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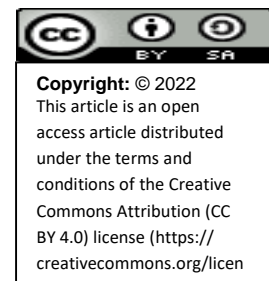
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Domestic Laws on the Rights and Protection of Rape Victims During a Pandemic

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Abstract

Women and children's rights most especially have been promoted and promulgated, particularly the protection from sexual abuse in different enactments. In the last century, there has been the ultimate realization of the need to protect women and children from sexual abuse. This has occasioned the enactment of national and state laws specifically tailored towards the protection of rape victims. Similarly, while identifying that the mere enactment of laws would not be enough to combat the fight against rape and protecting victims, the government established ministries and agencies to implement these laws. This inextricably led to the establishment of specialized arms of the Nigerian Police Force, Family Courts, specialized agencies, to mention but a few. Through the doctrinal approach and content analysis, this article examined the existing domestic legal frameworks on the protection of victims of rape and its effect on the rights on the victims of rape. The article went further to examine the extent of the effectiveness of those laws in light of a pandemic such as Covid-19.

Keywords: Rape, Crimes, Victims, Appellant, Rights

Rape as a crime under the Nigerian Criminal Law

In Nigeria's criminal law, there are provisions covering sexual crimes, such as rape, indecency, incest, corruption, addiction, and indecent treatment.¹ According to the respective laws, these few crimes should be punished. However, the focus of this article is limited to the examination of various domestic legislations and enactment criminalizing the offense of rape under the Nigerian legal system.

Penal Code of Northern Nigeria

Historically, the Penal Code had been available since the amalgamation of the country into an entity referred to as Nigeria, a country that later became a pluralistic state.² The Penal Code of Northern Nigeria which was passed in Nigeria in 1959 had its basis from the Penal Code of the Sudan, where it was majorly successful by its operation in a Muslim community.³ The Three distinct criminal laws became applicable in Nigeria which include the English Criminal law applicable to Lagos, Criminal Code in the North and the Indigenous criminal law customs in the south.⁴ There was the need to harmonize the laws to accommodate the cultural difference in the North; a predominantly Islamic region. This birthed the Penal Code, which is a hybrid of the provisions of the criminal code and Islamic law as applicable in the Northern region. By implication, the Penal Code strictly applied to the Northern region as they were elements of punishment of crimes peculiar to the region because of their strict adherence to the Islam religion. Sharia law has always been an important part of the legal system in northern Nigeria. The Penal Code promulgated in northern Nigeria follows the early codification model of Islamic Penal Code and Penal Code.⁵

An obvious weakness of the Penal Code lies in the failure to protect victims of rape. The Penal Code contains inadequate sections to make sure that victims are treated with dignity and long-term protection from intimidation. In addition some section of the law criminalizes certain sexual offences against girls without a corresponding provision aimed at the protection of boys from similar acts. Some of the provisions are reproduced as follows'. Section 275 of Penal Code states:

Whoever, by any means whatsoever,
induces a girl under the age of eighteen

¹ Criminal and Penal Codes has specific provision

² Penal Code of Northern Nigeria, Laws of Northern Nigeria 1959, Cap 89,

³ Alan Gladhill, 'The Penal Codes of Northern Nigeria and The Sudan', (1963) *African Universities Press, Law in Africa, Sweet & Maxwell London*, < <https://www.worldcat.org/title/penal-codes-of-northern-nigeria-and-the-sudan/oclc/848931817?referer=di&ht=edition>> accessed 28 August 2021

⁴ Oba, AA, 'Islamic Law as Customary Law 'The Changing Perspective in Nigeria', (2008). *International and Comparative Law Quarterly*. Volume 51, Issue 4 < <https://doi.org/10.1093/iclq/51.4.817>> accessed 22 July 2021.

⁵ Ruud Peters, 'The Reintroduction of Islamic Criminal Law in Northern Nigeria' *Journal of Natural History* (2002) < https://www.ecoi.net/en/file/local/1411812/mv177_peters-ngr0901.pdf> accessed 23 June 2021

years to go from any place or to do an act with intent that the girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punished with imprisonment which may extend to ten years and shall also be liable to fine.⁶

The above section expressly prohibits contracting young girls to engage in sexual activities, prostitution or unlawful or forced intercourse. As evident from the section, the offence is punishable with a maximum imprisonment sentence of ten years with an option of fine. Furthermore, a person would be said to be guilty of rape where such offence is committed with a person under the age of fourteen years or of unsound mind and shall be punishable with life imprisonment.⁷ Section 282 and 283 is reproduced as follows:

(I) A man is said to commit rape who has sexual intercourse with a woman in any of the following circumstances-(e) with or without her consent, when she is under fourteen years of age or of unsound mind.

283. Whoever commits rape shall be punished with imprisonment for life or for any less term and shall also be liable to fine.

In the case of *Esseyin v State*⁸ the Appellant was tried in the Kogi State High Court in Lokoja for rape and murder, punishable by death under Section 283 and Section 221 (a) of the Penal Code, respectively, but pleaded not guilty to the charges. The deceased who sold fresh cow milk to the appellant approached the Appellant working at a site. Few minutes later, the deceased had disappeared and later the same day the corpse of the deceased was exhumed from premises where the appellant was working. At the conclusion of trial, the trial court in its judgment discharged and acquitted the appellant of the offence of rape but found the appellant guilty of the offence of culpable homicide punishable with death and convicted and sentenced him accordingly.⁹ Despite the weight of the charges, the appellant was not found guilty and was discharged and acquitted of the offence of rape. Invariably, this judgment given by the court could not have served any form of justice to the deceased victim and the family of the deceased. It is evident that the welfare of the victim is neglected and of no concern in this case, as there was no order of the court made for the recovery

⁶ Penal Code 1959, Section 275

⁷ Penal Code 1959, Section 283

⁸ *Esseyin V State* (2018) NWLR 14 (Part 1690) S.C 491.

⁹ *Esseyin V State* (2018) 14 NWLR (Part 1640) 491.

of the victim. Similarly, in the case of *Mamuda v State*,¹⁰ the appellant as 3rd accused was at the High Court of Kano State arraigned and charged along with five others for rape of one Hindatu Sani on the 26th, 27th and 28 of October 2010 respectively contrary to section 283 of the Penal Code. At the end of the trial, the trial court found the 1st and 2nd accused guilty of conspiracy, abduction and rape under section 97, 275 and 283 of the Penal Code while the appellant was found guilty of rape under section 283 of the Penal Code. Whereas the 4th, 5th and 6th who said to be at large among the ten counts were dropped. The appellant was given a sentence of 7 years and a fine of N50, 000.00. Dissatisfied, the appellant appealed to the Court of Appeal. The court affirmed the conviction of the appellant by the trial court. Still dissatisfied, the appellant appealed to the Supreme Court, in which the appeal was unanimously dismissed.¹¹ It is apparent that this judgment though confirming the conviction of the accused person, failed to provide to the victim any form of respite or ameliorative justice such as monetary compensation and rehabilitation of the victim. The courts were more interested in the punishment of the perpetrator by the state.

Furthermore, the duration of prosecution in this case, clearly opens a window for the re-victimization of the victims. There is no adequate redress provided to the victim to obtain as compensation during the course of the trial to ameliorate the pains and agony experienced by the victim. Premised on the above provisions, there is no consideration for men or boys to be vulnerable to rape; it only provides laws for women and girls specifically. In addition, the Penal Code failed to provide protective measures for the psychological and mental trauma experienced by the victims. The Penal Code lacks any other intervention for the victims except if the offender is convicted of the crime. However, the punishment meted out to perpetrators of rape will be adequate if it could serve as a justice to the victims and deterrence to others. With the above analysis, it can be deduced that according to the Penal Code, it seems impracticable for rape victims to receive any compensation from the enormous challenges encountered in the course of trial especially during the lockdown caused by the Covid-19 pandemic when courts were not sitting. The lockdown directive did more harm than good to the issue of rape because it was not regarded as an urgent matter to be heard in the court of law. Rape victims in Nigeria were placed in danger owing to events beyond their control.

By implication, there is law on accessing compensation and rehabilitation as a scheme for rape victims. The culture of silence and being shamed to reveal the incident of rape needs to be addressed so that there is an enabling environment to protect the victims. The closure of courts made the prosecution of perpetrators of rape impossible. Rape victims were subjected to mental agony even in the course of seeking justice. Simply put, the inadequacies of the Penal code earlier discussed and the

¹⁰ *Mamuda V State* (2018) 5 NWLR (Part 1664) 128.

