions above show the initial state of the law of rape in southern Nigeria as the Criminal Code was adopted and re-enacted as the Criminal Code Law of the southern states. It is obvious that the definition of rape in this Act is limited in scope considering the different methods by which the crime is perpetrated in modern times. It still defines rape based on

the sex of the victim and the perpetrator, and it does not mention any way through which the victims of the crime can be helped.

The Criminal Code also reduces the punishment to two years, with or without caning where the victim is above thirteen years but below but below sixteen years of age or is an imbecile.

3.2 Penal Code²⁷

The Nigerian Penal Code is another federal Act providing for the law of rape. While the Criminal Code now applies to Southern Nigeria, the Penal Code applies to northern Nigeria. It is still the main law on rape in the north and it has been adapted and re-enacted as the Penal Code Law of the different states in northern Nigeria and in the Federal Capital Territory, Abuja.

The Penal Code provides for the definition for the offence of rape in Section 282 which has been stated earlier. The Penal Code further stipulates the punishment for the offence of rape in Section 283 thus: "Whoever has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine."

As seen above, the definition of rape in the Penal Code is largely similar to the definition in the Criminal Code. However, the Penal Code does not distinguish the rape of a matured woman from the rape of a minor or a person of unsound mind and the punishment for rape in the Code is fourteen years imprisonment, unlike what obtains in the Criminal Code.

Furthermore, the Penal Code clearly states that a girl below fourteen years of age or of unsound mind cannot be said to have given consent to the sexual intercourse for she is incapable to give such consent. Therefore, any unlawful carnal knowledge of such girl, with or without her consent amounts to rape.

3.3 Administration of Criminal Justice Act (ACJA), 2015

The Administration of Criminal Justice Act (ACJA) is a federal enactment on the administration of justice. It was enacted to unify the criminal procedures in all parts of Nigeria, thereby repealing the Criminal

²⁷ Penal Code (n 7).

Procedure Act and Criminal Procedure Code initially regulating criminal procedure in southern and northern Nigeria respectively. While the Act does not define the offence of rape, it introduces innovative ideas in the procedure for the trial and administration of justice in rape cases. Section 232 of the Act provides thus:

- 232(1) A trial for the offences referred to in subsection (4) of this section may not, where the court so determines, be held in an open court.
- (2) The names, addresses, telephone numbers and identity of the victims of such offences or witnesses shall not be disclosed in any record or report of the proceedings and it shall be sufficient to designate the names of the victims or witnesses with a combination of alphabets.
- (3) Where in any proceeding the court deems it necessary to protect the identity of the victim or a witness, the court may take any or all of the following measures:
 - (a) receive evidence by video link;
 - (b) permit the witness to be screened or masked;
 - (c) receive written deposition of expert evidence; and
 - (d) any other measure that the court considers appropriate in the circumstance.
- (4) The provision of this section shall apply to:
 - (a) offences under Section 231 of this Act;
- (5) Any contravention of the provisions of subsection (2) of this section shall be an offence and liable on conviction to a minimum term of one year imprisonment.

The offences under Section 231 are rape, defilement, incest, unnatural or indecent offences against a person. Therefore, the provision above seeks to protect the victim or witness where any of the offences is committed. The protection of victims and witnesses included in this part of ACJA is a welcome development as it is capable of encouraging rape victims and key witnesses to report and give testimonies. As observed earlier, despite the fact that rape is one of the commonest crimes of personal violence in Nigeria, it still remains under-reported because of the cultural beliefs and mindset of Nigerians which usually leads to the exposure of the victims of rape to unnecessary ridicule and embarrassment by other members of the society. In Nigeria, a typical victim of rape is usually afraid of what will happen to her after reporting that she has been raped. Fears of what will happen to her, her family name and even her

hope of getting married in the future cloud her mind that in the end, she decides to keep the occurrence to herself and not report in a bid to protect herself from ridicule and shame. This also applies to witnesses, who decide to not talk so that they wouldn't be called names or tagged wicked by members of society.

