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EXAMINING THE CRIMINAL CODE AND THE VIOLENCE AGAINST PERSON PROHIBITION ACT (VAPP ACT) ON THE OFFENCE OF RAPE AND THE LEGISLATIVE ATTEMPTS BY BOTH LAWS TO CRIMINALIZE THE OFFENCE OF RAPE

The offence of Rape is a menace that bedevils every society. Women, young girls and even infants make up the statistics for this offence. Prior to the advent of women emancipation and empowerment, women have been viewed through the microscopic lens of society as objects of sexual satisfaction that should be subsumed into the existence of their male counterparts. There have been countless cases of female genital mutilation, female child abuse, rape, enslavement, discrimination, and deprivation. The situation is further aggravated by the inability of legislation to provide the necessary protection as is expected in a civilized society. This lacuna necessitated the struggle for women emancipation and gender equality.

As society evolved and morality degenerated, men as well as women became objects of perverted sexual desires, yet the legislations necessary to properly address these vices were non-existent. There was an attempt, albeit weak, by the Criminal Code Act to criminalize the offence of rape. The attempt was weak in that, it was flawed with so many lacunas and created a wide net for perpetrators of the offence to evade justice. There was also an attempt by the Violence against person prohibition Act to address the offence of rape, it was an improvement on the criminal code but not a perfect legislation.

This article seeks to examine the offence considering these two statutory provisions.

DEFINITION OF RAPE AND THE SHORTCOMINGS OF THE CRIMINAL CODE ACT

Rape as defined by the court in **Posu v. The State [2011] 2 NWLR PT. 1234 393** is

An unlawful sexual intercourse with a female without her consent. It is the unlawful carnal knowledge of a woman by a man forcibly and against her will; the act of sexual intercourse committed by a man with a woman who is not his wife without her consent.

The flaw in this definition is undoubtedly from the interpretation of the Criminal Code. The relevant provisions of the Code will be reproduced for ease of reference.

Section 357

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of

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threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.

The key things to identify from the law are:

1. Rape as an offence can only be committed by men;
2. The offence involves having unlawful carnal knowledge of a woman or a girl;
3. For the act to be unlawful, the woman or girl withheld consent or;
4. That consent was obtained by force or means of threat, intimidation, fear or fraudulent representation.
5. In the case of a married woman, by impersonating her husband.

The offence is therefore committed when a man has unlawful carnal knowledge of a woman or girl without her consent. The courts have interpreted this provision in plethora of cases to mean that the offence is complete upon penetration of the female genital organ by a male genital organ. See **Posu v. The State** (*supra*). **Ahmed v. Nigeria Army** [2011] 1 NWLR pt. 1227 89.

It is apparent that this provision falls short of modern criminal jurisprudence because rape has gone beyond the penetration of the female genitals by the male genitals. Insertion of objects in any opening of the human body is a violation of that person and therefore constitutes rape. A feeble attempt was made to define sex in the case of **Musa V. The state** [2012] 2 NWLR pt. 1286 59, where sex was defined to include physical activity between two people in which they touch each other's sexual organs which may include sexual intercourse. This definition only recognizes sex as between persons of the opposite sex without taking cognizance of the reality that men can also be raped by both women and men, particularly in light of the prevalent homosexual relationship amongst adults in various continents.

A further look at the provisions of this Act will reveal that a married woman can only be raped by a person impersonating her husband but never by her husband. We must not forget that one of the ingredients of rape is the absence of consent, but the law is telling us that a married woman has given perpetual consent to her husband to engage in any form of sexual relationship he desires with her the moment wedding vows are made and this consent once given by the act of marriage can never be withdrawn. Marriage, therefore, has become a license for a man to subdue his wife to his sexual desires and the law will protect him. Nothing is said in the law about rape of a husband by the wife. The question begging for an answer is whether there is such a thing as spousal rape? The criminal code has answered this question in the negative. The code does not even recognize the possibility of the man being a victim of rape neither does it take cognizance

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of the fact that a man can be a rapist in marriage. The reality is that, sex although consensual between partners, married or unmarried, can translate to rape the very moment consent is withdrawn. Consent can be withdrawn by either party before penetration and even before ejaculation and it is immaterial that the perpetrator and the victim have been lovers. In **Okoh v. Nigeria Army [2013] 1 NWLR pt.1334 16**, it was stated with approval that previous or presumed suspected active sexual partnership, will not negate the offence of rape by imputing consent where the contrary has been proved. Consent must subsist from the beginning of the act till the end, therefore, consent obtained by means of threat, inducement and fraud, is no consent.

A more elaborate definition of rape was proffered by the US Justice Department where Rape was defined as the penetration, no matter how slight of the vagina or anus with any body part or object or oral penetration by a sex organ of another person without the consent of the victim. This definition according to the department was to assure rape victims that their ordeals will be addressed, and perpetrators will be brought to book. This definition unlike the criminal code is not gender specific and it envisages that rape can occur in the 3 types of sexual intercourse. However, it contemplates that rape via oral sex can only occur by the penetration of the mouth with the sex organ. This is untrue. Any penetration of the mouth by the sex organ or an object with the intention of the offender to derive sexual gratification or calculated to humiliate, torture and dehumanize the victim is rape. It is imperative to look at the provisions of the VAPP Act on rape.