¹¹ *Ibid.*

closure of court during the lockdown acted as contributory agents in compounding the rights and protection available to rape victims in the Northern part of the country.

Criminal Code of Southern Nigeria

The Criminal Code contains many provisions that directly or indirectly protect women from sexual abuse. The Criminal Code criminalizes the molestation of a child under 14 years of age;¹² abuse of girls under the age of thirteen;¹³ householder permitting defilement of young girls on his premises;¹⁴ abuse of girls under the age of sixteen and above thirteen and idiots;¹⁵ indecent treatment of girls under the age of sixteen; causing or encouraging the seduction or prostitution of a girl under sixteen; allowing persons under sixteen to be in brothels;¹⁶ procurement of young girls for unlawful carnal knowledge.¹⁷ Procuring the defilement of girls by threat;¹⁸ abduction of girls under the age of eighteen with intent to have carnal knowledge;¹⁹ rape punishable with life imprisonment or fourteen years in case of attempt;²⁰ indecent assault on girls²¹ abduction of young girls and girls under sixteen;²² Evidently, the Criminal Code provisions are largely aimed at protecting young children male and female from various sexual acts. Notwithstanding the various provisions identified, the Criminal Code still failed to make adequate provisions in respect of compensation for rape victims nor did it attempt a redefinition of rape. The focus remains primarily on sentencing the accused person rather than ameliorating the plight of the victim.

In the case of *Lucky v. State*²³, the accused on the 7th April, 2012, had illicit carnal knowledge with a girl of 11 years old without her consent, after sending her to buy 'pure water' for him. The trial Court convicted him of rape as charged. The court of Appeal also upheld the ruling of the trial court. On further appeal to the Supreme Court, the court upheld the decision of the two lower courts and dismissed the appeal of the appellant.

In *Benjamin v. State*²⁴ the appellant had sexual intercourse with a 12 year against her will. He was arraigned in Cross River State Superior Court and charged with rape, but pleaded not guilty to the charges. The original court sentenced the appellant to life imprisonment on the grounds that the prosecution proved the crime of rape beyond any reasonable doubt. Dissatisfied, the appellant appealed to the

¹² Criminal Code, section 216.

¹³ Criminal Code, section 218.

¹⁴ Criminal Code, section 219.

¹⁵ Criminal Code, section 221.

¹⁶ Criminal Code, section 222B.

¹⁷ Criminal Code, section 223.

¹⁸ Criminal Code, section 224.

¹⁹ Criminal Code, section 225.

²⁰ Criminal Code, section 357, 358 and 359.

²¹ Criminal Code, section 360.

²² Criminal Code, section 361 and 362.

²³ *Lucky vs. State* (2016), NWLR 13 (Part 1699) 128

²⁴ *Benjamin v. State* (2019) LPELR-53098 (SC)

Court of Appeal. The court affirmed the conviction of the appellant by the trial court, but reduced the sentence of life imprisonment to ten years imprisonment. The appellant still refused and appealed to the Supreme Court, which however, rejected the appeal unanimously.

Similarly, in *Idi v State*²⁵ the appellant was arraigned before the High Court of Kano State, for the offence of rape. He was alleged to have raped a 7-year-old girl and pleaded not guilty to the charge. Upon the ground that the prosecution proved beyond reasonable doubt the offence for rape, the trial court sentenced to ten years' imprisonment and in addition to pay a fine of N200, 000.00. Dissatisfied, the appellant appealed to the Court of Appeal. The court affirmed the conviction of the appellant by the trial court. Still dissatisfied, the appellant appealed to the Supreme Court, in which the appellant contended the evidence of the victim (at the time now 10 years old) as the trial court failed to record the preliminary questions put to her and her answer thereto.

However, the trial court recorded that it conducted the preliminary test on her. In resolving the appeal, the Supreme Court considered the provisions of Section 89(e) and 209(1) & (3) of the Evidence Act. Therefore, the appeal was unanimously dismissed. Section 357 of Criminal Code provides for the offence of rape and a penalty of life imprisonment, with or without caning for the offence of rape. The criminalization and punishment for the perpetrator of this offence will help the rape victims to seek justice. Although the Penal Code does not use expressions such as sex, it can be said that it is related to the age of the victim and has quite a few provisions on the prevention of child sexual abuse. This offence is punishable by life imprisonment, regardless of whether or not spanking.

Thus, from the analysis above, the Criminal Code does not provide any form of intervention to rape victims aside from the punishment of the perpetrators. This is squarely dependent on the ability of the prosecution to establish the ingredients or rape as well as a conviction of the accused. This is also applicable to the Penal Code which fails to provide other forms of intervention to rape victims.

Child Rights Act, 2003

The Child Right Act, otherwise known as the CRA, is the Nigerian embodiments of the Convention on the Rights of the Child and the African Convention on the Welfare and Rights of the child. It was adopted in the year 2003, during the regime of President Olusegun Obasanjo.²⁶ The Act addresses the four basic rights; civil; social; economic and political rights of children. Sections 21- 40 of the Act give an elaborate provision for the protection of children against harmful and hurtful practices. These

²⁵ *Idi v State* (2018) NWLR 4 (Pt 1610) 359

²⁶ Chimyere Amalu, 'Nigerian Child and the Child Rights Act' (Vanguard Nigeria, 29 June 2010) <https://www.vanguardngr.com/2010/06/nigerian-child-and-the-child-rights-act/> (accessed 19 June 2021)

include the prohibition of child marriage, child betrothal, infliction of skin marks, abduction, forced, exploitative, and hazardous child labour, child hawking, begging for alms, prostitution, unlawful sexual intercourse and other forms of sexual abuse and exploitation prejudicial to the welfare of the child.²⁷

Specifically, Section 30 strictly prohibits dealing or trading in children. With these provisions, children are not expected to be the subject matter of contractual dealings between contracting parties nor are they to be employed in furtherance of unlawful sexual endeavours such as prostitution, or pornography. The Act further imposes a 10 year sentence on any person who violates the provisions of the section.²⁸ Section 30 provides thus:

(1) No person shall buy, sell, hire, let on hire, dispose of or obtain, possession of or otherwise deal in a child.

(2) A child shall not be used- (a) for the purpose of begging for alms, guiding beggars, prostitution, domestic or sexual labour or for any unlawful or immoral purpose; or (e) procured or offered for prostitution or for the production of pornography or for any pornographic performance.

Furthermore, Sections 31 and 32 were dedicated solely for the prohibition of the sexual abuse of children. The section prohibits all forms of sexual intercourse with a person less than 18 years. The act further imposes a life imprisonment sentence for anyone found guilty of having sexual relations with a minor irrespective of the perpetrators belief that the child appears to be of age or that the child gave consent to the act. This may be regarded as some sort of strict liability. Section 31 provides:

(1) No person, shall have sexual intercourse with a child.

(2) A person who contravenes the provision of subsection.

(1) Of this Section commits an offence of rape and is liable on conviction to imprisonment for life.

(3) Where a person is charged with an offence under this Section, it is immaterial that-

(a) The offender believed the person to be of or above the age of eighteen years; or

(b) The sexual intercourse was with the consent of the child.

²⁷Child Rights Act 200, section 11(a).

²⁸Child Rights Act 2003 Section 30.

32.-(I) A person who sexually abuses or sexually exploits a child in any manner not already mentioned under this Part of this Act commits an offence.

(2) A person who commits an offence under subsection (1) of this section is liable on conviction to imprisonment for a term of fourteen years.²⁹

One major area distinguishing the CRA from other laws is that the Act further makes provisions for the protection of children's right in cases of emergency. This is noticeably absent in the earlier treaties. Section 42 of the Act makes provisions for emergency protection orders to be made by a court of competent jurisdiction, if a child is likely to suffer significant harm.³⁰ The power to apply for such emergency protection orders rests solely³¹ with the State government or an appropriate authority if there are strong indicators that the child is likely to suffer significant harm. The Act further makes provisions for who may exercise certain powers in respect of the child during the existence of such orders³² and the extent of such powers;³³ persons who may visit the child,³⁴ medical examination if considered necessary.³⁵ However, the Act limits the periods to which such emergency protection order can be made to a maximum number of nine (9) days,³⁶ which may be extended upon showing reasonable grounds for another period of not more than Seven (7) days;³⁷ where it is believed that the child would suffer greater harm if not extended. Such further extension can only be granted once without more.³⁸ One may question the applicability of the provisions of Sections 42 and 43 of the Child Rights Act in times of war or global pandemic or crises. Also, such orders can only be granted by a judge and any forms of specialized police are put in abeyance as evident during the spread of the Covid-19 pandemic which greatly affected Nigeria. Therefore, the Child Rights Act made specific provisions to protect children from sexual abuses in times of emergencies such as the pandemic. The closure of courts rendered the provision in effective in the face of the pandemic. Also, there are no structured guidelines as to how child victims access interventions available under the Act during the pandemic aside from the court.

