

KOGI STATE PENAL CODE LAW 2019: RE-ENACTING THE VIOLATION OF RIGHTS OF WOMEN AND THE GIRL-CHILD*

Abstract

The essence of law-making is majorly to bring solution to the problems of the society, in that sense, every enacted law is expected to be curative of the ills of the society. The rights of women and the girl-child have in recent times been at the front burner of rights agitation globally. As such the rights of women are not different from those of the entire comity of human in general. However, it is observed that certain laws in relation to women tend to portray women as less human. It is a thing of concern that some provision of laws enacted with the aim of protecting human rights, most often, turned out to legalize or codify the violation of the rights especially of women and the girl-child as the case may be. A good example is the recent 'Kogi State of Nigeria Penal Code Law 2019.' The law enacted some obnoxious provisions against the rights of women and the girl-child in the areas of the age of marriage, rape or consent to sexual intercourse and the justification for inflicting grievous bodily hurt on the woman (wife). The research recommends that the Kogi State Penal Code Law, 2019 be repealed immediately to bring it in tandem with global best practices in the protection of the rights of women and the girl-child.

Keynote: Penal Code Law 2019, Kogi State, Nigeria, Rights of Women and Girl-Child, Violation

1. Introduction

The cardinal objective of every statutory enactment is to provide remedy for actual or perceived wrong in the society. It is apt to say that the enactment of a new law is curative of any ailing situation or to forestall a perceived area of deficiency. The enactment of *Kogi State of Nigeria Penal Code and other Matters Connected Therewith, 2019*¹ was received with a lot of expectations, with the hope that it will introduce new reforms that will distinguish same from the erstwhile Penal Code² applicable to the Northern Nigeria, Kogi State inclusive. Some of the disappointing provisions of the new Kogi State Penal Code 2019 are its provision in respect of the age of marriage of girls (girl-child), the issue of consent for sexual relation with man the definition of rape within or outside marriage. Also, the provision justifying infliction of grievous bodily hurt on women (wife) in accordance with customary law of the place of marriage; all leave one to wonder whether the Kogi State Penal Code 2019 is in progression or in retrogression in the matter of the protection of the rights of women and the girl child. The article shall be discussed under the following headings;

2. Age of Marriage

The age of marriage under customary law was fixed, but the guiding rule was usually upon the attainment of puberty. Then, the problem is that puberty is a subjective term which is fluid, as it differs from person to persons and community to community. Puberty for girls may start as early as nine years and some at fourteen, but on the average, it is assumed 12 years is the age of puberty.³ Statutorily, the Marriage Act⁴ provide for the age of statutory marriage to be twenty one years, where it states:

If either party to an intended marriage, not being a widower or widow, is under 21 years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Nigeria, of the mother or if both be dead or of unsound or absent from Nigeria, of the guardian of such party, must be produced or annexed to such affidavit as aforesaid before a licence can be granted or a certificate issued.

The implication of this provision is that the Marriage Act fixes the age of statutory marriage at twenty one years and went further to criminalize and punish whoever participates, assists or procures the marriage of a minor upon conviction to a term of imprisonment for at least two years.⁵ Penal Code⁶ provides that 'sexual intercourse by a man with his own wife is not rape, if she has attained puberty.' The literal interpretation of this is that, it is immaterial whether or not the child-wife has attained 18 years. This is an indirect endorsement of the practice of child-marriage backed by law. It is however, worthy to note that the above provision of the Penal Code was copied

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¹Kogi State of Nigeria Penal Code and Other Matters Connected Therewith, 2019; Assented to by Governor Yahaya Bello, it came into existence on the 3rd/June/2019 (hereinafter Kogi State Penal Code 2019).

² Penal Code (Northern States) Federal Provisions Act (Cap P3) LFN 2004 (as applicable to Northern Nigeria) section 282(1)

³F Anyogu, and C Arinze-Umobi, 'Giving Legality to Emotional Entrhralment and Blackmail: Child Marriage in Nigeria' [2013] (1) (2) *Benue State University Journal of Private and Public Law* 250.