The provision in Section 232 above clearly seeks to solve this problem by first stipulating that a rape trial may not be held in public where the court so desires. This provides an exception to the general rule that all trials must be held in an open court with public access. As a result of this provision, where the court observes that the nature of the rape trial may endanger the victim in one way or the other if it is held in an open court, the court may, pursuant to this section order that the trial should not be held in public.

Furthermore, the section provides that the names, phone numbers and identity of victims of rape or witnesses shall not be disclosed even in the record of proceedings. It is enough, according to this provision to designate their names with a combination of alphabets; the Act drives home this point by attaching a punishment to any form of derogation from this provision. This protects the victim and the witnesses in no small way as the fear of being stigmatized, blamed or looked down on has been dealt with. Also, the Act in Section 232(3) provides that the court can receive evidence through other means other than physical oral testimony such as video link, written deposition, and having such witness or victim that needs to be protected screened or masked.

Moreover, the ACJA provides for the award of compensation to the victims of crimes. It empowers the courts, whether in a civil or criminal matter to call for evidence while determining the commensurate compensation for the victim.²⁸ Since the Penal Code and Criminal Code have no provision as to the compensation of victims, this is an encouraging and impressive development in the Nigerian Criminal Justice System. The Act applies to all criminal trials in Federal courts including the Federal High Court, National Industrial Court, the Court of Appeal and the Supreme Court. The Act also applies to courts in the FCT, Abuja.²⁹

²⁸ Section 314, Administration of Criminal Justice Act.

²⁹ *Ibid.*, Section 2(1).

3.4 Violence Against Persons (Prohibition) Act 2015

The Violence Against Persons (Prohibition) Act (VAPPA) was passed into law in May 2015. The Act was passed as a result of agitations for protection of persons against the different forms of domestic and public violence. It was the need to protect citizens from such violence that led to the enactment of VAPPA 2015. The Violence Against Persons (Prohibition) Act is an improvement on the penal and criminal code in relation to violence; it also makes provision for compensation to victims as well as the protection of their rights.³⁰

Section 1 of the Act provides thus:

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

By the virtue of the above provisions, the Act expands the meaning of rape embracing the other forms in which the offence is being committed

³⁰ <<https://lawpavilion.com/blog/the-violence-against-persons-prohibition-act-2015/>> accessed 30th April 2018.

in modern times. Thus, while other existing laws such as the Criminal and Penal Codes limit their scope of rape to protect only females in relation to vaginal penetration without consent, the Act has taken a giant stride to expand the meaning and scope of rape. Under the Act, in addition to the vagina, rape is committed when any person be it male or female, intentionally penetrates the anus or mouth of another person with any other part of his or her body or anything else without consent, or where such consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.³¹

It is worthy of note that this expanded definition under the Act protects both males and females against rape thereby settling the age-long issue of rape being gender biased as raised by jurists based on the traditional laws of rape in Nigeria.

Furthermore, by virtue of the definition of rape under this Act, it progressively took cognizance of the fact that sex now goes beyond the primary sex organs and thus, extended the scope of rape to include anus and mouth. This is because it was difficult in times past, to bring an issue of forceful anal or oral sex under the umbrella of rape simply because such occasion was not envisaged or accommodated by our laws. Also, penetration under the Act now goes beyond penetration by the penis to include penetration by any other part of the body and even other objects.

Moreover, in punishing rape, the Act provides that the punishment for the offence of rape is life imprisonment. It however further provides for the punishment of offenders less than 14 years of age which implies that the age of criminality set for 12 years under the Criminal Code has been reviewed under the Act and as such, a person below the age of 14 (not necessarily above 12 years old) can be guilty of rape under VAPPA but the maximum punishment in such cases is 14 years imprisonment. The Act also recognizes the possibility of having joint offenders and thus provides for the appropriate punishment in such instances.³²

³¹ Section 1(a)-(c) Violence Against Persons (Prohibition) Act 2015.

³² *Ibid.* at Section 2(a)-(c).

