THE DYNAMISM OF THE NIGERIAN LEGISLATIVE PROCESS

By

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Abstract
The decision of the Federal High Court Lagos in the case of Federal Republic of Nigeria v. Femi Fani Kayode[1] *brought to fore the need to tune the Nigerian Legal system onto the fast track in line with the high speed and rapidly evolving methods of crime. An issue as simple as dearth of a section of the law that recognizes the admissibility of a piece of evidence goes a long way in determining the escape or culpability of a felon, or the criminality or otherwise of certain acts that may be offensive, and indeed damaging to the economy and stability of the polity. While this paper is not an attempt to chronicle the statutes in Nigeria that require urgent review, the paper attempts to present the recent efforts of the National Assembly at addressing pressing legal challenges requiring legislative intervention in both procedural and substantive law. The paper also identifies certain areas of the law and evolving methods of crimes that need to be addressed through legislative amendments or enactments.*

Introduction

Although, the National Assembly had taken steps, by introducing section 84 into the Evidence Act 2011in order to cure the lacuna of the hitherto inability of courts to admit computer generated printouts or documents. Yet, there is still a lot left to be done in terms of updating the laws to conform to new forms of crimes. The Federal High Court Lagos rejected a computer printout of a bank statement of account tendered by the Counsel to the Economic and Financial Crimes Commission (EFCC) in the trial of Nigeria's former Minister of Aviation on the grounds that the statement of account was inadmissible as evidence before the court.

The former Minister was facing a 47 count charge of money laundering preferred against him by the EFCC. Between September 2006 and January 2007 while serving as Minister of Culture and Tourism and later, Aviation; the Minister was alleged to have received cash in excess of Nigerian Naira 500,000 and paying same into his personal account totalling N231 million. He was alleged to have paid the money into

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[1] FHC/L/523/08

his personal investment account for 90 days through one of his aides contrary to Section 15 of the Money Laundering (Prohibition Act) Act 2004.

The Judge in rejecting the Statement of account which was vital in proving the prosecution's case, relied on previous rulings of the Court of Appeal and the Supreme Court viz, **UBA Plc vs. S.A.F.P.U**[2], the Supreme Court's case of **Yesufu vs. ACB Ltd**[3]. The court held that computer printout document cannot be admissible in evidence as an entry in a banker's book.

The issue that came up for determination at the point of tendering the computer printout was whether a computer printout was admissible in evidence as an entry in a banker's book within the meaning and contemplation of Section 97 (2) of Nigeria's Evidence Act 2004[4]. The court's finding was in the negative in rejecting the evidence found that the document did not satisfy the conditions necessary for its admissibility in evidence under Section 97 (1) (h) and Section 97 (2) (e) of the Evidence Act.

The Judge went on to stress the need for legislation to be made in respect of the area in question, commenting that;

Though the counsel made reference to modern day practice of using computers in the day to day business of the bank, it is my opinion that the law remains as it is. It has not been amended by an act of the National Assembly, although it was high time they did that and I am bound to apply the law as it is. There is an urgent need for the amendment of the Evidence Act to cover admissibility of documents made by means of computer printout since it is clear that technological methods of producing document now form part of the day to day activities in business transactions, especially in the banking circle.[5]

In reaction, the National Assembly in 2011 while considering the amendments to the Evidence Act, introduced Section 84 which recognized the admissibility of statement in document produced by computers. The Evidence Act Amendment Bill that was passed into law which became the Evidence Act 2011, introduced many new sections among which are Sections 2[6], 14[7], 15[8], 33[9], 37[10], 63[11], 84[12], 90[13], 116[14], 118[15], 119[16], 120[17],134[18], 173[19], 174[20], 196[21], 206[22], 213[23], 255[24] and 257[25].

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[2] (2004) NWLR part 861 page 543 paragraphs A-G

[3] (1976) ANLR Part 1, 328)

[4] Chapter 112, Laws of the Federation of Nigeria.

[5] Hon. Justice Ahmed R. Mohammed of High Court of Lagos Nigeria.

[6] This section is introduced in order to clarify the enforceability of Section 1 of the same Evidence Act.

[7] Confers Discretion on courts to exclude improperly obtained evidence.

[8] State the conditions for the exercise of discretion under section 14.