Violence against Persons (Prohibition) Act 2015

Violence against Persons Prohibition Act (VAPP) 2015 was passed on the 15th of May, 2015. This Act criminalizes all form of physical, mental, sexual, discrimination and

²⁹ Ibid, section 30.

³⁰ Ibid, section 42(1).

³¹ Ibid.

³² Ibid, section 42(3).

³³ Ibid, section 42(4).

³⁴ Ibid section 42(5).

³⁵ Ibid section 42(5) (b).

³⁶ Ibid section 43(1).

³⁷ Child Rights Act 2003, section 43(5).

³⁸ Child Rights Act 2003, section 42(6).

all forms of violence done in public or private life.³⁹ It was adopted by the National Assembly in Abuja and is effective throughout the Federal Capital Territory. Specifically, this Act broadens the scope of rape as it provides extensively for protection order of the victims.⁴⁰ The VAPP Act was passed into law with the goal of eliminating violence in private and public life, prohibiting all types of violence against people, providing maximal and effective remedies for victims, and punishing criminals, as well as other relevant topics. Given that its provisions clearly criminalize various forms of domestic violence, which has become an epidemic in Nigerian homes, this Act is a positive move.⁴¹

It is the first criminal law in Nigeria to extend the definition of rape to include penetration of the mouth by the penis in addition to penetration of the vaginal and anus by the penis. It also provides for protection of domestic violence. The VAPP Act is also the first to outlaw and punish female genital mutilation, forceful eviction of a person's spouse and children, verbal, emotional, and psychological assaults, damaging widowhood practices, and political violence, among other things.⁴² In line with the aim of the Act, it will eliminate all forms of physical, mental or psychological discrimination against person.⁴³ In addition, the plight of victims was taken into consideration with remedies and adequate protection.⁴⁴ As literatures points that this Act provides a positive direction towards the protective measures for women.⁴⁵ The inclusion of marital rape is a departure from the existing criminal laws. This Act extensively provides a detailed definition of rape that differs from the existing definition:

- 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 does not consent to the penetration; or

³⁹ Violence against Persons (Prohibition) Act 2015.

⁴⁰ T. Abubakar, JSC, 'Revisiting the legal considerations for victims of crime in the criminal justice process in Nigeria' <<https://bsum.edu.ng/journals/files/law/vol9/article12.pdf>> accessed 20th August 2021.

⁴¹ James Ode Abah 'Violence Against Persons (Prohibition) Act 2015: Offences And Penalties Under The Act: A Brief Sum Up'

https://www.academia.edu/28221091/violence_against_persons_prohibition_act_2015_offences_and_penalties_under_the_act_a_brief_sum_up accessed 21st August 2021.

⁴² Enobong Akpambang, 'A Critical Appraisal of the Legal and Policy Frameworks for the Protection of Women's Rights in Nigeria' (2020) *American International Journal of Contemporary Research* Vol. 10, No. 1 <[http://aijcrnet.com/journals/Vol_10_No_1_March_2019/3](http://aijcrnet.com/journals/Vol_10_No_1_March_2019/3.pdf)>.pdf accessed 20 July 2021.

⁴³ A.N. Nwazuoke, 'A critical appraisal of the violence against persons (prohibition) Act 2015' *Journal of Law, Policy and Globalization* (2016) Vol. 47, <<https://www.iiste.org/Journals/index.php/JLPG/article/view/29658>> (accessed 20 June 2021).

⁴⁴ Violence Against Person (Prohibition), section 38.

⁴⁵ Cheluchi Onyemelukwe, 'Legislating on Violence Against Women: A Critical Analysis of Nigeria's Recent Violence Against Persons (Prohibition) Act, 2015.' (2016) <<https://via.library.depaul.edu/jwgl/vol5/iss2/3>> (accessed 25 July 2021).

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.⁴⁶

Section 1 of the Act defines rape as a person who deliberately inserts another part of his body or anything else into the vagina, anus or mouth of another person, and the other person does not agree with the penetration or is agree by force, in any way. The application of intimidation, fear of harm, or false and fraudulent statements about the nature of the behavior, or the use of any material that could deprive the person of the will. If the rape is committed by a group of people, the offenders will be jointly sentenced to at least 20 years in prison and no fines are allowed.⁴⁷ Unlike Article 30 of the Criminal Law, Article 1(2) (a) of the VAPP Law emphasizes the fact that men under the age of 12 may have entered the full stage of puberty and, therefore, can have physical relationship knowledge.

Therefore, the law stipulates that anyone under the age of 14 who violates Article 1 (2) (a) of the VAPP Act will be sentenced to a prison term of up to 14 years.⁴⁸ Meanwhile, anyone who willfully administers a substance to another person with the goal of overwhelming or stupefying that person so that another person can engage in sexual conduct with that person is guilty of violating Section 22 of the VAPP Act. Therefore, on conviction, the offender faces a maximum sentence of ten years in jail or a fine of N500, 000.00, or both. It is argued that if the victim was raped in addition to being administered the substance, a crime under s.1 (1) of the VAPP Act was committed.⁴⁹ By section 3 of the VAPP ACT, in the case of rape or other sexual offences, where there is evidence that the victim has suffered physical and/or psychological harm, the offender shall be liable upon conviction to imprisonment for three years.

The applicability of Criminal Code Cap 38, LFN and the Penal Code demonstrates that the former is applicable in the southern portion of the nation while the latter is applicable in the northern portion. It is important to note that the VAAP Act is only applicable in states that have adopted it. This inevitably demonstrates that state and

⁴⁶ Violence Against Person (Prohibition), section 1.

⁴⁷James Odeh Abah ‘Violence Against Persons (Prohibition) Act 2015: Offences And Penalties Under The Act: A Brief Sum Up’

https://www.academia.edu/28221091/violence_against_persons_prohibition_act_2015_offences_and_penalties_under_the_act_a_brief_sum_up accessed 29th June 2021.

⁴⁸ Anthony Nwazuo, ‘A Critical Appraisal of the Violence Against (prohibition) Act 2015’ *Journal of Law, Policy and Globalization* (2016) Vol.47<<https://www.iiste.org/Journals/index.php/JLPG/article/view/29658>> (accessed 20 July, 2021).

⁴⁹ *Ibid.*

jurisdictional laws differ. Despite residing in the same nation, the protection and rights afforded to a rape victim differ. Additionally, in the Southern area, a young person under the age of 12 cannot be held responsible for such a crime. However, in the North, a person under the age of 12 cannot be held responsible for the commission of the offense, unless the prosecution can show the child's maturity. The position of the victim, and not the offender's age, should be the determining factor in this case, not the offender's age.⁵⁰

None of the laws recognizes marital rape. This is because supposedly after a person is married, he or she cannot be raped by his or her husband. Therefore, these two laws do not take into account the pain of the victims or the necessity for assistance to aid in their rehabilitation. In cases of rape, the predominantly patriarchal and sexist culture of Nigerians attaches blame to the victim rather than the perpetrator. Despite the fact that rape has been classified as a crime in virtually every nation, many cases go unreported and unpunished.⁵¹

This definition of rape played a key role in criminalizing anal rape and omitting non-consensual penetration.⁵² Another recognition is that the female genders are not considered to be the only victim of rape neither are males the only perpetrator. This Act has removed the lack of protection to victim of rape, which is not available in the existing laws criminalizing rape. This recognition of the plights of a victim under the above section should be a motivation for rape victims to report the perpetrators of rape.⁵³ The protection of physical and psychological harm encourages another charge to be exercised against the offender. Besides showing the definition of rape, it also shows the rights of victims and imposes a more serious punishment for the perpetrator. Section 3 of the Act further empowers the victims of rape to seek justice against the perpetrator for the physical and psychological harm done.

According to section 38 of VAPP⁵⁴, a victim of rape will be entitled to the assistance from government and non-government agencies providing such services. The rationale for the provisions of section 38(1) in VAPP is for the wellbeing and development of the victim. It is a remarkable thing that the victim of a choice of the assistance services can be provided to the victim of rape.