Another important feature of the Act is its provision for compensation to victims of crimes under the Act. The Act provides that the Court shall award appropriate compensation to the victim as it may deem fit in the circumstance.³³ And in addition to the rights provided for under chapter IV of the Nigerian Constitution, victims and survivors of violence are entitled to comprehensive medical, psychological, social and legal assistance by accredited service providers and government agencies or non-governmental agencies providing such assistance; information on the availability of legal, health and social services and other relevant assistance and be readily afforded access to them; rehabilitation and re-integration programme.³⁴

The lawmakers, taking cognizance of the fact that victims or potential victims might not want to come forward to lodge complaints in relation to offences under the Act because of the fear of further victimization in the wider society (especially at the work place), provides that no complainant of any offence under the Act shall be expelled, disengaged, suspended or punished in any form whatsoever by virtue of the action of compliance with the provisions of this Act.³⁵ The identities of victims of offences under the Act is also sought to be protected. The Act provides for the number and categories of persons that may be in court during trial³⁶, it empowers the Court to hear proceedings in camera or to exclude any person from attending such proceedings³⁷ and prohibits the publication of certain information in relation to the trial.³⁸ This is to ensure that the dignity of the victim (and other parties to the trial) is protected.³⁹

According to the Act:

- (45)(1) Any offence committed or proceedings instituted before the commencement of this Act under the provisions of the –
- (a) Criminal Code, Cap LFN 2004
 - (b) Penal Code, Cap LFN, 2004

³³ *Ibid.*, Section 3.

³⁴ *Ibid.*, Section 38(1)(a)-(c).

³⁵ *Ibid.*, Section 38(1)(e).

³⁶ *Ibid.*, Section 38(3).

³⁷ *Ibid.*, Section 38(4).

³⁸ *Ibid.*, Section 39.

³⁹ <<https://lawpavilion.com/blog/the-violence-against-persons-prohibition-act-2015/>> Accessed 30th April 2018.

- (c) Criminal Procedure Code Cap. LFN, 2004
 - (d) any other law or regulation relating to any act of violence defined by this Act shall as the case may require be enforced or continue to be enforced by the provisions of this Act.
- (2) Any provision of the Act shall supersede any other provision in similar offences in the Criminal Code, Penal Code and Criminal Procedure Code.

Unfortunately, despite the progressive nature of VAPPA and its all-encompassing provisions, the Act only applies only to the Federal Capital Territory, Abuja.⁴⁰ However, some states in the federation have adopted the Act as law.

3.5 Criminal Law of Lagos State, 2011

The Criminal Law of Lagos State, 2011 also provides for the offence of rape. According to Section 258 of the Law:

- 258(1) Any man who has unlawful sexual intercourse with a woman or girl, without her consent, is guilty of the offence of rape and liable to imprisonment for life.
- (2) A woman or girl does not consent to sexual intercourse if she submits to the act by reason of force, impersonation, threat or intimidation of any kind, fear of harm or false or fraudulent representation as to the nature of the act.
 - (3) Sexual intercourse between a man and a woman who are married is not unlawful.
 - (4) Sexual intercourse is complete on the slightest penetration of the vagina.

The law goes further to extend the frontiers of the offence beyond male offenders by providing that any person who penetrates sexually the anus, vagina, mouth or any other opening in the body of another person with a part of his body or anything else, without the consent of the person is guilty of a felony and liable to imprisonment for life. The offence is however called sexual assault by penetration⁴¹ unlike VAPPA which categorizes them as acts amounting to rape.

⁴⁰ Section 47, Violence Against Persons (Prohibition) Act 2015.

⁴¹ *Ibid.*, Section 259.

3.6 Oyo State Administration of Criminal Justice Law, 2016

The Oyo State Administration of Criminal Justice Law, 2016 is an adaptation of the federal Administration of Criminal Justice Act. It therefore provides for the protection of victims and witnesses.⁴² Also, by virtue of Section 315⁴³, the Law provides for the award of compensation to victims by courts.

