

# Law of Rape in Nigeria and England: Need to Re-Invent in the Twenty-First Century

M. O. A. Ashiru Dr. O. A. Orifowomo\*

Department of Jurisprudence & Private Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria

\*Email of the corresponding author: oorifowo2003@yahoo.co.uk

## Abstract

This paper examines the law of rape in England and Wales, and Nigeria, showing the necessity for an urgent change in Nigeria's domestic laws on rape - a form of gender-based violence - which is static in comparison with the ever changing law in England and Wales, from which the laws in Nigeria originated. The law on rape in Nigeria is too archaic and inadequate to deal with the rising cases of sexual violence in the country, underlined by the lethargy of the lawmakers to reinvent the law on the subject.

## 1. Introduction

Rape is one of the most serious and heinous crimes of violence which one person can commit against another fellow human being. It constitutes a violation of a person's fundamental human rights and freedom. The majority of rapes are carried out by someone who may be known to the victim, such as a current or former partner or a friend.<sup>1</sup> However, during war, rape is used, for example, as a weapon of ethnic cleansing and to systematically force families to flee their villages. It devastates the lives of the victims and their families causing severe physical and psychological pain and suffering, including death, sexually transmitted infectious diseases and unwanted pregnancies. It is a form of gender-based violence which knows no border. Rape is global pandemic affecting both the young and old, people of various classes and both the educated and uneducated, regardless of their race, ethnic background or religion. Sadly, women and girls are the most affected of this crime.

Most crimes of rape are not reported for reasons such as the social stigma attached to the victim, the fear of being ostracised from the family and community and also the fact that the police may be unwilling to make an official report due to insufficient evidence.<sup>2</sup> Even when reported and the accused is not convicted at the end of a trial, the victim is made to feel condemned and looked down upon. The inadequacy of national legislation, in countries failing to update their laws on rape, to deal with the loopholes in the law is also a reason why victims of rape are deterred from bringing the matter to court, knowing that there is a high probability that the accused would not be found guilty of the crime.

Although the definition of rape varies in different jurisdictions as there is no universally accepted legal definition to it, there is a consensus that there should be penile penetration by the accused and absence of consent from the victim. In many cases, there is no doubt or dispute that penetration occurs; the dispute mainly arises as to the issue of consent. At common law, rape is defined as unlawful sexual intercourse committed by a man with a woman who is not his wife, through force and against her will.<sup>3</sup> It is also defined as unlawful sexual activity (especially intercourse) with a person (usually a female) without consent and usually by force or threat or injury.<sup>4</sup>

Many countries such as England and Wales, the United States of America and Canada have changed their laws on rape to meet up with the various immorality and prevalent sexual abuses of the twenty-first century. However, the law of rape in Nigeria, Africa's most populous country<sup>5</sup> is archaic and static. Over fifty non-governmental organisations<sup>6</sup> (NGOs) in Nigeria, have sought for a change in the sexual laws of Nigeria by

\* About the two authors: M. O. A. Ashiru LLB, LLM, Senior Lecturer, Dept. of Jurisprudence & Private Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria; LL.B. (Hons), Dr. O. A. Orifowomo, BL., LL.M., M.Phil., PhD, MBA, ACTI, Cert. Space Studies (ISU, Strasbourg, France); Senior Lecturer, Department of Jurisprudence & Private Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria

<sup>1</sup> See for example, statement by Nigeria's Minister Ministry of Women Affairs and Social Development, Hajija Zainab Maina, at the Fifty-Seventh Session of the Commission of the Status of Women (CSW 57). Nigeria [www.un.org/womenwatch/daw/csw/csw57/.../memberstates/nigeria.pdf](http://www.un.org/womenwatch/daw/csw/csw57/.../memberstates/nigeria.pdf) (accessed 23/02/15)

<sup>2</sup> The British Crime Survey Interpersonal Violence Module 2005-2006 found that 40% of adults who are raped tell no one about it; that 31% who are sexually abused reach adulthood without having disclosed their childhood sexual abuse. They conclude that this means that victims do not get the support they need to deal with the sexual abuse or violence they have experienced; that where victims do try and access support, it has not always been available. [www.crimereduction.homeoffice.gov.uk/sexualoffences/sexual04.htm](http://www.crimereduction.homeoffice.gov.uk/sexualoffences/sexual04.htm) (accessed 8/09/14)