The comprehensiveness of this Act is makes it worthy of note that there is protection for the victims of rape. The passage of the Act in FCT and the 13 states in concur with this Act provides rights and protection to the victims of rape. Nonetheless, since the enactment of the act in 2015, only thirteen states and the FCT have adopted the VAPP Act out of Nigeria's 36 States. The states that have enacted the acts are: Oyo,

⁵⁰ Okopius. L, *Laws of Ngeria*; <http://lawsfnigeria.placng.org/view2.php?sn=432> (accessed July 2nd, 2022).

⁵¹ Stanley Alieke, "*Marital or spousal rape: What the law says about it*"; <https://www.thecable.ng/marital-spousal-rape-what-the-law-says-about-it> (accessed 2nd July, 2022).

⁵² *Ibid.*

⁵³ United Nations Human Rights, "*Rape as a grave and systematic human rights violation and gender-based violence against women*"; (2020) (accessed 2nd July 2022)

⁵⁴ Violence Against Persons (Prohibition) Act 2015, section 38.

Ogun, Lagos, Osun, Ekiti, Edo, Anambra, Enugu, Ebonyi, Benue, Cross River, Kaduna, FCT, and Plateau.⁵⁵ With the significant provisions for protective measures or interventions guaranteed to rape victims, it appears that there seems to be a dearth of case prosecution and conviction under this law. One would deduce that the implementation of the law is not effective as it should be.

Therefore, it is practically impossible for the victims of rape to understand the process of how the consequence of rape could be managed. The poor domestication of the Act in most of the states would have a great impact on rape victims in asserting their rights concerning compensation and rehabilitation. The strategies of implementation of these laws are inadequate in relation to provisions of health facilities to victims of rape. More importantly, victims of rape usually are shunned by the society because of the stigmatization or the subject matter. The expenses incurred when victims seek medical help and legal representation discourages the victim. These laws are laudable to an extent; the provisions are forlorn without adequate implementation and enforcement by the relevant law enforcement agencies.⁵⁶

Legal Implications under the Violence against Persons (Prohibition) Act.

The VAPP Act provides for several ways in which the incident of rape can take place other than penile-vaginal penetration. The Act provides for other modes through which rape can be committed which include the use of fingers, objects or insertion of other body parts into those of another without consent. This is in sharp contrast to the Penal code and the Criminal code which only recognizes penetration by the man to the woman. Furthermore, the VAPP Act made provisions for the protection of victims of rape while the Penal code and the Criminal code did not fully make provisions for the rape victims. This can be gleaned from the provisions of Section 38 of the Act which provides that the courts may in addition to the guaranteed rights; every victim of violence is entitled to receive and access medical, psychological, legal, social assistance from both government and non-governmental actors.⁵⁷ The Court may further award adequate discretionary compensation to the victims, where it is

⁵⁵Uniga Ovenaone Jennifer 'Effective Implementation of The Violence Against Persons Prohibition (VAPP) Act, Curbing The Impunity of Perpetrators of Gender Based Violence (GBV) And Promoting Socio-Economic Development In Nigeria' (2021) *International Journal of Management, Social Sciences, Peace and Conflict Studies (IJMSSPCS)*, Vol.4 No.2

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiw3tTGz9jyAhXJ3YUKHd_WChUQFnoECAIQAAQ&url=https%3A%2F%2Fwww.ijmsspcs.com%2Findex.php%2FIJMSPCS%2Farticle%2Fview%2F218&usg=AOvVaw3RoMYR6rM7MaGE4JjdUK_R (accessed 19 July 2021) See Also Aderemi Ojekunle 'It's Not Freedom for Women in Nigeria as 23 States Hold Back Signing on the Violence Against Persons (Prohibition) Act' (Dataphyte 15 June 2021) <https://www.dataphyte.com/development/gender-development/its-not-freedom-for-women-in-nigeria-as-23-states-hold-back-signing-on-the-violence-against-persons-prohibition-act/> (accessed 21 July, 2021).

⁵⁶ Nduka Orijinmo, 'We are tired; Nigeria women speak out over the wave of violence'. *BBC News Lagos* (2000) <https://www.bbc.com/news/world-africa-52889965> (accessed 5th June 2021).

⁵⁷ Violence against Persons (Prohibition) Act 2015, section 38.

perceived as necessary.⁵⁸ In addition to the guaranteed protection offered under the Act, the identities of the victims are also protected. The VAPP provides that both sexes can be raped but the Penal and Criminal Code imply that only the female gender can be raped. Also, unlike the other laws, the VAPP Act distinguishes between the concept of public harm and private harm. Private harm refers to violence committed by members of the family, relatives, neighbors and members of the community, while public harm refers to offences which threatens the peace, security and well-being of any person or nation, perpetrated by state or non-state actor.⁵⁹

Impacts of the proof of the Ingredients of Rape on the victims of the Crime.

Generally, it is well known in the criminal law parlance that to secure conviction in rape cases, the prosecution is expected to prove the offence beyond reasonable doubt. This is mandated by the provisions of the 1999 Constitution (as amended) in Section 36(5) and Section 138(1) of the Evidence Act. Section 36(5) provides ‘every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty’ while Section 135(1) of the Evidence Act provides that ‘if the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. ‘Thus, for an offence to be established beyond reasonable doubt, the prosecution must establish all material ingredient of the alleged offence as prescribed for under the applicable law the accused is being prosecuted.’

When considering criminal offences and attempting to prove beyond reasonable doubt the guilt of an accused, intention on its own, no matter how hideous will not be enough to secure conviction in rape cases without the actual commission of the act. The inability of the prosecution to establish the concurrence of the mental element and physical act of rape will hinder the punishment or prosecution of the offender. Thus, all criminal offences must have 2 basic elements;

Mens Rea – Consent is one of the ingredients the prosecution must prove the alleged victim did not consent to the intercourse. In proving the guilt of the accused, the question is ‘did the victim consent or not’ and did the accused used force, threats or fraud to achieved the act of penetration?⁶⁰ Consent was defined in *Ogundipe V. Oduwaiye & Anor*⁶¹ as follows “Consent merely means to agree or to permit someone to do something.⁶²

⁵⁸ Violence Against Persons (Prohibition) Act 2015, section 26 and 43.

⁵⁹ Violence Against Persons (Prohibition) Act 2015, section 46.

⁶⁰ Alan Need & Peter Seago, Criminal Law, Sweet & Maxwell ‘s Textbook Series 1999p.388

⁶¹ *Ogundipe V. Oduwaiye & Anor* (2013) LPELR-20474 (CA)

⁶² See Oxford Advanced Learner’s Dictionary (7th Edition at 309”Per Joseph Shagbaor Ikyegh, JCA (Pp 12 -12 Paras E-F)

The Black's Law Dictionary states that consent is agreement, approval or permissions to some act or purpose, especially given voluntarily by a competent person ⁶³ For instance, consent of a child has placed strict liability on adults by virtue of the provisions of Section 31 of Child's Right Act as regards age of consent to be 18 years. And as such, the offender cannot rely on the consent of the child to escape liability of the offence of rape. This is because the consent of a child for intercourse is irrelevant.⁶⁴ There are instances where the accused is aware that the victim has not given consent, yet proceeds in the act of sexual intercourse with the victim where the person is under the influence of drugs or such a person is sleepy. Situations like these are not a clear consent.⁶⁵

A good example of the foregoing is when the victim did not have the capacity to give consent if the victim suffers from as result medical health challenges that affect their mental learning capacity or being in the influence of alcohols. Any consent assumed in such circumstances cannot be said to exist but the *mea rea will* be enable the proof of rape to be present and the accused will be guilty under the Criminal Code. It is recognized that consent obtained not necessarily by force, such as threat to economic loss or social injury may amount to rape. The Penal Code on the other hand, only recognizes that consent has been vitiated where it is obtained by fear of death or harm. Thus, there must be evidence of force or threat using force.⁶⁶ It is submitted that the position taken under the criminal code is the preferred view. For example, in many instances a person in authority over a woman may pressure or coerce such a woman into submitting to sexual intercourse.