[9] Nature of oral evidence required to clarify contents of documents, books, letters etc.

[10] Provides a concise but clear definition of Hearsay.

Out of the new provisions in the Evidence Act 2011, Section 84 addresses a manifest gap relating to admissibility of statements in documents produced by computer. Section 84 states as follows:
84 (1)- In any proceeding a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement of computer in question…

Section 84 Evidence Act 2011 was obviously a reaction to the call of Justice Ramat and other legal analyst who had wondered for so long as to why inspite of the dominance of the computer in almost all facets of human endeavour, our laws are still oblivious of the reality. The section no doubt is a novelty, but a novelty that raises other new questions i.e why the entire Evidence Act was not completely overhauled to cover wider range of issues. Although one problem was solved, many more remained unsolved and protracted indeed.

The problem nevertheless is not only with the Evidence Act, but that of the entire gamut of our laws that either requires updates, or enactment of completely fresh legislation to cover burning issues that are already criminalized in other countries.

Evidence Act and Computer Printouts Prior to 2011 Amendment
The section of the Evidence Act relied upon by the court in the case Fani Kayode[26] states:
Section 97 (1)- Secondary evidence may be given of the existence, condition or contents of a document in the following cases -when the document is an entry in a banker's book[27].

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[11] Introduces previous conviction as evidence in a subsequent civil proceeding against the convict.
[12] Allows the admissibility of statement in document produced by computers.
[13] Clarifies on the nature of secondary evidence admissible under section 89 Evidence Act.
[14] States procedure for resolving conflicting affidavits.
[15] A new provision on altered affidavits.
[16] State the procedure for insertion of Jurat in affidavits.
[17] Allows declarations to be taken without oath if in the presence of appropriate person.
[18] Explains the standard of proof in civil cases.
[19] Re-emphasis judgments of a competent court as Res Judicata against same parties when facts are all fours.
[20] Clarifies on the consequence when the a judgment is not pleaded as an estoppels.
[21] On the effect of statements on documents marked "without prejudice".
[22] Introduction of caution to be stated to witnesses before giving oral evidence.
[23] Introduces the need for courts to prevent communication between witnesses.
[24] Empowers the minister of justice to make orders or regulations or guidelines with respect to admissibility of any class of evidence that may be relevant under the evidence Act.
[25] Repeals the Evidence Act 2004.
[26] supra
[27] 97 (1) (h) Evidence Act 2004

The secondary evidence admissible in respect of the original documents referred in the several paragraphs of subsection 97 (1) of this section is as follows- The copies cannot be received as evidence unless it be first proved that the books in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.

If literal method of statutory interpretation is adopted, the above sections did not contemplate computers as ordinary books of the bank, or computer printouts as entries in a banker's book. A banker's book is definitely not the same with a computer. Therefore, section 84 of the new Evidence Act was apt to the need of the moment, but the question is, is that all that needs to be done to address the gaps in the laws juxtaposed against contemporary realities? The National Assembly may need to continue identifying some of these areas of gap in our laws in order to keep them in touch with contemporary realities. Such areas as regulating and allowing the easy admissibility of such evidence as recordings and text massages, forensic evidence, internet crimes, antitrust, sabotage, corporate criminal liability etc.

Audio Visual Evidence and Text Messages

Lawyers in Nigeria often encounter problems when attempting to tender in court audio visual evidence/ videos, compact disk, diskettes and information contained in flash drives, phonebook text-messages and other forms of computer or high-tech information preserving devises. The Evidence Act is yet to be updated to recognize the existence of such materials, or clearly stipulate the procedure for admission of such evidence.

Forensic Evidence

Forensic evidence to establish multiple thumb printing in proof of electoral malpractices lacks clear and direct legislations spelling out the procedure for tendering of such evidence. This has left such cases unproved, hence the continued perpetration and perpetuation of electoral malpractices during elections in Nigeria. Electoral offences are usually committed in such a manner that direct evidence may be difficult to find. Forensic evidence as to finger print impression therefore may turn out to be the only means and way through which such cases may be proved. The most common form of electoral practice is multiple thumb printing and stuffing of ballot boxes; yet hardly has any one being able to prove these allegations in election tribunals since the commencement of the present democratic experiment.