<sup>3</sup> Black's Law Dictionary (West Group, St. Paul Minn), 8<sup>th</sup> Edition

<sup>4</sup> *Ibid.*

<sup>5</sup> Nigeria Country Profile –West Africa- Nations Online [www.nationsonline.org/oneworld/nigeria.htm](http://www.nationsonline.org/oneworld/nigeria.htm) (accessed 15/02/15)

<sup>6</sup> Such NGO's include the Wellbeing Foundation Africa and Women's Rights Advancement and Protection Alternative

pushing for the passage of the *Violence against Persons (Prohibition) Bill 2013* (VAPP-Bill) into law. Though this Bill is currently before the Nigerian Senate, it appears the Parliamentarians have failed to recognise the necessity in urgently passing it into law.

This paper, thus seeks to consider the law of rape in two jurisdictions; first, the concept of rape under English law and secondly under Nigerian law, which law is based on English common law. In doing so, this paper highlights the necessity of changing the law of rape in Nigeria to suit this present day and age. England and Wales have succumbed to a total overhaul of her law, even though the previous law on rape was a consolidation of various statutes dating back to the late nineteenth century and had been amended on numerous occasions to meet specific problems.<sup>1</sup>

## 2. Rape Under the Law of England & Wales

### 2.1 Background to the Change in Law

The current law on rape is contained in the *Sexual Offences Act 2003*, which came into force on 1 May 2003. Questions relating to consent, belief in consent and problems relating to proof of consent, made it difficult for the prosecution to secure a conviction. This was because the previous law on rape, which was contained in the *Sexual Offences Act 1956*, was “archaic, incoherent and discriminatory.”<sup>2</sup> For these reasons, it was necessary that the 1956 Act on sexual offences be changed in order to strengthen and modernise the law, not just on rape but also on all other sexual offences, so as to have an Act that was clearer, more coherent with a comprehensive set of offences appropriate for modern day, with penalties that reflect the seriousness of the offences. It was also hoped that by so doing the conviction rates would be improved, as juries would have a clearer legal framework to decide on the facts in each case.

Following three years of consultations with various bodies such as those involved in tackling sexual offences and law enforcement bodies, the government in July 2000 published a consultation paper, “*Setting the Boundaries: Reforming the Law on Sex Offences.*” This in turn led to the publication of the White Paper, “*Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences,*” whereby proposals on strengthening the law relating to sex offenders and modernising penalties and the law on sex offending to increase public confidence and better protection of the public was put forward. These proposals were expressed in the *Sexual Offences Act 2003*, which redefines many of the offences found in the *Sexual Offences Act 1959* but at the same time introduces new offences.

### 2.2 The Changes to the Law on Rape

#### 2.2.1 The Definition of Rape

One of the major changes in the 2003 Act on rape is to redefine rape from non-consensual vaginal or anal intercourse to non-consensual penile penetration of the vagina, anus or mouth. By extending the offence of rape to include non-consensual penile penetration of the mouth, the Act recognises that penile penetration of the mouth of the victim can be equally as traumatic and repulsive as the other forms of penile penetration. An accused thus commits an offence if “he intentionally penetrates the vagina, anus, or mouth of another person, with his penis.”<sup>3</sup> The slightest degree of penetration will be sufficient to constitute the complete offence of rape. Penetration is a continuing act from entry to withdrawal. Thus, although the accused penetrates the complainant with consent, once that consent is withdrawn the accused must withdraw his penis, as failure to do so will amount to the *actus reus* of rape. While both males and females may be victims of rape, only males, as principals may commit the offence of rape.

Apart from the fact that the accused must have intentionally penetrated the vagina, anus or mouth of the victim, section 1 of the Act goes on to provide that:

- b) B (the complainant) does not consent to the penetration, and
- c) A (the accused) does not necessarily believe that B consents.<sup>4</sup>

The prosecution must therefore prove intentional penetration, absence of consent and absence of reasonable belief in consent.

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(WRAPA). Also the International Federation of Women Lawyers FIDA has been active in having the Bill passed into law.