In addition, it appears that most female victims of rape who wish to prove that they did not consent to the sexual intercourse face great difficulties unless they can show overt signs of fairly serious injury. Thus, the victim must show that she either struggled with the rapist or he inflicted bodily harm on her. This is the actual intention of the accused to commit the crime of rape knowing she or he does not consent to the act. The mental element of rape was held by the House of Lords in the English case of *D.P.P v Morgan*⁶⁷ where it was held that if an accused person believed that the woman was consenting, he should not be guilty of rape even though he had no reasonable grounds for his belief. This decision is still valid in Nigeria, if a person is accused of rape and he/she claims that the victims consented, he does not bear the burden of establishing the defense of honest and reasonable mistake.⁶⁸

Actus Reus – This denotes the act of crime. It may also be an omission to act or being negligent in the discharge of a duty of care. In the offence of rape, the *actus reus* denotes penetration while the *mens rea* is the intention to have unlawful carnal

⁶³ Bryer.A.Garner (Ed in Chief 8th ED 2004 P323

⁶⁴ Alan Need & Peter Seago, Criminal Law, Sweet & Maxwell 's Textbook Series1999p.388

⁶⁵ R v William(1923) 1 KB340

⁶⁶ Penal Code,sec 285(e)

⁶⁷*DPP v. Morgan* MIE. R. 347 (Part 1975); A.C 182 (Part 1976)

⁶⁸ Criminal Code Act 1960 Pg 376

knowledge. In the case of *Lucky v State*,⁶⁹ the court stated that the accused had *mens rea*, which was the intention to have sexual intercourse with the prosecutrix without her consent, or that the accused acted recklessly not caring whether the prosecutrix consented or not. In the case of *Idi v State*,⁷⁰ the court while mentioning the ingredients of rape listed *mens rea* which was the intention to have sexual intercourse with the victim without her consent, or that the accused acted recklessly not caring whether the victim consented or not. As for *actus reus* that is the action which makes the crime rape, the court in plethora of cases including *Idi v State*⁷¹ has stated the *actus reus* to be penetration no matter how slight.

For most crimes, where the prosecution cannot prove that both elements were exhibited by the accused, the charge cannot be successfully maintained. Where the *mens rea* is established, but there is no corresponding illegal act, for whatever reason, the prosecution will be able to maintain the charge of ‘attempted ...’ however the substantive offence will fail. Thus, to secure a conviction for rape, there must be a concurrence of both the *actus reus* and *mens rea*. Furthermore, in the case of *Iko v The State*, the Supreme Court where Kalgo JSC stated, on the essential ingredient of rape: “The essential and the most important ingredient of the offence of rape is penetration and unless penetration is proved, the prosecution will fail. Nonetheless, penetration, however, how slight is sufficient and it is not necessary to prove any injury or the rupture of the hymen to constitute the crime of rape...” The case of *Adonike v State* affirmed that to secure the conviction for the offence of rape, the prosecution must prove the following ingredients of the offence:

That the accused person had sexual intercourse with the prosecutrix.

That the act of sexual intercourse was done without her consent or was obtained by fraud, force, threat, intimidation, deceit or impersonation.

That the prosecutrix was not the wife of the accused.

That the accused had the *mens rea*; the intention to have intercourse with the prosecutrix without her consent or that the accused acted reckless not caring whether the prosecutrix consented or not.

That there was penetration.

The act of penetration must be proved as seen in the case of *Afor Lucky v State* and other several cases that penetration is considered as a vital ingredient to be proved to establish the offence of rape. Even if the hymen is not broken, penetration, with

⁶⁹*Lucky v. State* (2016) NWLR 13 (Part 1528)

⁷⁰*Idi v State* (2018) NWLR 4 (Part 1610)

⁷¹*Ibid.* 2

or without emission, is adequate, as it is widely regarded and established. The act of penetration is obtained under Section 357 of Criminal Code that provides “unlawful carnal knowledge of a woman or girl...” and Section 282 of the Penal Code states that “where a man has sexual intercourse with a woman...” From these two provisions, it is only women and girls that can be raped excluding men and boys. Notably, penetration as the *actus reus* of these two provisions are unlawful sexual knowledge and sexual intercourse which must be proved beyond reasonable doubt by the prosecution that accused committed the offence of rape to secure conviction.

In the case of *Akpan v. State*⁷², the Court of Appeal opined that where consent was obtained by fraud or threat, the criminal offence of rape would have taken place. The question to be asked is that situations where it is impracticable for rape victims to access medical intervention for medical examinations as immediate response especially during the lockdown during the Covid-19 pandemic, what is the fate of such rape victim that seeks for justice? And how vital is the medical report for the prosecution of the case of rape to obtain justice as the rape victims desire for justice and the law to act as deterrent from committing the offence of rape? There is no structured designation of medical forensic laboratories accessible to rape victims provided in Nigeria criminal law for lockdown in a pandemic. In addition, rape victims will suffer secondary victimization as a result of their inability to provide the evidence required for prosecution. The anguish of a rape victim is typically intense, particularly when the perpetrator is not prosecuted owing to a lack of evidence to support the victim's accusation. Apart from rape victims post-traumatic stress disorder, social isolation, and feelings of shame victimization. In the Supreme Court case of *Idam v State*,⁷³ the issue of penetration was in controversy as the counsel to the appellant submitted that the prosecution failed to establish the essential elements of penetration, the court stated that in the record of appeal, the appellant admitted under cross examination that he had had sexual intercourse with the *prosecutrix* more than six or seven times before this one for which he is standing trial. With such admission, the court held that the issue of penetration is no longer in controversy.

In *Nseudoh v State*,⁷⁴ the court outlined the essential ingredients of rape; it deemed that sexual intercourse is deemed complete upon penetration of penis into vagina. It has been held that even the slightest penetration constitutes sexual intercourse. In the case, although the *prosecutrix* was a virgin, the court would have still been entitled to find that sexual intercourse occurred, if it is satisfied that by surrounding circumstances of the case penetration could be proved although not deep enough to rupture the hymen and will still be sufficient enough to constitute rape.

All definitions of rapes as provided under the above cited statutory authorities in comparison have similar elements which are lack of consent and sexual intercourse.

⁷² (2014) LPELR -227 (CA)

⁷³ *Idam v State* (2020) 12 NWLR (Part 1737)

⁷⁴ *Nseudoh v State* (2020) LPELR 49633

Also in similarity the Penal Code and the Child's Right Act categorize sexual intercourse with child as rape. Although under the Penal Code the law explicitly provides for gender 'girl' but the Child's Right Act provides that a 'child' can be interpreted to be both male and female. By analysis, prior to the enactment of the Violence Against Person Prohibition Act, the definition of rape was restricted in certain ways, like only men can rape, and it only involves vaginal penetration, but upon enactment, the mouth and anal cavity were included as organs to which rape can be carried out. Some judicial authorities which have also mentioned the important elements of rape include *Muhammadu v State*⁷⁵ where the court stated that the essential ingredients of the offence of rape which the prosecution must prove to secure a conviction of rape are:

That the accused had sexual intercourse with the prosecutrix.

That the act of sexual intercourse without consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation.

That the prosecutrix was not the wife of the accused

That the accused had the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not.

That there was penetration no matter how slight.⁷⁶

In another recent case of *Aliyu v State*,⁷⁷ the court stated the important elements of a charge of rape to include:

Sexual intercourse

The woman was not the wife of the accused or if she was his wife, she had not attained puberty

There was penetration

The act was done under circumstances in section 282(1) of the penal code.⁷⁸

Section 282(1) talks about lack of consent, or consent given under duress, misrepresentation of identity, fear of harm. An analysis of these judicial authorities and others including *Esseyin v State*⁷⁹ and *Mamuda v State*⁸⁰ the courts have also given judicial recognition to necessity to prove penetration and lack of consent.

⁷⁵*Muhammadu v State* (2020) NWLR 12 (Part 1753)

⁷⁶*Ibid.* 1

⁷⁷*Aliyu v State* (2019) NWLR 11 (Part 1682)

⁷⁸*Ibid.* 1

⁷⁹*Esseyin V State* (2018) NWLR 14 (Part 1690) S.C 491

⁸⁰*Mamuda v State* (2019) NWLR 5 (Part 1664)

The court in the case of *Natasha v State*⁸¹ the court stated that the most important and essential element of rape is penetration.

Furthermore, the provision of section 1 of the Violence against Persons (prohibition) Act, a person is said to have committed the offence of rape if:

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; the other person does not consent to the penetration; or 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.⁸²

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Under the Criminal Code, section 357 states the elements of rape to be: unlawful carnal knowledge of a woman or girl without her consent, or with her consent, but the consent was 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 impersonating her husband.⁸³

By the provision of section 282 under the Penal Code Act, a man is said to have committed rape, when he has sexual intercourse with a woman in the following circumstances:

Against her will, without her consent. with her consent, when her consent has been obtained by putting her in fear of death or of hurt, with her consent, when the man knows he is not her husband and her consent is given because she believes that he is another man to whom she believes herself to be lawfully married
With or without her consent, when she is under the age of fourteen years of age or of unsound mind.⁸⁴

⁸¹ *Natasha v State* (2017) NWLR 18 (Part 1596)

⁸² Violence Against Persons (Prohibition) Act 2015

⁸³ Criminal Code Act 1990 CAP C 38 Laws of the Federation of Nigeria, 2004

⁸⁴ Penal Code of Northern Nigeria, Laws of Northern Nigeria 1959, section 282 Cap 83 Laws of the Federation of Nigeria, 2004.