⁴ Cap M6 LFN 2004 s18.

⁵ *Ibid* s 48

⁶ Penal Code (n2) s 282(2)

in 1960 from Sudan Penal Code which is a derivative of the Indian Penal Code drafted in 1834.⁷ The Sudan Penal Code⁸ and the Indian Penal Code now prohibits any form of sexual intercourse with a girl who has not attained 18 years, whether as a wife or not and with or without her consent, it is immaterial.⁹ The Kogi states Penal Code 2019 provides; ‘Sexual intercourse by a man with his own wife is not rape, if she has *attained puberty*.’¹⁰

It is sad that Kogi State Penal Code Law which is the latest extant law on the age of marriage in the year 2019 still defines the age of marriage by making recurs to *attainment of puberty* in a civilized society like we have today. It is worthy to note that the Kogi State Child’s Rights Law¹¹ defines the child as ‘...a person under the age of eighteen years.’¹² The same CRL Kogi State went ahead to prohibit any form of marriage with a child. It prohibits both child betrothal and child marriage. It states: ‘No person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void and of no effect whatsoever.’¹³ It further provides; ‘no parent, guardian or any other person shall betroth a child to any person. A betrothal in contravention of subsection (1) of this section is null and void.’¹⁴ The CRL Kogi State criminalizes and award punishment for promoting or contracting child marriage and child betrothal.¹⁵

From the above provisions of the CRL Kogi State dealing with the age of marriage and betrothal, it is most unreasonable that the new Kogi State Penal Code Law 2019 re-enacted or retained the provision of section 282(2) copied from Sudan Penal Code about sixty years ago, which permits sexual intercourse by a man with his own wife and that same does not amount to rape, where the said wife has *attained puberty*. The allusion to *attainment of puberty* as the determinant factor for age of marriage or age of majority is most misleading and cannot be generally applicable to everyone as the physiological make-up of individual differs from person to person and community to community as a result of several factors.

The expectation is that the age of marriage provided in several conventions, e.g the Convention on the Rights of the Child,¹⁶ African Charter on the Rights and Welfare of the Child¹⁷ and many domestic laws like the Child Rights Act¹⁸ are unanimously as setting the global standard would have been the guiding pole and inspiration today for the drafters of the new Kogi State Penal Code Law 2019. For example, the Protocol to the African Charter on Human and Peoples’ Right on the Rights of Women in Africa, 2003¹⁹ states that; for the purpose of the present Protocol: ‘*women* mean persons of female gender, including girls.’²⁰ It provides that States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: ‘the minimum age of marriage for women shall be 18 years.’²¹

⁷ SS Richardson, *Notes on the Penal Code Law* (3rd edn Gaskiya Corporation Ltd Zaria) 1-3

⁸ Sudan Penal Code, 2003, s2 of Sudan Penal Code 2003, repealed her Penal Code of 1994 which has similar provision with s282(2) of Nigeria’s Penal Code, that is to show that Sudan has been modifying and reforming her laws over the years. Nigeria, who derived a version of the Sudan Penal Code as her ‘Penal Code Law Cap 89 Laws of Northern Nigeria since 1963, has not done anything to reform its laws, rather, Nigeria only renamed the law as Cap P3 Laws of the Federation of Nigeria 2004, without reforming a single provision of her Penal Code.

⁹ *Ibid* Sudan Penal Code, 2003 ss 316 and 316A.

¹⁰ Kogi State Penal Code 2019 (n1) s282(2)

¹¹ Child’s Rights Law Kogi State, enacted into Law on 12th November 2009 (hereinafter CRL Kogi State)

¹² CRL Kogi State *Ibid* s 273

¹³ CRL Kogi State *Ibid* s 21

¹⁴ CRL Kogi State *Ibid* s 22 (1) (2)

¹⁵ *Ibid* s 23(a)-(d)

¹⁶ The Convention was adopted by the General Assembly Resolution 44/25 Annex to the Resolution UN Doc A/44/ (1989). The Convention was adopted on 21st Nov.1989 and came into force on 2nd Sept. 1990, Convention on the Rights of the Child, defines a child to mean... ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’ Art 1.