3.7 Oyo State Violence Against Women Law 2016

The Oyo State Violence Against Women Law is a law to prohibit violence against women in public and private life, harmful traditional practice, and prescribe punishment for the offenders and other matters connected therewith. Its provisions are largely similar to the provisions of VAPPA but are mainly focused on women. The law defines rape as the intentional penetration of the vagina, anus or mouth of a woman by a man with any other part of his body or anything else without the consent of the woman to the penetration or where the consent is obtained by force or means of treat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of the woman or in case of a married woman by impersonating her spouse.⁴⁴ Though the law recognizes only female victims and male offenders, it goes beyond vaginal sex to recognize anal and oral sex. Also, in punishing rape, the law just like VAPPA provides for the punishment of offenders less than 14 years of age and it recognizes cases of rape by a group of persons.⁴⁵ However, the general punishment, which is life imprisonment does not apply to cases where the victim is a girl of or above 11 (eleven) years of age but below the age of 13 years; or a girl with mental disorders, in such cases, the punishment is 14 years imprisonment without an option of fine.⁴⁶

⁴² Section 231(1)-(5), Oyo State Administration of Criminal Justice Law 2016.

⁴³ *Ibid.*, Section 315(1)-(2).

⁴⁴ Section 6(1)(a)-(b) of the Oyo State Violence Against Women Law.

⁴⁵ *Ibid.*, Section 6(2)(a)-(c).

⁴⁶ *Ibid.*, Section 8.

Furthermore, the Oyo State Violence Against Women Law provides for the compensation of victims⁴⁷, the rights of victims to receive the necessary materials, comprehensive medical, psychological, social and legal assistance through governmental agencies or non-governmental agencies providing such assistance; be informed of the availability of legal, health and social services and other relevant assistance and be afforded ready access to them; and to rehabilitation and re-integration programme of the state to requisite skills in any vocation of the victim's choice and also in necessary formal education or access to micro credit facilities.⁴⁸

The law further protects victims by providing that no complainant of any offence under the Law shall be expelled, disengaged, suspended or punished in any form whatsoever by virtue of the action of compliance with this law.⁴⁹ The identities of victims of offences under the Act is also sought to be protected. The Act provides for the number and categories of persons that may be in court during trial⁵⁰, it empowers the Court to hear proceedings in camera or to exclude any person from attending such proceedings⁵¹ and prohibits the publication of certain information in relation to the trial.⁵² This is to ensure that the dignity of the victim (and other parties to the trial) is protected.

4.0 Effects of the Different Provisions

The acts and laws discussed above are the legal provisions on the law of rape in different jurisdictions in Nigeria. While some of the provisions are similar, others are fundamentally different. The differences flow from the definition of rape, age of the offender, sex of the offender, age and sex of the victim, punishment for the offence, protection of the victims in court and the award of compensation to victims among others. One other area in which the effect is seen is in the area of use of terms. From the provisions discussed above, while an act would be referred to as rape in one jurisdiction, in another it may be called sexual

⁴⁷ *Ibid.*, Section 6(3).

⁴⁸ Section 38(1)(a)-(c).

⁴⁹ *Ibid.*, Section 38(3).

⁵⁰ *Ibid.*, Section 38(5).

⁵¹ *Ibid.*, Section 38(6).

⁵² *Ibid.*, Section 38(7)(a)-(c).

assault by penetration. For example, under the Violence Against Persons Prohibition Act (VAPPA), where penetration is done using any object and such object penetrated in the mouth, anus or any part of the body, the perpetrator would be guilty of rape. However, if the above Act was tried under Section 249 of the Criminal Law of Lagos State, 2011, it would be referred to as sexual assault by penetration.

The differences in the provisions of these laws demonstrate the many faces of the law of rape across the different jurisdictions that make up the Nigerian legal system. Consequently, a person who is found guilty of committing some acts that fall within the definition of rape in one state and gets convicted for the offence in that state may be discharged and acquitted in the another where such acts do not essentially constitute the offence of rape. It is therefore important to consider the effects of these differences in the law of rape on the offender, the victim of rape, the legal practitioner and the Nigerian legal system.

4.1 The Offender

The definitions of rape according to the different acts and laws suggest who can be convicted for the crime. The Criminal and Penal Codes provide for the offender to be a male who has a penis thereby restricting the gender of an offender under the Codes to the male gender.