<sup>1</sup> For example the *actus reus* of rape under the Sexual Offences Act 1956 was defined as “unlawful sexual intercourse with a woman.” By virtue of section 1 of the Sexual Offences (Amendment) Act 1976, section 1 of the Sexual Offences Act 1956 was amended to “unlawful sexual intercourse with a woman without her consent.”

<sup>2</sup> These were the words used by David Blunkett, the Home Secretary, in the White Paper titled “Protecting the Public” (HO 2002) to describe the Sexual Offences Act 1956.

<sup>3</sup> Section 1(1)(a) Sexual Offences Act 2003. The Act defines vagina to include vulva and references to a part of the body includes references to a part surgically constructed (in particular, through gender reassignment surgery). The crime of rape therefore now applies to transsexuals – thus a male-female transsexual may be the victim of vaginal rape while a female-male transsexual may commit the offence of rape as a principal.

<sup>4</sup> Sections 1(1)(a) and (b) *Sexual Offences Act 2003*

### 2.2.2 Resolving the meaning of consent

The issue of consent is normally one of those factors, which have to be proved in a rape case. Under the 1959 Act, as there was no statutory definition of consent, juries had to be directed as to this issue. The direction given by Dunn, LJ in the leading authority<sup>1</sup> on how juries should be directed on the issue of consent caused a lot of criticism as to the inconsistency which could arise and the amount of discretion left to the jury. Dunn, LJ directed the jury to give consent its ordinary meaning and that there was a difference between consent and submission. He stressed that whilst consent involves a submission, it by no means followed that a mere submission involved consent. He went on to add:

In the less common type of case where intercourse takes place after threats not involving violence or the fear of it ... we think that the appropriate direction to a jury will have to be fuller. They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular, the events leading up to the act and her reaction to them showing their impact on her mind... Where [the line between true consent and mere submission] is to be drawn in a given case is for the jury to decide, apply their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case.

The statutory definition of consent under the 2003 Act is most welcomed, following the amount of discretion left to the jury and the inconsistencies that could arise, as it now strengthens the law on consent. The definition of consent is also supported further by conclusive and evidential presumptions.

Consent as defined under the Act is where a person “agrees by choice, and has the freedom and capacity to make that choice.”<sup>2</sup> From this definition, one of the crucial questions to consider would be the complainant’s capacity; that is, the age and understanding, to make a choice as to whether or not to take part in the sexual activity in question. This is of particular importance in those instances when a complainant has been voluntarily intoxicated.

Before the decision of the court in *R v Bree*,<sup>3</sup> there were concerns as regards the absence of a clear definition of capacity. This arose as a result of the judge’s failure in the case of *R v Dougal*<sup>4</sup> to question whether or not the victim had the capacity to consent to sexual activity, given her level of intoxication. As the prosecution were unable to proceed further with the case because it was unable to prove that the complainant had not given consent because of her level of intoxication, the judge directed the jury to enter a not guilty verdict. The case of *R v Bree* answers the question as to the capacity of a complainant to consent, where that complainant is voluntarily intoxicated to the point of stupefaction at the time of the incident. The complainant who voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse and agrees to do so is not raped. It would however, amount to rape if the complainant had lost her capacity to choose as a result of drink.

### 2.2.3 Conclusive Presumptions

This is set out in Section 76 of the Act. Where the prosecution proves that the defendant did the relevant act (that is, intentionally penetrated with his penis, the vagina, anus or mouth of the complainant) and either one of the two circumstances specified in section 72(2) existed, it will be conclusively presumed:

- a) that the complainant did not consent to the relevant act, and
- b) that the defendant did not believe that the complainant consented to the relevant act.<sup>5</sup>

The relevant circumstances as provided in section 76(2) are:

- a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
- b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Deception as to the nature or purpose of the relevant act under the 1959 Act negated consent. Under the 2003 Act, the complainant must have been deceived as to the nature or purpose of the relevant act.<sup>6</sup> The case