¹⁷ The Charter was adopted and opened for signature by the twenty-sixth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, Addis Ababa, Ethiopia, 11 July, 1990; it entered into force 29th Nov. 1999. See OAU doc./CAB/LE/24.9/49 (1990) (hereinafter ACRWC). It defines a child to mean ‘every human being below the age of 18 years’ Art 2.

¹⁸ The Childs’ Right Act Cap C50 LFN, 2004 (was passed by the National Assembly on 31st July, 2003) (Hereinafter CRA). S.1

¹⁹ Adopted at the 2nd Session of the Assembly of the African Union, Maputo, on 11th July, 2003, it came into force on 25, Nov. 2005 after being ratified by 15 African Government.

²⁰ *Ibid* Art 1 (k)

²¹ *Ibid* Art 6 (b)

Above all, Convention on the Elimination of All Forms of Discrimination against Women,²² nullifies child betrothal and child marriage, it provides: ‘The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation shall be taken to specify a *minimum age for marriage* and to make the registration of marriages in an official registry compulsory’.²³ The minimum global standard for marriageable age today is 18 years, the celebration of marriage or the attainment of puberty does not ripen an otherwise immature person for marriage. Sexual intercourse with a child or the marriage of any girl below the age of 18 years is a crime.²⁴ The implication is that even where a person who is less than 18 years allegedly consents to a marriage without any form of duress or undue influence, as long as the person is less than eighteen years, the marriage so contracted amounts to a nullity.

3. Definition of Rape within or outside Marriage

Another provision of the Kogi State Penal Code Law 2019 that has drawn the attention of this article is the definition of rape, circumstances of rape and person against whom rape may be committed. The definition of rape as contained in the law is as follows;

A man is said to commit rape who, save in the case referred to in subsection (2) of this section, 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 he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
- e) with or without her consent when she is under fourteen years of age or of unsound mind.²⁵

It is interesting to state that the above provision is *in pari-materia* with the provision of the erstwhile Penal Code²⁶ applicable to the Northern Nigeria, it is therefore needless to reproduce same here. A quick look at sub-paragraph (a) and (b) of the same section, it is needless to provide in sub-paragraph (a) *against her will* and in sub-paragraph (b) *without her consent*; these two sub-paragraphs mean the same thing as to the absence of consent, modern drafting employs precision and brevity in order to avoid a situation where the interpreters of the law will be looking for different interpretations for the same word or phrase where none exist. It is expected that the law as it was/is ought to have been reformed to meet with the trend of modernity and the sophistication of crime wave in the society today. There is no doubt that a law derived from the Penal Code of Sudan²⁷ about sixty years ago, certainly needs some form of reform or amendment. By the definition of the offence of rape as above, it reveals some legal issues for consideration in relation to when the offence is said to have been committed, by who and against who. It may be garnered from definition of rape above that;

- a. it is only a man that is capable of committing the offence of rape;
- b. it is only the penetration of the male sexual organ into the vagina of the female that constitute rape;
- c. It is only girls less than fourteen years that can be said to lack capacity to consent to sexual intercourse and;
- d. a person of unsound mind no matter the age cannot consent to sexual intercourse.