Internet Crimes

Internet offences are on the rise with syndicates popularly called yahoo boys[28]. Internet fraud is usually cross border in nature, which could originate in one country and delivery occurring in another. The ways and means of perpetrating makes the only means of proof of these cases through virtual means. There is no direct and clear legislation providing for the procedure allowing the tendering of soft copies of evidence to be accessed either in the open court or by the Judge. This creates difficulty in the prosecution of these crimes and even in the investigation process because it leaves the investigator ignorant of what to find and gather for a successful prosecution of the case. Many cases of the prosecuted by the Economic and Financial Crimes Commission in this respect have failed to secure conviction.[29]

In addition to the gaps relating to computer-related evidence, there are other aspects of legal, political, judicial and socio-economic realities that are either inadequately covered by existing law or completely outside any existing law. Aspects of such realities that are considered below in this article are: monopoly and anti-trust, oil sabotage, award of fine in lieu of punishment, cell phone crimes, criminal corporate liability, mandatory minimum sentence rule in certain cases, and unenforceable crimes. In addition, to the foregoing, there are certain deviant conduct that have evolved beyond the scope recognised by Nigerian law. Without keeping pace with this reality, the criminal law becomes redundant in addressing such conducts. The example of such conducts that will be examined below is non-consensual sexual acts that are not presently recognised as rape in Nigeria.

Monopoly and Anti-Trust

There are major concerns that the Nigerian economic space is an 'unbridled horse'. Ours is a limitless capitalism where monopoly is allowed. Individuals and corporations operating business with policies clearly aimed at exclusion of competitors and others are gaining grounds day by day. While the Companies and Allied Matters Act 1990 makes provisions for intra company activities and monitors the performance and actions of company boards and executives, there are no laws that directly regulate inter-company relations especially with respect to monopolistic policies and unfair advantage. The Companies and Allied Matters Act is a far cry from what is adequate to tackle extreme and unfair competition and monopoly in the way of the European and American Anti-Trust Laws[30] in order to check the excesses associated with unregulated capitalism.

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[28] www.nairaland.com describes yahoo boys a syndicate of certain young Nigerians who use the internet to defraud unsuspecting victims

[29] ibid

[30] **Antitrust** refers to a series of laws enacted in the US and more recently in EEC to outlaw trust and related monopolies. The purpose is to encourage fair competition for the benefit of consumers. Competition results in better quality, better service, and lower prices. The laws are administered by the US Federal Trade Commission, who especially reviews mergers and acquisitions for potential to restrict competition.

Oil Sabotage

Oil bunkering and oil installation vandalism in the high seas is becoming a common sight in Nigeria, yet, not a single culprit has yet been convicted. Lack of a direct legislation to tackle the offence leaves the police lost as to how to conduct proper investigation with a view to successfully prosecuting the offence. The militants hiding under social agitations blow up pipeline; siphon crude oil and export same through the black market.

Award of Fine in Lieu of Punishment

Payment of fine as options to imprisonment as contained in statutes in Nigerian laws are still of pre-independence value that has today become stipends in the light of the fall in quality of currencies.[31] The quantum of fine needs to reflect current realities. For instance section 460 of Criminal Code which relates to crimes against railway properties or railway workers provides for imprisonment of "three months or to a fine of **forty naira**".[32] Another is section 495 Criminal Code relating to cruelty to animals which provides for "imprisonment for six months or to a fine of **fifty naira**".[33] There are also so many similar provisions in other parts of the Criminal Code and the Penal Code providing as options to imprisonment what at best could be referred to as "ridiculous" amounts in the face of present realities.

Cell phone Crimes

The use of cell phones to commit contemporary crimes is a serious cause for concern. While the approach like the one legislatively enacted in the form of the ID Law of South Africa, to intercept and monitor calls and text messages may not be immediately tenable in Nigeria, a Law should however be in place to make it mandatory for cell phone companies to cooperate with authorities on a short notice from the police to divulge information of calls made in the commission of offences; place, time GPRS location of the number holder if possible and any other information that will assist the police in the speedy arrest of culprits.

Criminal Corporate Liability

Nigeria's criminal laws make no special provision concerning the criminal liability of corporations or companies (as distinct from the individual liability of members composing the corporations), and the exact extent of corporate liability is a matter of some doubt.[34] This is, looking at the two principal legislations on crime in Nigeria, Criminal Code and the Penal Code.