Under common law, crime of rape requires at least a slight penetration of the penis into the vagina. Pursuant to section 31 of the Child's Right Act rape is sexual intercourse with a child whether or not consent is given. And by the Child Rights Act, a child is any person below the age of 18. Generally, the legal frameworks criminated more than the prevention of the effects of rape on the victims. VAPP Act addresses the protection of rape victims that was excluded in the Penal and Criminal Codes. Consent is one of the ingredients the prosecution must prove the alleged victim did not consent to the intercourse. In proving the guilt of the accused, the question is 'did the victim consent or not' and did the accused used force, threats or fraud to achieved the act of penetration? Consent in rape was defined in *Ogundipe V. Oduwaiye & Anor* (2013) LPELR-20474 (CA) '...as merely means to agree or to permit someone to do something.'⁸⁵

The Black's Law Dictionary states that consent is agreement approval or permissions to some act or purpose, especially given voluntarily by a competent person. For instance, consent of a child has placed strict liability on adults by virtue of the provisions of Section 31 of Child's Right Act as regards age of consent to be 18 years. Consequently, the offender cannot rely on the consent of the child to escape liability of the offence of rape. This is because the consent of a child for intercourse is irrelevant. There are instances where the accused is aware that the victim has not given consent, yet proceeds in the act of sexual intercourse with the victim where the person is under the influence of drugs or sleepy. Situations like these are not a clear consent. A good example is when the victims did not have the capacity to give consent in case of medical health challenges that affect their mental learning capacity or being under the influence of alcohols. Any consent assumed in such circumstances cannot be said to exist but the *mea rea* will be make the proof of rape to be present and the accused will be guilty under the Criminal Code. It is recognized that consent obtained not necessarily by force, such as threat to economic loss or social injury may amount to rape.

The Penal Code on the other hand, only recognizes that consent has been vitiated where it is obtained by fear of death or harm. Thus, there must be evidence of force or threat using force. It is submitted that the position taken under the criminal code is the preferred view. For example, in many instances a person in authority over a woman may pressure or coerce such a woman into submitting to sexual intercourse. In addition, it appears that most female victims of rape who wish to prove that they did not consent to the sexual intercourse face great difficulties unless they can show overt signs of fairly serious injury. Thus, the victim must show that s/he either struggled with the rapist or s/he inflicted bodily harm on her.

Rights of Victims of Crime that is Applicable to Rape Victims

⁸⁵ See Oxford Advanced Learner's Dictionary (7th Edition at 309" Per Joseph Shagbaor Ikyegh, JCA (Pp 12 -12 Paras E-F)

Specifically, certain pieces of legislation, such as the VAPP Act, safeguards the rights of crime victims, such as rape victims, and give redress, such as the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act (2003) and the Administration of Criminal Justice Law (2007). The 1985 United Nations (UN) General Assembly Declaration of Basic Principles of Justice for victims of crime and Abuse of power, paragraph 1, defines a victim as person(s),

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 criminal laws operative within Member States, including those laws proscribing criminal abuse of power⁸⁶.

According to the United Nations Declaration on Victims, a person is a victim even if the perpetrator is apprehended, arrested, prosecuted, and convicted. In this meaning, victims include family members, witnesses to the crime or injustice, and intimate friends who have been harmed or lost as a result of the harm done to the individual. Rape victim protection is a state and federal government's responsibility. This will be accomplished through the law enforcement, justice, and health departments of the government. The absence of a formal framework safeguarding and protecting victims of crimes does not absolve the government of its responsibilities to safeguard and protect victims. Furthermore, Section 17, Social Objectives, of the CFRN 1999's Chapter II Fundamental Objectives and Directive Principles of State Policy, which is summarized in subsection (1)⁸⁷ as 'The State social order is founded on the ideals of liberty, equality, and justice' violates the CFRN 1999's Chapter IV Fundamental Rights provisions. The petitioner is entitled to a variety of reliefs, including restitution, compensation, and damages, as well as common law prerogative rights in civil proceedings, as set forth in Section 46 of the CFRN (1999) which provides, among other things;

- (1) Any person who alleges that any of the provision of this chapter has been, or is being, or likely to be contravened in any state in relation to him, may apply to a High court in that state for redress. (2) Subject to the provision of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and

⁸⁶ UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* : resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/34 <https://www.refworld.org/docid/3b00f2275b.html> (accessed 30 April 2022)

⁸⁷ Section 17(1), The Constitution of the Federal Republic of Nigeria, 1999.

may make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that state of any right to which the person who makes the application may be entitled under this Chapter.⁸⁸

Furthermore, since the burden and standard of proof are on the victim, this may make it difficult for a rape victim to seek remedies under civil procedure for an infringement of fundamental human rights. However, another challenge arose during the Covid-19 as court processes were suspended for other non-time-bound cases. Because of the financial consequences of Covid-19, a victim may be unable to pursue a claim for compensation or restitution.⁸⁹

Rape as a Breach of Fundamental Human Rights

The full protection of the rights of all citizens will involve the state's protection of relevant values in its constitution. In fact, there are strong historical reasons for this presumption. This is because the tradition of constitutional recognition of rights enjoys a privileged position within the scope of general human rights protection. This is not surprising, because many important historical initiatives aimed at ensuring a strong commitment to rights have taken constitutional forms from the beginning or over time. This shows that in most jurisdictions, the constitution is the supreme legislation and is therefore placed above so many premiums.

The Constitution of the Federal Republic of Nigeria⁹⁰ is the supreme law of Nigeria. This is because any law that is incompatible with any provision of the constitution is considered invalid within the scope of its incompatibility.⁹¹ The Constitution establishes basic rights that can be used to enforce and protect the rights of rape victims, such as the right to human dignity⁹² and right to personal liberty.⁹³ It is thus argued that rape is a direct infringement of the human dignity and right to personal liberty of victims.⁹⁴ It is instructive to note that there is no evidence of judicial pronouncement interpreting these provisions of Fundamental Human Rights relating to rape. However, there is no provision in the Constitution that limits the interpretation of these rights to a specific situation. Although, the victims whose

⁸⁸The Constitution of the Federal Republic of Nigeria, 1999. section 46

⁸⁹ UNODC, Coronavirus Disease (COVID-19) Response: Thematic Brief on Gender-based Violence against Women and Girls, (2020).

https://www.unodc.org/documents/Gender/Thematic_Gender_Briefs_English/GBVAW_and_UNODC_in_COVID19_final_7Apr2020.pdf accessed 30 April 2022.

⁹⁰ Constitution of the Federal Republic of Nigeria 1999 CAP 23 Laws of Federation 2004 (As Amended)

⁹¹ Constitution of the Federal Republic of Nigeria 1999 as amended, Section 1(3).

⁹² Constitution of the Federal Republic of Nigeria 1999 (As amended), Section 34.

⁹³ Constitution of the Federal Republic of Nigeria 1999 (As amended), Section 35.

⁹⁴ Theresa Akpoghome, *et al* 'Penetration, Corroboration and Non-Consent. Examining the Nigerian Law of Rape and Addressing its Shortcomings' (2012) *University of Ilorin Law Journal*, Volume 8, < www.djetlawyer.com > (accessed 13 June 2021).

rights have been trampled upon by reason of being raped can invoke the provision to assert their rights under this section of the constitution. This is so, because of the premium placed on the Constitution. In this note, it can be argued that the rights of everyone (whether children or adults) guaranteed by Chapter 4 of the Constitution are human beings, and therefore have the right to enjoy all of these rights.⁹⁵

Difficulties Establishing the Offence of Rape

The position of the law as stated in *Sunday Muhammadu v State*⁹⁶ and *Eyong Idam v Federal Republic of Nigeria*⁹⁷ is that for a prosecution to successfully prove the offence of rape s/he must show lack of consent and prove penetration immaterial of how slight. In the present society it can be noticed that due to certain factors and conditions the rate of conviction of rape is low. Part of the issues affecting the successful prosecution of rape in Nigeria is examined below: Proof beyond reasonable doubt, by virtue of section 135 of the Evidence Act 201, the offence of rape must be proved beyond all iota of doubt. In a case including *Onoyiwa v State*,⁹⁸ *Udjour v State*.⁹⁹ The appellant was arrested on 24th day of September, 2008 on an allegation of having a carnal knowledge of a girl of 9 years who was then a student of Delta Career College, Warri and an employee of the accused. At the court of Appeal, it was stated that in the case of *Mohammed vs. the State* the argument of the accused/appellant that the charge is improper because the age of the victim who was raped is under the age of 11 years and not 18 years. Therefore, the section 357 of Criminal Code does not cover the crime of rape of a girl of 11 years. In spite the submission of the accused, the appellant was charged of offence of rape under S.357 of the criminal code law.¹⁰⁰

The court held that the offence of rape s.228 of the Criminal Code¹⁰¹ under which the appellant was charged means a forcible sexual intercourse with a girl or woman

⁹⁵ Akinwale Ashiru *et al*, 'Law of Rape in Nigeria and England, Need to Re-invent in the Twenty-First Century' (2015), *Journal of Law, Policy and Globalization*, Volume 38
<http://www.iiste.org/Journals/index.php/JLPG/article/viewfile/235133/24235> (accessed 13 July 2021).