It is the view of this paper that the conditions above are obsolete and requires reformation and amendment. Surprisingly, no effort was made to redress the effect of the colloquial definition of rape in the Penal Code even when the opportunity presented itself by the making of the new Kogi State Penal Code Law 2019. Remarkably, the drafters of the new Penal Code for Kogi State need not go far away to Sudan or India to adopt their laws for Kogi State again. There are several pieces of legislation in Nigeria today that moved away from the archaic definition of rape as contained in the new Kogi State Penal Code Law 2019. The legislation which improved on the enforcement of the rights of all persons with respect to the offence of rape in Nigeria is the Violence against Persons Prohibition Act (VAPPA).²⁸ The long title of VAPPA explains that the Act is aimed at eliminating violence in private and public life, to provide maximum protection and effective remedies for victims and

²²Convention on the Elimination of All Forms of Discrimination Against Women, 1979, was Adopted by the General Assembly Resolution 34/180 on 18 December 1979: UN doc. A/34/46. 130 voted in favour and non against it and ten abstentions. The Convention came into force on 3rd, September 1981. (Hereinafter referred to as CEDAW).

²³ *Ibid* CEDAW Art 16(2)

²⁴ CRL Kogi State (n11) s 31

²⁵ Kogi State Penal Code 2019 (n1) s282(1)

²⁶ Penal Code (applicable to Northern States only) (n2) s282(1)

²⁷ Sudan Penal Code (n8)

²⁸Violence Against Persons Prohibition Act (hereinafter VAPPA) signed into law by President Goodluck Ebele Jonathan on 23rd May, 2015

punishment for offenders and to prohibit other related matters. By the provision of VAPPA, rape is defined as follows;

- (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 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.

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The definition of rape above seems more all-encompassing in the sense that it prohibits expressly all forms of indecent contact with a person without consent, and that the act of rape can be committed by a male or female. It states; '*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 implication of this provision is that all forms of unlawful sexual intercourse, indecent contact with a person inclusive of indecent contact with any person against his or her consent are prohibited. Such sexual advances or indecent contact involves contact with the genital organs, mouth, anus or any other parts of the body of the victim. It is immaterial whether the offender uses any part of his or her body for sexual pleasure against the victim; it suffices and amount to rape where the offender uses his or her genital, any part of the body or anything to penetrate the vagina, anus or mouth and any part of the victim's body without his or her consent. The definition of rape by VAPPA is all encompassing and is not gender specific like the Penal Codes.³⁰ Both male and female may be victims of rape. VAPPA provides that a person convicted of the offence of rape is liable to imprisonment for life,³¹ except where the offender is less than 14 years; in that case, the offender may be liable to a maximum of 14 years imprisonment.³² In addition to punishment, the court may also award appropriate compensation to victims of rape as it may deem fit in the circumstance.³³ From the examination of VAPPA above it can be concluded that;

- a. It is not only a man that is capable of committing the offence of rape; both male and female can be liable for rape
- b. It is not only the penetration of the male sexual organ into the vagina of the female that constitute rape alone; rape may be properly constituted by any act of sexual pleasure derived from another person whether male or female, where either of the vagina, anus, mouth or any other parts of the body of the victim is penetrated by the assailant without his or her consent. Reference to any other part of the body of the victim will be construed to include surgically constructed orifices (e.g gender reassignment surgery).³⁴
- c. Consent obtained by means of deception or false and fraudulent representation as to the nature of the act and deception as to the identity of the sexual partner would vitiate any apparent consent. It therefore follow that a defendant may be guilty of rape if he or she inserts a finger into the victims vagina, anus or orifices on the ground that the action is necessary for a medical examination, when in actual sense he performed the act for the purpose of the defendant's own sexual gratification.

The above are the likely reform expected of the new Kogi State Penal Code 2019. However, the contrary is the case, the drafters of the purported new Kogi State Penal Code law embarked successfully on a voyage of *copying an old law unto the pages of new paper* without more. It would have been smart and reasonable of the drafters of the new law to simply adopt the definition of rape as contained in VAPPA by making it applicable in Kogi State.

4. Chastisement of Female Spouse

The Penal Code³⁵ allows a husband to punish the wife in the guise of correcting the wife as long as same does not amount to infliction of grievous hurt, it provides;

- (1) Nothing is an offence which does not amount to the infliction of grievous hurt upon any person and which is done;
- (d) by a husband for the purpose of correcting his wife such husband and wife being subject to any native law or custom in which such correction is recognised as lawful.