4.1.1 The Act

Thus, in a jurisdiction where the Criminal Code or Penal Code applies, only a male can be convicted of rape and where the penetration is by an object or any other body part other than the penis, there is no rape. Also under these two Codes, in a situation where the act was perpetrated through the anus or the mouth; that is, where the penis or object was inserted in the anus or mouth of the victim, the offence of rape cannot be committed. On the other hand, in the Federal Capital Territory where VAPPA applies, and also in the Criminal Law of Lagos State, 2011⁵³ and under the Oyo State Violence Against Women Law 2016, where penetration is done using any object and such object penetrated in the mouth, anus or any part of the body, the perpetrator can be convicted

⁵³ Section 259.

for sexual assault by penetration or rape depending on the jurisdiction. Therefore, a perpetrator of the crime may or may not be convicted and punished for committing the offence in the same way depending on the jurisdiction where the offence was committed.

4.1.2 The Punishment

Furthermore, the punishment for the offence of rape which was life imprisonment in all cases under the Criminal Code now varies from one jurisdiction to another. The Penal Code provides that anyone convicted of rape shall be liable to imprisonment for fourteen years and a fine⁵⁴, Violence Against Persons Prohibition Act (VAPPA) on the other hand provides that offenders are liable to life imprisonment but where the offender is less than 14 years old he/she will be liable to a maximum of fourteen (14) years imprisonment. This is also similar to the provisions of the Oyo State Violence Against Women Law.

4.1.3 Joint Offenders

Under the Criminal Code, Penal Code and the criminal code laws of the various states there is no provision for the punishment of joint offenders of the offence of rape, what applied to them was the law on principal offenders and accomplices to crime.⁵⁵ However, the situation is now different under the Violence Against Persons Prohibition Act and the Oyo State Violence Against Women Law which provide specifically for situations where the act of rape is jointly carried out by two or more persons. In such instances, it is provided that such joint offenders are jointly liable to a minimum of twenty years imprisonment.⁵⁶ Therefore, joint offenders tried outside the FCT and Oyo State may be punished with less than twenty years imprisonment whereas their counterparts in the FCT and Oyo State are subject to imprisonment for more than twenty years.

⁵⁴ Section 283, Penal Code (n 7).

⁵⁵ Section 7, Criminal Code Act (n 6).

⁵⁶ Section 1(2)(c), Violence Against Persons Prohibition Act 2015; Section 6(2)(c) Oyo State Violence Against Women Law 2016.

4.1.4 Age of Offender

Moreover, the age of criminality under the Criminal Code is seven (7) years; the Act further provides that a male person under the age of twelve (12) years is presumed to be incapable of having carnal knowledge.⁵⁷ And by virtue of these provisions, it has been held over the years that a male under the age of twelve years is not capable of committing the offence of rape, since he cannot, according to the Act, have carnal knowledge. However, VAPPA and the Oyo State Violence Against Women Law now provides for the punishment of offenders less than the fourteen (14) years old. The provisions do not stipulate whether or not the offenders have to be above twelve (12) years old so it is possible that an offender who is less than 12 years old can now be convicted under the two laws. This is not surprising as the two laws recognize penetration by other body parts besides the penis and objects. It should be noted that the Oyo State Violence Against Women Law also reduces the punishment to 14 years where the victim is a girl above eleven (11) years but below thirteen (13) years old or where the victim has mental disorders.⁵⁸

Therefore, the deciding factor in whether a perpetrator of an act will be convicted and punished for the offence of rape depends largely on the jurisdiction where the offence is committed and where he is charged for the offence and his punishment also depends on the law(s) applicable to that jurisdiction.

4.2 The Victim

The criminal justice system has been predominantly concerned with the accused, that is, the offender often to the exclusion of the victim. The victim's role has therefore become for the most part procedural and evidential, making initial complaint about the incidence of the offence and testifying in court as to the events which led to and constituted the alleged rape with no consideration of what happens to the victim at the end of the whole process. The Criminal Code Act and the Penal Code have no provision for the victims of rape; the Acts contain only the definition of the offence and the punishments to be meted on the offenders, with nothing on the protection or compensation of victims of

⁵⁷ Section 30, Criminal Code Act (n 6).

⁵⁸ Section 8 Oyo State Violence Against Women Law 2016.

the crime. However, due to recent developments and movements for the protection of victims of crime, there are provisions on the protection of victims in the new acts and laws, some of which were discussed in this article.