The provision of CFRN (1999) Chapter IV outlined in the Fundamental Rights Sections 33. Right to life, 34. Right to dignity of human persons, 35. Right to personal liberty, 36. Right to fair hearing 37. Right to private and family life, 38. Right to freedom of thought, conscience and religion, 39, Right to freedom of expression and the press, 40. Right to peaceful assembly and association, 41. Right to freedom of movement, 42, Right to freedom from discrimination, 43. Right to acquire and own immovable property the sections are parimateria (similar provisions) as well as supplementary to the following international legal instruments: International Covenant on civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), International Convention on the Elimination of All Forms of Racial Discrimination (1950), Convention on the elimination of AH forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (1984), Convention on the Rights of the child (1989), Universal Declaration of Human Rights, (1948), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and African (Banjul) charter on human and peoples' Rights (1981).

⁹⁶*Muhammadu v state* (2020) NWLR 19 (Part 1753) 11.

⁹⁷*EyongIdam v Federal Republic of Nigeria* (2020) LPELR 49564

⁹⁸*Onoyiwa v State* (2018) LPELR (Part 44255)

⁹⁹*Udjour v State* (2018) LPELR 43928

¹⁰⁰ Laws of the Bendel State of Nigeria. Vol. 11, 1977 as applicable in Delta State.

¹⁰¹ Cap C21 Vol. laws of Delta State of Nigeria 2006

without her giving consent to it or with her account of the consent being obtained by force or by means of threat or intimidation of any kind or by fear or harm or by means of false and fraudulent representation as to the nature of the act. “The charge was perfectly in order by charging and convicting the accused person for rape under S.358 of the criminal code”¹⁰²

On the issue of “girl and woman” used in the provision stated above. It is worthy to note that the age of victim was not mentioned but rather the gender is mentioned in the provision of S.357 of Criminal Code. The researcher agrees with the position of the court that age of the victim does not have any effect on the charge of the offence of rape. The settled position of law as provided in a plethora is that rape is unlawful carnal knowledge of a girl or a woman without her consent as in this case. The criminal responsibility of any accused person is premised on the satisfactory of both the guilty mind (*mens rea*) and the actual accuser of the act.

Furthermore, the case of *Udjour v State*. These cases went on appeal to the Supreme Court and part of their basis for appeal was that the prosecution failed to prove their case beyond reasonable doubts although the appellants had been convicted at the lower court for the crime of rape. This issue is a technical matter that can actually secure the discharge of the accused although there is clear evidence he may have committed the crime. Issue of Corroboration of evidence, in the case of *Aliyu v State*¹⁰³ the court stated that corroboration of evidence in rape is not a matter of law but it is an area of practice and desirable to have corroboration of such evidence of the victim. The Supreme Court in *Musa V State*¹⁰⁴ stated that corroboration evidence need only show the following:

That sexual intercourse took place that it took place without the consent of the victim that the man/accused committed the sexual offence.

The court stated that failure to corroborate evidence is not fatal to the case of the prosecution of *Babatunde v State*.¹⁰⁵ In *Ofordike v State*,¹⁰⁶ the court stated that corroboration is not essential to secure a conviction where the evidence of sole witness is cogent, strong and credible. Delayed reporting of the incident to the police or appropriate authority will make it difficult in establishing the offence.¹⁰⁷ Most victims find it hard to bring out their claims early enough due to several factors including trauma, embarrassment and shame. The resultant effect of such delay includes

¹⁰² Cap 49 Vol. 1 laws of the defunct Bendel State 1976.

¹⁰³ *Aliyu v State* (2019) LPELR 47421

¹⁰⁴ *Musa v State* (2013) NWLR (Part 1359) 9

¹⁰⁵ *Babatunde v State* (2018) LPELR 44583

¹⁰⁶ *Ofordike v State* (2019) NWLR 5 (Part 1666)

¹⁰⁷ Rape and sexual offences: Rape and Sexual Offences. Tackling Rape Myths and Stereotypes (2021) *Legal Guidance, Sexual offences*. < <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes>> accessed 27 July 2021.

expiry of DNA of the perpetrator that may have gotten onto the victim, in many places, the window for collecting bodily forensic evidence is 72hrs.¹⁰⁸ As inhumane and unreasonable as it may sound most rape victims upon being raped are advised to contact the authorities and visit a rape trauma center, so qualified professionals will be able to successfully obtain any form of evidence linking to the perpetrator which would then increase the chances of a successful complaint. Inconsistent account, due to the trauma accompanying the incident of rape, it is very possible for a victim to give inconsistent account of the incident. Although this is quite normal in the medical parlance, people especially those to which the rape is being reported will find it hard to proceed with the case as the inconsistency would have casted doubt in their minds.

A previous allegation by the victim which may not have led to successful convictions makes it difficult to believe and establish subsequent rape allegation by the same victim. And due to the evidential burden of beyond all reasonable doubt, it is possible that the evidence given in the previous trial is why the case did not succeed. Nevertheless, this does not in any way connote that the allegation is false. Sexual history or orientation of the victim may make it difficult to believe a victim's story and take appropriate steps early enough to secure a conviction.¹⁰⁹ For example, given the advancement of sexualities in societies of today, most people will find it hard to believe and convict the rapist of a sexual worker or a gay person simply because of their personal bias and dislike for such sexual orientations. Lack of professionals,¹¹⁰ many people who are involved in the process of securing a rape conviction can be considered unprofessional, from the medical practitioner who ought to take samples of DNA and preserve them, to the Police officers who ought to investigate the case properly and arrest the right suspects, the system in Nigeria is filled with unprofessional officers.

Rape, which is a form of patriarchal violence is tried within patriarchal system. The system around the world is built and intertwined so deeply into patriarchy that it seems almost impossible to secure a conviction. Most men believe in taking what they want, and when such men are in power it becomes close to impossible to convince them to see the wrong in a situation like rape, because they feel it is normal. Due to narrow legal definition of rape under the law, a person who commits crime can only be tried for offences provided under the law. The provision of the law is narrow as can be seen under the penal and criminal codes, the definition of rape under both laws is restricted and shortsighted. Both codes provide nothing regarding rape of the male

¹⁰⁸Waltke Heather et al. Investigating and prosecuting sexual assault crimes is much more complicated than simply performing DNA testing. Importance of Non-DNA Forensic Evidence, *National Institute of Justice* <https://nij.ojp.gov/topics/articles/sexual-assault-cases-exploring-importance-non-dna-forensic-evidence> accessed 26th July 2021.

¹⁰⁹ Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2019) *Feminist Legal Studies* Vol.19 <https://link.springer.com/article/10.1007%2Fs10691-011-9169-2#citeas> (accessed 19 July 2021).

¹¹⁰Gilligan F. 'Why Is It So Hard To Prosecute Sex Crimes' (*Strategic Advocacy for Human Rights* 14 September 2020) <https://medium.com/@SAHR_org/why-is-it-so-hard-to-prosecute-sex-crimes-536ec2137669> (accessed 24 June 2021).

gender and also make an indirect implication to the fact that a woman cannot be raped by her husband. Lack of properly equipped medical investigative laboratories around Nigeria is another problem. This makes it close to impossible to carry out proper test on rape victims, to preserve samples obtained either from examination of the victim's body or from the scene of the crime. There is also the lack of an extensive DNA database to compare samples recovered from the victim to determine the identity of the perpetrator.