The same vacuum exists in the other vital statutes like Economic and Financial Crimes Commission (EFCC) Act, Independent Corrupt Practices Commission

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[31] See the Penal Code punishments section with options of fine.
[32] Section 460 (4) Criminal Code.
[33] Section 495 (1) (f) Criminal Code.
[34] Okonkwo and Naish., Criminal Law in Nigeria (Ibadan: Spectrum Books, 2005). Pg 124-127.

(ICPC) Act, the Anti-Terrorism Act etc. This is a major lacuna in the sense that corporations can actively participate in corruption, terrorism and similar offences.

It is clear that a corporation can be made criminally liable by the express wording of a particular statute. Section 74 (5) of the Factories Act, for instance, contemplates the possibility of the commission of any one of the offences it creates by "a company, co-operative society, or other body of persons."[35] In **R. v. Anglo-Nigeria Tin Mines Ltd**,[36] it was held that a firm could be prosecuted for certain offences under the old Minerals Ordinance. But the question remains, what is the nature of the general principle of corporate liability where such liability is not expressly provided?[37] That is the question begging for answer.

Many countries have taken steps to provide alternative punishments in statutes where the culprit is a corporation, by means of fines, forfeiture or winding up. There appears to be a global consensus today that companies as legal persons enjoy the same rights, privileges and therefore the liabilities of the biological person. As for the definition of person, a person can be natural or artificial. A natural person is a human being while an artificial person is a creature of law conferred with attributes called corporate personality, making it "an invisible, intangible being and existed only in the contemplation of the law".[38]

Companies are creatures of the law, intended for all intent and purposes to enjoy legal recognition, with capacity to sue and be sued similar to the capacity of a biological person. Except of course, as adumbrated in the **R. v. Anglo-Nigeria Tin Mines Ltd**[39] in relation to capacity to be sued in criminal cases, where **Berkeley J.** explained that "there was no one who could be brought before the court and if necessary placed in the dock." Also, the objection that a corporation could not be said to have a mind capable of being guilty, and therefore could not be convicted of any offence requiring any form of *mens rea*. And there was the further point that it was not easy to find a suitable punishment for a corporations.

"But this old view of broke down with the increasing proliferation of corporations, hence the need to rethink the mild application of the principle of corporate criminal liability when serious offences are committed by agents of a company in furtherance of the objective of the company. At first, companies were held vicariously liable for offences committed by their servants. But subsequently, by a fictional process, the states of mind of the agents of the corporation were held to be attributable to the

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[35] ibid
[36] (1930) 10 N.L.R. 69 cited in Okonkwo and Naish op. cit. pg. 124.
[37] Okonkwo and Naish op. cit.
[38] see the case of Fawehinmi v. NBA (No. 2)(1989) 2 NWLR (Pt. 105)558 at 633
[39] supra

corporation, so that the corporation itself could be said to have committed the offences with the requisite mental element".[40]

"In the case of **A.G. (Eastern Region) v. Amalgamated Press**,[41] a corporation was charged under section 14 (1) of the Eastern Region Newspaper Law (1955) which provided that, "Any person who publishes or reproduces, or circulates in a newspaper any statement, rumour or report knowing or having reasons to believe that such statement, rumour or report is false, shall be guilty of an offence and liable upon conviction to a fine of two hundred pounds or to imprisonment for one year." In convicting the accused company, Aintley C.J. said:

I make no doubt that corporation can have knowledge of the falsity or otherwise of that which is published in a newspaper, and a corporation, through its agents, is clearly capable of publishing newspapers. I cannot see, therefore, why a corporation is capable of publishing in a newspaper that which the corporation knows, or has reason to know is false.[42]"

"In the Amalgamated Press case, the convicted company was fined in lieu of imprisonment because the law make provision for the option of fine. The court per Ainley C.J further declared that a corporation cannot be charged with an offence the only punishment for which is imprisonment. An indication that our courts find it a lot easier to convict and proceed to sentence a corporation where the specific provision in issue is accompanied with an option of fine. For corporations therefore, an effective means of punishment lay to hand in the fine. But, can the courts hand in the fine where the provision did not clearly state it?"[43]