²⁹ *Ibid* s1(1) (a)-(c)

³⁰ Kogi State Penal Code 2019 (n1); Penal Code (applicable to Northern States only) (n2)

³¹ VAPPA (n28) s1(2)

³² *Ibid* s1(2) (a)

³³ *Ibid* s1(3)

³⁴ Mike Molan, *Modern Criminal Law* (5th edn Cavendish Publishing Australia) p 250

³⁵ Penal Code (applicable to Northern States only) (n2) s 55(1)(d)

The above provision is reproduced verbatim by the new Kogi State Penal Code 2019.³⁶ It is expected that the new Kogi State Penal Code 2019 should have reformed the provision of the law as above to bring it in tandem with the practical enforcement of the rights of women without discrimination as to gender and inequality of sexes. It is the opinion of this article that the retention of the provision which permits the husband to enforce correction of his wife by way of chastisement (less grievous hurt) in accordance with the customary law or tradition of the place of marriage is barbaric and inhuman treatment on the wife. The question that may readily come to one's mind is that; in the heat of passion and anger can a husband who is enraged to the point of chastising the wife with the purported intent to correct her be able to weigh the degree of pain and the instrument with which to chastise the wife? More so that in many marriages there may be bottled up issues which may aggravate an outburst leading to the intended chastisement. This provision of the law has been the justification for much domestic violence by men against women with its attendant consequences in the past and presently.

Nigeria is signatory to many conventions and charters which prohibits inequality of sexes and discrimination on ground of sex or gender, most of which are bed rocked in the tradition, custom and the negative social construct of the people. Such laws like the provision of the new Kogi State Penal Code Law ought not to be retained in the *lex lata* of a supposed civilized State like Kogi State. In the light of the above, CEDAW³⁷ provides that;

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake;

(a) to embody the principle of the equality of men and women in their national constitution or *other appropriate legislation* if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(e) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulation, customs and practices which constitute discrimination against women;

(f) To repeal *all national penal provisions* which constitute discrimination against women.³⁸

The above provision of CEDAW command the elimination of the provision of section 55 (1)(d) of the Kogi State Penal Code Law 2019, more instructive is the fact that the provision of CEDAW is readily available for the drafter of the new law to follow.

This article is of the view that the drafters of the new Kogi State Penal Code Law 2019 failed to utilize the opportunity of law-making as an instrument of social control by infusing new way of life modelled by law, in so doing, to eliminate all forms of discrimination against women. In order to achieving that aim, CEDAW provides that;

States Parties shall take all appropriate measures:

(a) To *modify the social and cultural patterns of conduct of men and women*, with a view to achieving the elimination of prejudices and customary and all other practices which are *based on the idea of the inferiority or the superiority* of either of the sexes or on stereotyped roles for men and women;³⁹

There is no justification for the recommendation of the law for the husband to chastise the wife for the purpose of correcting the wife, the provision is based on the traditional idea to the effect that women are chattels and property of the husband; as such the woman is rated inferior to the man. It must be added and made clear that the provision of the new Kogi State Penal Code 2019 which empowers the husband to enforce correction of his wife by chastisement has a far reaching and limitless negative consequence on both the physical and psychological make-up of the victim. The provision of VAPPA⁴⁰ which is a domestic legislation offers an opportunity for the drafters of the new Kogi State Penal Code Law 2019 to borrow leaf therefrom. It prohibits the infliction of any form of *physical injury* on a person, whereas the Kogi State Penal Code Law 2019 legalize any form of physical injury on the wife so long as it does not amount to *grievous hurt*. One striking provision of VAPPA is the prohibition of both physical and psychological injury against another person, especially with respect to persons who maltreat and act violently against another person in the name of punishment. It provides;

A person who willfully causes or inflicts physical injury on another person by means of any weapon, substance or object, commits an offence and is liable on conviction to a term of imprisonment not exceeding 5 years or a fine not exceeding N100,000.00 or both.⁴¹