According to the Violence Against Persons Prohibition Act (VAPPA), a victim is any person who individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights through acts or omissions that are in violation of this Act or the criminal laws of the country and includes the immediate family or dependents of the direct victim and any other person who has suffered harm in intervening to assist victims in distress.⁵⁹ Therefore, in a rape case, the victim is the person who has been raped, his/her spouse, children or other family members that have been affected in one way or the other by the criminal act.

According to the Criminal and Penal Codes, the victim of rape can only be a female. Section 282 of the Penal Code clearly shows this where it provides that "A man is said to commit rape which gave in the case referred to in subsection (2) has sexual intercourse with a woman ..." the Criminal Code also provides in Section 357 that "Any person who has unlawful carnal knowledge of a woman or girl, without her consent ..." These provisions show how the crime of rape has been streamlined to a crime against the female gender over the years and the possibility of a man being raped has been an issue of jurisprudential discourse. The Violence Against Persons Prohibition Act however, defines rape as the intentional penetration of the vagina, anus or mouth of a person by the perpetrator without the consent of the victim. This provision, by not indicating the specific sex of the victim and by accommodating other areas that can be penetrated besides the vagina shows that it is possible for a male to be a victim of rape under the Act. However, due to the fact that VAPPA does not apply to every state in the federation, a male can only report that he has been raped in the FCT, there is no provision for a male victim of rape in other states where the Criminal Code and Penal Code still apply, even the Oyo State law which is similar to VAPPA in its provisions protects only the female victims. Therefore,

⁵⁹ Section 46, Violence Against Persons Prohibition Act 2015.

while a male victim of rape in the Federal Capital Territory gets justice, compensation and protection, his counterparts in other states do not enjoy such protection of the law.

The law under the Penal and Criminal Codes did not specifically provide for the protection of victims of rape, it did not matter what happens to them, their health or reputation in as much as they have reported the crime and the offender has been punished. However, the enactment of the Administration of Criminal Justice Act, 2015, which unifies criminal procedure throughout Nigeria, has brought about the protection of victims of crime in Nigeria. The Act protects the victim by providing that a rape trial may not be held in public where the court so decides. Therefore, where the Court observes that the nature of the rape trial may endanger the victim in one way or the other if it is held in an open court, the court may, pursuant to this section order that the trial should not be held in public.

The ACJA also provides that the names, phone numbers and identity of victims of rape shall not be disclosed even in the record of proceedings. It is enough, according to this provision to designate their names with a combination of alphabets; the Act drives home this point by attaching a punishment to any form of derogation from this provision. Also, the Act in Section 232(3) provides that the court can receive evidence through other means apart from physical oral testimony such as video link, written deposition, and having such witness or victim that needs to be protected screened or masked. The ACJA provides for the award of compensation to the victims of crimes. It empowers the courts, whether in a civil or criminal matter to call for evidence while determining the commensurate compensation for the victim.⁶⁰ The Violence Against Persons Prohibition Act, Oyo State Administration of Criminal Justice Law and Oyo State Violence Against Women Law also have similar provisions on the protection and award of compensation to victims of rape.⁶¹ Victims are under these laws entitled to comprehensive medical, psychological, social and legal assistance by accredited service providers and to government agencies or non-governmental agencies providing

⁶⁰ Section 314, Administration of Criminal Justice Act.

⁶¹ Sections 3, 38(1)(a)-(e), 38(3)-(4), 39 of VAPPA; Sections 231(1)-(5), 315 (1)-(2) of the Oyo State Administration of Criminal Justice Law; Sections 6(3), 38(1)(a)-(c), 38(3)-(7) of the Oyo State Violence against Women Law.

such assistance; to information on the availability of legal, health and social services and other relevant assistance and be readily afforded access to them; rehabilitation and re-integration programme.

It is however saddening that some states of the federation have not enacted their Administration of Criminal Justice laws and in those states, there is no protection for the victims of rape. While victims in the FCT and some other states are paid compensations and provided with rehabilitation, treatment and other necessary services, their counterparts in the other states where the old laws apply are left unprotected, with no compensation and exposed to the prying eyes of the public during trial.