"It may therefore be better if the applicable criminal laws are overhauled to stipulated alternative punishments of fine for all manner of crimes ranging from common thefts, corruption, terrorism or even murder. Since, as decided, a corporation cannot be hanged or imprisoned, yet, corporations can be culpable for the crimes if carried out by the company's agents in the pursuit of the goals of the company. After all, in the English cases of **R. v. I. C. R. Haulage**,[44] the suggestion was made that a corporation should be liable for an offence involving violence committed by one of its servants; and in **Moore v. Bresler**,[45] a company was convicted in respect of the fraudulent act or its agent, even though he intended to defraud the company".[46]

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[40] Okonkwo and Naish op. cit. pg 124.
[41] (1956-57) 1 E. R. L. R. 12.
[42] ibid
[43] ibid
[44] (1944) K. B. 551.
[45] (1944) 2 All E. R. 515.
[46] See Okonkwo Nash supra.

Mandatory Minimum Sentence Rule in Certain Cases

Wikipedia the free encyclopaedia[47] defines a **mandatory sentence** as a court decision setting where judicial discretion is limited by law. Convicted persons are punished with at least a minimum number of years in prison. Mandatory sentencing laws vary from country to country; it is mainly an area of interest only in common law jurisdictions, since Civil Law jurisdictions usually prescribe minimum and maximum sentences for every type of crime in explicit laws.

Mandatory minimum sentence refers to the fixed sentence that a judge is forced to deliver to an individual convicted of a crime, neglecting the culpability and other mitigating factors involved in the crime. For example, people convicted of certain crimes must be punished with at least a minimum number of years in prison. In 1986, the United State's Congress enacted mandatory minimum sentencing laws to impose the mandatory minimum sentence. Mandatory sentencing laws vary from country to country.[48] The country with the most instances of mandatory minimum sentence in the United State. Mandatory sentencing and increased punishment were enacted when the United States Congress passed the Boggs Act of 1952. The acts made a first time cannabis possession offense a minimum of two to ten years with a fine up to $20,000; however, in 1970, the United States Congress repealed mandatory penalties for cannabis offenses. With the passage of the Anti-Drug Abuse Act of 1986 Congress enacted different mandatory minimum sentences for drugs, including marijuana.[49]

In 1973, New York State introduced mandatory minimum sentences of 15 years to life imprisonment for possession of more than 112 g of hard drugs.

Across the United States, and at the Federal level, the United States federal courts are guided by the Federal Sentencing Guideline (See War on Drugs for more information about US drug laws.) When a guideline sentencing range is less than the statutory mandatory minimum, the latter prevails. Under the US Controlled Substances Act 1970, prosecutors have great power to influence a defendant's sentence and thereby create incentives to accept a plea agreement. In particular, defendants with prior drug felonies are often subject to harsh mandatory minimums, but the prosecutor can exercise his discretion to not file a prior felony information. If he does not file it, then the mandatory minimum will not be applied.[50]

In Australia, in 1997, mandatory sentencing laws were introduced by the Northern Territory in Australia. The Three Strikes and Out Policy raised incarceration rates of women and indigenous by 216% in the first year. The incarceration rate for men rose by 57% and 67% for indigenous men. The mandatory sentencing laws sparked

[47] www.wikipedia.com last visited on 22-8-13.
[48] www.uslegal.com last visited 22-8-13.
[49] www.wikipedia.com last visited 22-8-13.
[50] Ibid.

debate of the laws being discriminative (indirectly) as indigenous people are overrepresented in the crime statistics in the Northern Territory.[51]
Both Singapore and Malaysia similar to Nigeria have mandatory death penalty for certain offences, most notably murder and possession of a certain amount of controlled drugs (See Capital punishment in Singapore).[52]

In the past Taiwan has had a large number of offenses that carried a mandatory death penalty, but these laws have been relaxed to a large extent recently.[53]

In India, the only crime punishable by a mandatory death sentence is murder by a convict serving a life sentence. The mandatory death penalty provided in Section 31A of India Law is in the nature of minimum sentence in respect of repeat offenders of specified activities and for offences involving huge quantities of specified categories of narcotic drugs.[54]