<sup>1</sup> *R v Olugboja* [1982] QB 320

<sup>2</sup> Section 74 Sexual Offences Act 2003

<sup>3</sup> [2007] EWCA Crim 256

<sup>4</sup> [2005] Swansea Crown Court. Facts of case and comment on the absence of a definition of capacity obtained from the Consultation paper by the Office for Criminal Justice Reform titled “Convicting Rapists and Protecting Victims – Justice for Victims of Rape.” [www.cjsonline.gov.uk/downloads/application/pdf/Rape-consultation.pdf](http://www.cjsonline.gov.uk/downloads/application/pdf/Rape-consultation.pdf) (accessed on 8/09/14)

<sup>5</sup> Section 76(1), Sexual Offences Act 2003

<sup>6</sup> *R v Flattery* [1877] 2 Q.B.D 410 (which was approved in *R v Williams* [1923] 1 K.B. 340) the court upheld a conviction for rape where the defendant told the complainant, aged 19 that he would cure her of fits by performing a surgical operation upon her. The complainant allowed him to have intercourse with her, believing that the act was a surgical one. Under section 76(2)(a) this would be a fraud as to the nature of the act. This can be compared with the case of *R v Linekar* [1994] ECWA

of *R v Jheeta*<sup>1</sup> that went to the Court of Appeal, illustrates the application of section 76(2)(a). The appellant deceived the complainant into having sexual intercourse with him, in order to alleviate or remove the problems that she having been deceived by him, believed she faced. It was held that as she had not been deceived as to the nature or purpose of the intercourse, section 76(2)(a) did not apply. Instead, she had been deceived as to the situation in which she found herself.

Also, the Act would not cover the situation where a person does not disclose the fact that he has a sexually transmissible infection and then has consensual sexual intercourse with another, without informing that person of their infectious state.<sup>2</sup> It is not rape, as there is no deception as to the nature or purpose of the relevant act. However, what the court is likely to do is to take into account as an additional factor for sentencing, the fact that the defendant knew that he has a sexual infection and went ahead to commit a sexual offence with another.<sup>3</sup> Under the 1959 Act, impersonation of a woman's husband or regular sex partner negated consent. There was doubt as to whether this would apply to other situations of impersonations, such as a casual sex partner. Section 76(2)(b) dispels such doubt, and extends the categories of impersonation sufficient to invalidate consent beyond that of a husband or regular sex partner.

#### 2.2.4 Evidential Presumptions

Evidential presumption under the Act is rebuttable. Where the prosecution proves that the defendant did the relevant act (that is intentionally penetrated with his penis, the vagina, anus or mouth of the complainant), that any of the circumstances specified in subsection (2) existed, and that the defendant knew that those circumstances existed, the complainant will be presumed not to have consented to the relevant act and the defendant will be presumed not to have reasonably believed that the complainant consented.<sup>4</sup> Thus, once the prosecution proves the sexual act (that is penile penetration), any of the specified circumstances in subsection (2) and the defendant's awareness of the circumstance, the presumption arises. The burden is then cast on the defence of producing sufficient evidence to raise an issue of consent or reasonable belief that the complainant consented. If the judge is satisfied that there is sufficient evidence to justify putting the issue of consent to the jury, he will direct the jury accordingly. If there is not sufficient evidence, the presumption will arise and the judge will direct the jury to find the defendant guilty.

The circumstances specified in section 75(2) are the use of threat or violence against the complainant either at the time of the relevant act or immediately before it began; the use of threat or violence against another person, causing the complainant to fear for that person, at the time of the relevant act or immediately before it began; the unlawful detention of the complainant at the time of the relevant act, the fact that the complainant was asleep or otherwise unconscious at the time of the relevant act, the complainant's inability to communicate consent or otherwise because of physical disability, or the administration of a stupefying substance.

#### 2.2.5 Reasonable Belief in Consent

Another radical change made by the 2003 Act relating to the law of rape is the question of reasonable belief in consent, as was laid down in *D.P.P. v Morgan*.<sup>5</sup> It was held in *D.P.P. v Morgan* that a mistaken but honest belief in consent should lead to acquittal, even if this belief in consent was not a reasonable one. Following this decision, the *mens rea* of rape was put into statutory form by section 1 of the *Sexual Offences (Amendment) Act 1976* whereby proofs either of knowledge that the other person did not consent or recklessness as to their consent, was required. The decision in *D.P.P. v Morgan* and the enactment of the decision in statutory form caused a lot of controversy and were denounced as a rapist charter.