4.3 The Witness

The Criminal and Penal Codes both have no provision for the protection of witnesses. The law was focused on the offender without considering what happens to the witness who stands in court to witness to the events leading to the crime. Witnesses face dangers like threat to life, damage to property, harassment, embarrassment by members of the society and so on. They are sometimes at the risk of being victimized or blamed by the offender's family members as the cause of their relative's being in jail. Rape is a sensitive crime which can, after conviction affect the reputation of everyone attached to it in one way or the other and due to its nature, there is usually no eyewitness to the offence, even where a person witnesses the offence, the person is usually unwilling to testify.

It is in a bid to ensure that witnesses come to court to testify without fear that the newly enacted laws such as VAPPA, ACJA, Oyo State Criminal Justice Law and Oyo State Violence against Women Law now provide for the protection of witnesses alongside victims. The laws do not only protect the victims of crime, they extend to witnesses as well. Witnesses can now give evidence through video links and be screened where necessary or where the court finds it risky for them to testify physically in court and their names, addresses, telephone numbers and identities are not to be disclosed in any record or report of proceedings. The protection afforded the witnesses according to these provisions are however limited to the jurisdictions where the laws apply, not everywhere within Nigeria. A witness may be screened in a state or allowed to give testimony through video links and other protective

methods and exposed in another state to criticisms and attack from the public.

4.4 The Legal Practitioner

The different provisions on the law of rape as explained in this paper are enough to make a legal practitioner unsure of what a rape case requires and how to go about prosecuting an offender, proving the offence or even defending an accused person. A prosecuting or defence counsel will always need to look into the specific provisions applicable in the particular jurisdiction where the case of rape at hand is being tried. This confuses a legal practitioner as he cannot categorically state what the Nigerian law of rape is, or assure his client of what the outcome of the matter would be, based on the cases he has taken in other jurisdictions. As the prosecuting counsel is faced with the dilemma of what he is required to prove as the ingredient of rape, the defence counsel is faced with enquiring into how he can defend his client under the applicable laws. For instance, a counsel who wants to defend a female accused of rape may not be able to rely on her gender to show her incapability to commit the offence, as it used to be under the Penal and Criminal Codes in the FCT or any other state where the contrary has been established by law.

5.0 Conclusion and Recommendations

The law of rape in Nigeria has been shown to have developed over the years and it has expanded beyond the initial limits and its sole focus on the offender without consideration for the victim and the witnesses. It has grown for its restriction to only the Penal and Criminal Codes to being defined and provided for, by other recent Acts and Laws such as the Administration of Criminal Justice Act and Laws and Violence Against Persons Prohibition Act and Laws.

However, different jurisdictions in Nigeria apply different laws, there is no unified code that applies in all states to rape and this makes rape look like the proverbial elephant which was described differently by four blindfolded men based on their perspectives. The law of rape now has different faces depending on the jurisdiction where a particular case is being tried and the laws applicable in such jurisdiction.

Legal practitioners now have to specifically consider the law in each state before approaching rape trials. A victim of rape cannot be

categorically sure that he/she is protected under the Nigerian law without first considering the law of rape in his/her jurisdiction. A perpetrator of rape can either go scot-free or be punished depending on what the law in his jurisdiction says and he cannot be sure of the length of his term of imprisonment without also considering the laws applying to his jurisdiction.

The points raised in this chapter clearly show that the law of rape in Nigeria needs attention. There is the need for a single law that applies to rape throughout the federation. The enactment of the Administration of Criminal Justice Act in a bid to unify the law on Criminal Procedures in Nigeria is a positive move in this light; however, states that have not adopted this Act into Law should be encouraged to do so. Also, due to the broad nature of the Violence Against Persons Prohibition Act, it is my recommendation that the scope of its application be extended to all the states in the federation and not just the FCT alone as it is presently, or other states may also enact similar laws to apply to rape cases in their jurisdiction. For justice to be done and manifestly seen as done and for there to be a progressive legal system, the Nigerian law of rape must be unified such that a person can categorically state what the position of the law is, about rape, throughout the federation.