In Japan, the only crime punishable by a mandatory death sentence is instigation to a foreign aggression.[55]

Reference to other countries in this research helps in appreciating the concept and the fact that it is not novel. Most countries that apply it have also adopted different modus of introducing the guideline and implementation. However, each country decides crimes that deserve to be accorded such status by the rampancy of the crime. While the United States it has mostly being drug related offences, Japan with its unique Second World War experience imposes minimum sentence on crimes of instigation to a foreign aggression. For most countries capital offences such as Murder and treason carry such mandatory minimum sentence.[56]

In Nigeria, although not in such conscious terms, capital offence provisions surely contain minimum sentence once proved, and recently such crimes as kidnapping and abduction. But on general terms, there is no such regulation or provision to guide judges in the exercise of discretion in sentencing after convictions.[57]

Such cases as corruption, terrorism etc may require legislation or regulation on handling sentences in such situations.

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[51] See www.abc.net.au/new last visited 20th February, 2015.
[52] seewww.wikipedia.com last visited 22-8-13.
[53] See www.wikipedia.com last visited 22-8-13.
[54] ibid
[55] ibid
[56] www.wikipedia.com last visited 20-2-15.
[57] Ibid.

Unenforceable Crimes

The general principle is that all crimes are only crimes because there is a written law that criminalises the act in question. However, there are certain crimes that are impossible to enforce. Mainly due to the societies' acceptance of those acts are normal. Chukkol classified these types of crimes as obsolete offence when he stated as follows:

Both the Criminal Codes and the Penal Codes do contain offences which, to put it mildly, are obsolete and little harm will be done if they are taken out. One of such offences is bigamy-an act which has hardly ever been viewed as an offence by the generality of the Nigerian public.[58]

The essentially English notion of bigamy involves a situation where a person had contracted a monogamous marriage and later purports to marry someone else during the lifetime of his or her spouse.[59] The offence of bigamy is codified in section 370 of the Criminal Code which provides:

...Any person who, having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife is guilty of felony and is liable to imprisonment for seven years...

Aguda, Chukkol and many other scholars have called into question the whole idea of retaining the offence of bigamy in our law since on various occasions people who in theory are monogamous take additional wives and do not hide the fact. And as Chukkol put it, they may even go ahead and invite every important dignitary in the town including the local magistrate and the Divisional Police Officer to dance and celebrate.[60]

Other similar offences that bare no meaning in our present day statute books among others include section 417 (e) of the Criminal Code which talks of one's face being 'blackened'- an act which can hardly be of significance in the African environment. Section 381 of the Penal Code makes it criminal for servants engaged in carrying persons or goods to refuse to do so; an act which was common in the Indian colony when coolies[61] used to carry their white overloads to cross rivers and swamps. Such an offence has certainly lost its relevance in the present day Nigeria.[62] The legislature both National and States must inaugurate a process, either through the law reform commission or similar bodies, to scrutinize the statutes and identify those aspects that are outdated or obsolete as stated by a writer when he offered the following piece of advice;

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[58] Chukkol K. S., Law of Crimes in Nigeria (Kaduna, ABU Press, 1989) pg 565.
[59] Ibid.
[60] Chukkol ibid at p. 566.
[61] Coolies is name used to refer to unskilled labourers.
[62] Ibid.

Obsolete offences must be eliminated, inconsistent penalties must be reconciled...technical obstacles to conviction must be suppressed. Severe penalties must be provided (or reserved) for offences which, today, pose the greatest threat to society.[63]

Non-Consensual Sexual Activity

As defined by the Criminal Code, rape is "unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of false threats or intimidation of any kind, or by fear of harm, or by means of false or fraudulent representation as to the nature of the act, or in case of a married woman, by personating her husband".[64]

The Penal Code on rape states as follows, "A man is said to commit rape who ... 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 the 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".[65]

Under both the Criminal and Penal Codes, the offence of rape essentially involves a male using his phallus to penetrate a female's sexual organ. As such, where there is no vaginal penetration or where there is non-phallic penetration, the deviant conduct will not fall within the definition of rape as contemplated by the Criminal Code and the Penal Code. So where a female unlawfully has carnal knowledge of a male without his consent, such deviant conduct will not come within the definition of rape. Likewise, where the unlawful sexual assault on a female does not involve penetration by phallus but involves penetration by some other part of the body, such would not come within the present definition of rape.