The stigmatization and victim blaming that accompany the victims of rape may lead to withdrawal of rape allegations or may even prevent the victim from bringing forward their claims. The victims may withdraw their statements or lose interest in carrying on with a legal pursuit of justice in criminal justice system. The evidential burden of proving the offence beyond all reasonable doubt is another factor that makes it difficult to prove the crime of rape, because perspectives differ and what may serve as overwhelmingly convincing to one person may be inadequate to another person.¹¹¹

Hindrances to the Prevention of the Offence of Rape¹¹²

Due to the advancement and the need to accept various sexualities, people are constantly being exposed to different indecent concepts some of which promote immorality. Equally, there is lack of proper punishment under the law to serve as a deterrent to other intending rapists. For example, a situation where the punishment for rape is castration, this will serve as a lesson to the public and other intending rapists. Many people these days do things to impress their peers and most bad peers encourage ill behaviors. Some even go far ahead as daring each other to commit illicit acts. A society and people are made up of the upbringing and training inculcated in each person by their parents and the society. In modern society and to make better the society in special mention to rape, parents need to teach their children that they have no rights to lay hands on another person's body without the consent of the other person no matter the situation.

It is worthy to observe that the Kaduna State Penal Code Amendment Law 2020¹¹³ makes provision for castration of the testicles and removal of the fallopian tube. The law provides for stiffer punishments for raping an adult than the previous maximum sentence for raping an adult which was 21 years in prison, and the maximum sentence for raping a child which was life in prison. However, if a person older than

¹¹¹ Jide Bodele, 'The Dust is not Settled: An Analysis of the Burden of Proof on Defendants in Criminal Cases' (LawPavillion 16 April 2021) <https://lawpavillion.com/blog/the-dust-is-not-settled-analysis-of-the-burden-of-proof-on-defendants-in-criminal-cases/> (accessed 19th July 2021).

¹¹² Egharevba Matthew *et al.* 'Taming the rape scourge in Nigeria: Issues and Actions. (2016) *Gender and Behaviour* Vol.14 No.3, https://www.researchgate.net/publication/320077852_Taming_the_Rape_Scourge_in_Nigeria_Issues_and_Actions> (accessed 11 August, 2021).

¹¹³ Kaduna State Penal Code Amendment Law 2020 available at <https://media.premiumtimesng.com/wp-content/files/2020/09/Kaduna-State-Penal-Code-Amendment-Law-2020.pdf> accessed 4 July, 2022.

14 is raped, they could be castrated or have their fallopian tubes removed, but they will not get the death penalty. Furthermore, the inadequate awareness around the need to treat rape as a crime and not as a trivial matter is another hindrance to the reporting and prevention of rape. For instance, where a rape occurs and both the victim and rapist belong to the same family, rather than follow the appropriate legal measure, most families would prefer to bury the case thereby projecting a bad precedent. Another factor that hinders the offense of rape is insufficient resources to agencies that deal in fighting against gender violence and prevention of incidences of sexual assault.

The criminal court system in Nigeria and worldwide has been considerably disturbed by Covid-19, creating tremendous strain on the system and confusion for individuals involved as victims and suspected perpetrators. There has been a substantial backlog of cases due to the suspension of court proceedings during the lockdown. Few states in Nigeria have a special court for sexual offences. There is a growing backlog of sexual offenses because courts are unable to deal with the volume of cases that are being brought into the system. This will caused some difficulties to rape victims of sexual violence and other stakeholders that want the guilt of the perpetrators in their pursuit of justice as a redress. Scholars are of the view that a speedy trial for rape victims is indeed a requirement of the 21st century.

Prevention of Rape

Public Enlightenment

Public enlightenment has been a critical tool in changing behavior, attitudes, beliefs and value system of people.¹¹⁴ As a result, extensive public awareness and education should be provided in schools, social clubs, cultural group gatherings, churches, mosques, and through the media, to first and foremost debunk the fallacies regarding rape. Many people's perceptions of rape are shaped by these myths, and because they are unknowingly impacting people's perceptions, the inaccurate assumptions may be taken as true. When individuals read news that a young girl has been raped near a club, they frequently instantly look for a causes such as location where she was assaulted, the time of day she was raped, the clothes she was wearing, or the fact that she was a woman and so on. These kinds of thinking shifts the blame away from the offender of the crime. The appropriate thought should be that whether the victim

¹¹⁴ N. Mokogwu *et al*, 'Characterization of Rape Victims, Events and the Quality of Post-Rape Care in Public Health Facilities in Edo State, Nigeria' (2020)*Journal of Community Medicine and Primary Health Care* Vol. 32 No. 1. <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi609Gh7tjyAhUEhQKHRcABbQQFnoECAIQAAQ&url=https%3A%2F%2Fwww.ajol.info%2Findex.php%2Fjcmphc%2Farticle%2Fview%2F194173%2F183421&usg=AOvVaw3jwxdKLOvyhhlUuzJRRPAe> > (accessed 23 June 2021).

was abused, because a man with the power to do so decided to rape her. A well-researched publication delves into the details of these fallacies.¹¹⁵ This attitude and misunderstanding in the community detracts from addressing the true cause of sexual assault, without which prevention measures will be worthless.

Civil society organizations (CSOs) and the media play an important role in championing the public enlightenment movement. During a recent press conference in Nigeria, the President of African Civil Society against Rape, a Civil Society Organization, urged Nigerians to join forces with CSOs to raise public awareness about rape and sexual violence.¹¹⁶ The CSOs' role would include supporting relevant bills in the National Parliament that would strengthen the present sexual violence legislation. This might include rape: establishing whether according to the African Civil Society against Rape in Nigeria a capital offense is punishable by life in prison. The goal is to make the thought of sexual assault as unappealing as possible to a would-be perpetrator. The plethora of physical and emotional hurdles that rape victims/survivors face in particular, as well as society as a whole, would warrant any harsh legislative measures to stop this horrible assault on the integrity of individuals and, by extension, society as a whole.¹¹⁷

Institutional Framework

Until the society establishes an institutional framework to deal adequately with actual cases of rape, prevention of rape will remain a mirage. The criminal justice system, the police, social services, and sexual assault services are all part of these approaches. More so functional, skilled, and coordinated service providers are required to provide support for rape victims and survivors to speak up by making free, community-based assistance available, as well as effective prosecution of criminals, will act as a deterrent and possibly prevent the next victim from being a victim.¹¹⁸ Every responsible society must devote particular attention to the most vulnerable members of society.

According to extant literature, these individuals acquire rape prevention skills after participating in a behavioral skills training program, which¹¹⁹ could be repeated in

¹¹⁵ Ojo Olufemi, 'Assessment of the Acceptance of Rape Myths among Nigerian University Students: Crawford University in Nigeria under Survey' (2013) *Psychology and Social Behaviour Research*. Vol. 1. No. 98 https://www.researchgate.net/publication/270620587_Assessment_of_the_Acceptance_of_Rape_Myths_amongNigerian_University_Students_Crawford_University_in_Nigeria_under_Survey (accessed 23 August 2021).

¹¹⁶ Eze, Uwom, 'Prevention Of Sexual Assault In Nigeria' (2013) *Annals Of Ibadan Postgraduate Medicine* Vol. 11. No.2.< <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4111066/>> (Accessed 8 August 2021.)

¹¹⁷ Jane Leserman, 'Sexual Abuse History: Prevalence, Health Effects, Mediators, And Psychological Treatment.' (2015) *Psychosom Medicine* Vol. 67 <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=23A2E7C1637415DC9797774DB5B8C52A?doi=10.1.1.522.1479&rep=rep1&type=pdf> (accessed 24 July 2021).

¹¹⁸ Eze, Uwom, 'Prevention Of Sexual Assault In Nigeria' (2013) *Annals Of Ibadan Postgraduate Medicine* Vol. 11. No.2.< <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4111066/>> (Accessed 8 August 2021).

¹¹⁹ Eastgate Gillian 'Sex, Consent and Intellectual Disability, (2005). *Australia Family Physician*. Vol. 43.No. 6. https://www.researchgate.net/publication/7935700_Sex_consent_and_intellectual_disability/citation/download (accessed 4 June 2021).

different communities while taking into account their unique demographic and socio-cultural characteristics. It cannot be overstated that children with mental retardation require extra attention from their parents, guardians, and careers as well as the society as a whole. Such training programs could be repeated in different communities while taking into account their unique demographic and socio-cultural characteristics. It cannot be overstated that children with mental retardation require extra attention from their parents, guardians, and care givers, as well as the society as a whole.

Conclusion

This article examined the domestic law that criminalizes the offence of rape and highlighted the inadequacies of the laws in protecting the victims of rape. It also discussed the ingredients and its interpretation by the judicial authorities. However, the examined literature revealed disparity between the laws concerning the concept of the rights of rape victims as there were limited provisions in the existing laws on protection of neither rape victims nor the guidelines in accessing interventions. However, the Sexual Offences Act in comparison to Nigerian Laws on rape provides a robust provision definition of rape, admits of marital rape and grievous sexual assault.