THE VIOLENCE AGAINST PERSONS PROHIBITION ACT

With the promulgation of the Violence Against Persons [Prohibition] Act (VAPP Act) in 2015, the long arm of justice has been extended to accommodate acts that violates people's sexuality. Prior to the VAPP Act, the offence of Rape can only be committed by men against women. Rape is a traumatizing experience that many victims lack the willingness to confront and pursue the judicial process of prosecution, they prefer to endure the trauma than expose themselves to the horrid victimization of society. For those who are able to confront the situation, and in a bid to overcome the experience, they unknowingly tamper with evidence required to prosecute their rapists, thereby leaving the elements of the offence unprovable and the Nigerian courts are left with no option than to let the rapists walk away guilt-less.

Section 1 of the Act provides: a person commits the offence of rape if -

1. He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his body or anything else;
2. The other does not consent the penetration;

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3. 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.

From the above definition, it is apparent that:

1. Women as well as men can be raped;
2. Rape can be committed with the offender's body or by the use of an instrument;
3. Consent is vitiated by fear, force, intimidation, misrepresentation, use of substance or impersonation (in the case of a married person).

The provisions of the VAPP Act is by all standard an improvement of the Criminal Code but like the criminal code, the Act does not recognize marital rape although it recognizes and criminalizes spousal battery, see Section 19.

Assuming that the act of spousal rape was preceded or/and succeeded by an act of battery, a spouse will take benefit of this provision but only as it relates to battery and no more. Further still, it would appear that the law only makes provision for physical damage but no contemplation for mental abuse. What then becomes the fate of a spouse who was induced or threatened with psychological damage to self or a loved one? It is unfortunate that despite the increasing number of spousal rape, drafters of this 2015 Act still persevere in the ignorance of the existence of spousal rape. The court in **Okoh's case (supra)** recognized that being in a romantic relationship does not amount to perpetual consent to sex. What then is the basis for excluding spousal rape?

Another problem with the offence of rape in Nigeria is how to prove the commission of the offence. Penetration and absence of consent being the elements to prove the offence but how does one establish penetration and absence of consent? The court in **Ahmed v. Nigeria Army [2011] 1 NWLR pt. 1227 89** have stated that any slight penetration will suffice, emission or rupturing of the hymen are not necessary requirements to establish the offence. The use of fingers, bottles, dildos, fruits, or any object will amount to rape. Rape of an adult unlike that of a child requires no corroboration as single credible evidence can suffice to establish the offence. Where the assaulter disputes the commission of the offence, it will be important that the claim of the victim be corroborated by medical evidence or eyewitness account. Rape victims are advised to resist the urge to clean up once the offence is committed, rather, they should go to a nearest hospital and get an examination done. This will help to preserve the evidence (DNA of the rapist) needed to prosecute and convict the assailant. The issue of consent has been discussed in this article. Further to the discussion, it is an irrebuttable presumption of law that a child under the age of 16 cannot give consent to sexual relation – See **Section 363** of the criminal

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Code. It is immaterial that there were reasonable grounds to believe that the girl is above sixteen or that she consented, such consent in law amounts to no moment. Similarly, it is an irrebuttable presumption of Law that a male below the age of twelve is incapable of having carnal knowledge of a woman. See **Section 30** of the Code. The VAPP Act unlike the criminal Code recognizes that the offence can be committed by a person within that age range, therefore, it prescribes a maximum sentence of 14years where the offender is less than 14years.

Another laudable provision of the VAPP Act is the introduction of monetary compensation to victims of rape. Unlike the civil court were damages as awarded to parties to the suit, monetary compensation in criminal matters are very rare and if awarded, are awarded to the State. With the provisions of Section 3, rape victims can be assured of not just retribution but also compensation for the trauma suffered and this will serve as an incentive to rape victims to come forward and report their ordeal so that the perpetrators will be prosecuted. The award of compensation is however not as of right, it is at the discretion of the judge.

CONCLUSION

There are few Legislations that addresses rapes and unwarranted sexual advances, despite their paucity, they are all insufficient in addressing this offence. Society has moved from the position that rape can only be committed by men to rape can be committed by any gender. There has also been a progression from real-type sex rape to all-type sex rape. While the VAPP Act addressed the lacunae created by the Code, it is still not all encompassing but a progress from existing statue. The Act fails to take cognizance of the fact that a person can be sexually assaulted orally without penetration of any kind. There may be discharge of fluid into the mouth of a victim without the sex organ or any object used coming in contact with the mouth of the victim. Failure to recognize spousal rape is another shortcoming of the Act. Much as the Act is welcomed with promising expectations, it is imperative to state with every sense of humility that the draftsman ought to have reflected these observations, except there are reasons for the omission.