This aspect of our criminal law is clearly out of pace with present realities. Another definition of rape was given by the International Criminal Tribunal for Yugoslavia (ICTY) in the Furundzija case.[66] In that case, the ICTY reviewed the law of rape of different jurisdictions and defined rape to be unlawful sexual penetration of the vagina, anus, or mouth of the victim by the penis or the vagina or anus of the perpetrator.[67] By this definition rape can be committed by both male and female

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[63] L. B. Schwartz: 'Reforms of the Federal Criminal Law: Issues, Tactics & Prospects' 1977 (No. 1) Duke Law Journ. 171.

[64] Criminal Code LFN 1990, Section 357.

[65] Penal Code LFN 1990, Section 282(1).

[66] Furundzija, Case No. IT-95-17/1 147.

[67] For further analysis of the judgment see Marzen, C. G. "Furundzija Judgment and Its Continued Vitality in International Law, The" 43 **Creighton L. Rev.** 505 (2009).

perpetrators. Moreover, the penetrated part of the body does not have to be the female organ.

It may be noted that other forms of deviant conduct identified above can amount to indecent assault,[68] or assault with intent to commit unnatural offences.[69] However, the apparent classification of these conduct as assaults instead of rape give the wrong impression that they are less heinous, harmful or shameful than unlawful carnal knowledge. Furthermore, there are no laws regulating the creation, keeping and use of sex offenders registers in Nigeria. This is an obvious gap in existing legislation.

Context for Reform

The Nigerian legal system and countries with English roots are referred to as 'common law', in contrast with the system of other parts of Europe that are derived from Roman law and referred to as 'civil law' systems. England never absorbed Roman law principles and methods, but developed its law from singular, native sources which, with the spread of English social culture, have become the foundation of the law in most English-speaking countries[70], including Nigeria. The English law perhaps due to the flexible process of crafting legislations through the courts developed a mechanism for adopting contemporary challenges like the new forms of crime.

Nigeria as a nation is an intertwining of many ethnic nationalities and city states merged together for the purpose of colonial administration, but later named Nigeria and granted independence under one flag and one Constitution. Each of this ethnic Nationalities and city states had their unique customs and laws. The colonial period and the immediate aftermath of the post independence Nigeria characterized tremendous dynamism in the growth of Nigerian Legal system, particularly the criminal justice sector which mirrors the bold and wide social gap between the different ethnic and religious groups. For these reasons, change was inevitable. The change and rapid growth was stimulated by the need to keep the country one.

When Nigeria became relatively stable having overcome the hurdle of diversity and adoption of a rigid constitutional method in 1979, legislative enactments became the exclusive responsibility of the parliaments. The dynamism in Nigerian courts was curbed and restricted to only interpretation of enacted legislations.

Military interventions of the 1980's to 1990s scuttled the parliament's ability to blossom and legislate accordingly. Thus, a great deal affected the capacity of the

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[68] Criminal Code Sections 360, 352; Penal Code Sections 285.

[69] Criminal Code Section 214, 352; Penal Code Section 284.

[70] See Graham Hughes, Common Law Systems (Published in Fundamentals of American Law) Edited by Allan B. Morrison. Oxford University Press 2004.

Nigerian parliament's to pass laws on current and unfolding events. This largely accounts for the drawback that Nigerian Laws suffer today.

The last ten years has nevertheless provided a relatively stable constitutional civil rule; an opportunity once again for Nigeria to join the band wagon of global legislative race in line with societal dynamics and growing criminal tendencies.

Areas for Reform

The Nigeria's Evidence Act is a 1945 law handed down by the colonial Britain. The law substantially remained the same and un-changed until the 2011 amendment which attempted to tackle some of the shortcomings. The sluggish response to contemporary crimes in this fast evolving world only leaves the country behind on so many legal developments around the world. The areas as highlighted in this article not covered create the problem of recognition and admissibility of these pieces of evidence in courts. For instance text messages and other forms of electronic records need to be addressed through amendment of the Evidence Act or enactment of a fresh legislation to focus on these areas. The mare empowerment of the Minister as contemplated in section 255 of the 2011 Evidence Act may not be sufficient. Britain embraced computer printouts of bank transactions as evidence with a legislation passed in the Civil Service Act of 1968. Nigeria only made similar enactment in the 2011 Evidence Act, which is too slow. Nigeria will need to enact laws that will cover effectively information technology, and this has to be done contemporaneously with other nations and as the technologies appear and the crimes evolve. This way, perpetrators may not be able to get away with it. This will help in the fight against corruption in Nigeria. Recognition and admissibility of these types of evidence will also help curbing internet crimes.