³⁶ Kogi State Penal Code 2019 (n1) s 55(1)(d)

³⁷ CEDAW (n22)

³⁸ *Ibid* Art 2 (a), (f) and (g)

³⁹ *Ibid* Art 5 (a)

⁴⁰ VAPPA (n28)

⁴¹ VAPPA *Ibid* s 2(1)

It further provides that;

A person who willfully or knowingly places a person in fear of physical injury commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N200,000.00 or both.⁴²

Whatever may be the justification, any person who compels another, by the use of force or threats to engage in any conduct or act, sexual or otherwise, to the detriment of the victim's physical or psychological well-being commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N500,000.00 or both.⁴³ This provision re-enforces the prohibition of both physical and psychological violence against any person within and outside marriage, it prohibit sexual abuse and exploitation of any kind. Lastly, VAPPA provides for the prohibition of the circumcision or genital mutilation of women or the girl-child which is not expressly prohibited in the Kogi State Penal Code 2019. It provides; 'The circumcision or genital mutilation of the girl child or woman is hereby prohibited.'⁴⁴ Anyone who performs, supports or procures another person to carryout female circumcision or genital mutilation, commits an offence and upon conviction shall be liable to a term of imprisonment not exceeding 4 years or to a fine not exceeding N200,000.00 or both.⁴⁵ It is obvious from all of the above that the recent agitations and the evolving campaign for the enforcement of the rights of women and the girl-child, to some extent, finds support in the enactment of VAPPA in order to fill the gaps or to complement the provisions of the Penal Codes and other allied laws on the protection of the rights of women against the practice of female genital mutilation. Surprisingly, the new Kogi State Penal Code 2019 did not contemplate the need to make provision for the prohibition of the circumcision or genital mutilation of women or the girl-child. This and many more contemporary crimes ought to have been the focus of the new Kogi State Penal Code Law 2019.

5. Poor Drafting

Unfortunately, and most unluckily the new Kogi State Penal Code 2019 in its Table of Contents at page xxii provides for Pornography and Related Offences section 435, Cyber stalking section 436, Cybersquatting section 437, Unlawful Access to a Computer section 438, Computer Related Forgery section 439, Computer Related Fraud section 440. Curiously, the above highlighted offences in the Table of Contents are nowhere captured in the body of the law. Meanwhile, from the Table of Contents, Repeal is section 441 and Savings and Transition section 442. It is obvious that sections 435-440 are completely omitted from the body of the law as compiled in the Table of Contents thereby leading to a grave lacuna and variance between the sections of offences in the Table of Contents and the actual body of the law. The implication of the omission and mix-up altered the sections of the main body of the Law, which ends at section 436. 'Repeal' is therefore section 435 as against section 441 in the Table of Content while 'Savings and Transition' is section 436 as against section 442 in the Table of Content.

6. Conclusion and Recommendations

Without prevarication, this article concludes that the Kogi state Penal Code Law 2019 is nothing short of an 'old wine in a new wine skin.' The whole exercise in the enactment of the Kogi State Penal Code Law 2019 depicts an act of *copy-and-paste* without an iota of attempt at reforming or enacting a new law that meets the present reality and need of the society. It concludes that law-making indeed requires great skill and the skill of men trained in the art of law and policy making. The research therefore recommends that 'politicians' should confine themselves to the circumference of wrestling powers during elections; when eventually in office they should learn to employ the services of professionals and the know-how in order to deliver on their electioneering promises. Law reform and law-making is a serious business, which requires expertise and professionalism. It further recommends that the Kogi State Penal Code Law, 2019 be repealed immediately to bring it in tandem with global best practices in the protection of the rights of women and the girl-child.

⁴² *Ibid* s 4(1)

⁴³ *Ibid* s 5

⁴⁴ *Ibid* s 6(1)

⁴⁵ VAPPA (n28) s 6(2)