Laws to criminalize certain commercial practices that seek to edge out competition and unfairly subdue rivals need to be enacted. Anti-trust or similar legislations go a long way in enhancing commercial best practice and balanced capitalism.

Fines paid in place of imprisonment should reflect current realities. The amount should be reasonably punitive or exemplary rather than symbolic as it is now with most of the laws. In this respect, most of the criminal laws in Nigeria need to be reviewed. Especially the Penal Code Law applicable in Northern Nigeria and Criminal Code Law applicable in the Southern part of Nigeria.

Law to clearly define what amounts to vandalism and persons to be classified as accessories to the crime in the circumstances should be in place. The law should place certain public officers in communities where these pipelines exist responsible and failure to prevent the damage or apprehend the culprits should itself be criminal. This is because this type of offence involves elaborate preparations that in most cases the crimes occur before the very eyes of the law enforcement agent, creating a suspicion of collusion.

The amendment of the Evidence Act needs to also effectively cover admissibility, means and process of admission of forensic evidence. An explicit piece of legislation to address adequately the process of admissibility of expert evidence is required, just like the Federal Rule of Evidence 702 of the United States, which covers the admissibility of expert evidence, particularly forensic testimony[71].

The principles of criminal corporate liability in our laws need to be updated in tune with the rest of the advanced world. This is because while it is true that companies as legal persons though equal to biological persons in terms of rights, privileges and liabilities, can however not be hanged or imprisoned for crimes that attract such punishments like murder, manslaughter, terrorism or theft; the laws may nevertheless be amended to provide alternative punishments of fine or winding up, or forfeiture in the event of culpability in such offences.

Furthermore, the growing incidents and variations of sexual attacks necessitate the broadening of the present definition of rape.[72] The need to keep sexual offenders away from children or vulnerable persons also calls for the establishment, management and use of a sexual offenders' register.

Conclusion

The Nigerian National Assembly has so far displayed tremendous resilience in tackling burning issues requiring accelerated attention. This was shown in the year 2002 in enacting the EFCC Act and the review in 2004. The refusal to amend the Constitution in 2006 to allow the former President Obasanjo to run for a third term despite pressures and threats only confirms that Nigeria's democracy has began to work. The 2011 amendment of the Evidence Act though a major step in the right direction, a lot more is still yet to be done. As such, grappling with evolving crimes should be a matter of urgent national interest.

The Minister of justice in line with contemporary global best practice of judicial activism and proactively may need to start exercise the powers conferred on the office by section 255 of the Evidence Act 2011 to identify those areas of evidence procedure that require supplementation, or areas not well or fully covered and make appropriate regulations or guidelines. For instance, mandatory minimum sentences, or limits on sentences in certain cases, are areas where the Minister of Justice can make guidelines to fine-tune those areas[73].

On matters of criminal legislation, the state state assemblies are as important as the National Assembly, because the principal criminal laws in Nigeria the Penal Code

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[71] See the case of **UNITED STATES v. VAN WYK** 83 F.Supp.2d 515 (D. New Jersey, 2000).

[72] Okagbue, I.: ***The Reform of Sexual Offences in Nigerian Criminal Law*** Nigeria Institute of Advanced Legal Studies, 2007 reprint.

[73] The US Attorney General Holder introduced a guideline on the handling of drug related offences by judges in Federal Courts of the US in 2003 where the severity of the sentences was downgraded.

and the Criminal Code are all state laws, hence, the need to clarify that all issues conversed in this article on the need for the parliaments to be perceptive and responsive to the needs of the moments applies as well to states.

The areas identified in this article as requiring reform and or amendment in the laws applicable in Nigeria is no means exhaustive. Many more areas exist that require the attention of the legislators.