Recklessness as to consent under the *mens rea* of rape no longer applies, as section 1 of the 2003 Act requires an intentional penetration by the defendant and that he reasonably believed that the victim was consenting. Section 1(2) of the Act further states that, whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps the defendant took to ascertain whether the victim consented. Only reasonable and not reckless mistake will negate *mens rea*. Thus, there is a departure from the subjective test to an objective test as the burden is now on the defendant to ensure that the victim was

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Crim 2 where the kind of lies told by the defendant in this case will not vitiate consent under section 76(2)(a). In *Linekar*, the appellant had sexual intercourse with the complainant, a prostitute. He deceived her about his intentions and made off without paying her, after having sexual intercourse with her. It was held that she was not deceived as to the nature or the purpose of the act.

<sup>1</sup> [2007] EWCA Crim 1699

<sup>2</sup> *R v B* [2006] EWCA Crim 2945

<sup>3</sup> CPS Issues Public Policy on Sexual Transmission of Infection  
[www.ght.org.uk/display.php?..../pd&field=Document&ID=867](http://www.ght.org.uk/display.php?..../pd&field=Document&ID=867) (accessed 8/09/14)

<sup>4</sup> Section 75(1) Sexual Offences Act

<sup>5</sup> [1976] AC 182. The husband of the victim encouraged the defendants to have sexual intercourse with her. He assured the defendants that his wife enjoyed sexual encounters with strangers and particularly enjoyed being forced to have sexual intercourse. The victim had no such desires. Even though she begged the defendants to stop, they continued to have sexual intercourse with her. They pleaded that they honestly believed that the victim was consenting.

consenting. In so doing, it would be necessary to consider what steps the defendant took to ascertain whether the victim consented.

### 3. Rape Under Nigerian Law

The current provisions relating to the law of rape under Nigerian law are inadequate and archaic and need to be changed to meet up with the various situations in today's society, which may constitute rape. They are not gender neutral and are based on the concept that only a woman can be raped. Okagbue describes this offence as "a gender oriented crime" since a male can only commit the crime against a female.<sup>1</sup> His reasoning behind this statement is based on the historical protection by the law of male's property, by the control of woman's body as their property<sup>2</sup> and the fact that a male could determine when a woman procreated.<sup>3</sup>

The law of rape under Nigerian law is based on statute and also on Sharia Law. The application of the law of rape under statute depends on which part of the country it is being applied. If its application is in the Southern States of the country, the *Criminal Code Act* would be applied, whereas the *Penal Code Act* is applied in the Northern States of Nigeria.<sup>4</sup> Since the application of the *Criminal Code Act* and the *Penal Code Act* in Nigeria, there have not been any amendments to either of them. There is also Sharia Law, which applies in the Northern States of Nigeria. It was re-introduced into these States some years ago. The first to capitalise on this law was Zamfara State, whose Sharia's Penal Code came into effect on 27 January 2000. Soon after, eleven other Northern States followed suit by implementing various forms of Sharia.<sup>5</sup> The argument put forward for Sharia in its entirety was the need for a separate law to govern the lives of the average Muslim in Nigeria as the Nigerian legal code is based on the received English Law and Christianity in origin and context.

#### 3.1 The crime of rape under the Criminal Code Act<sup>6</sup>

The relevant section is section 357 which provides:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of harm, or by means of false and fraudulent 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 prosecution must prove carnal knowledge. Section 6 of the Code provides that:

"When the term "carnal knowledge" or the term "carnal connection" is used in defining an offence, it is implied that the offence so far as regards that element of it, is complete upon penetration."

The slightest penetration of the vagina by the penis is sufficient. It is not necessary that the hymen was ruptured or that there was ejaculation. The Code does not recognise that penetration of a woman or girl's anus or mouth could be equally as traumatic as that of the vagina and that it should be considered as one of the elements, which may constitute rape. Only a woman or girl may be raped as far as the wordings of the Code suggest. Even though in this day and age, there have been cases of men claiming to be raped, the *Criminal Code Act* does not take cognisance of this fact. Neither does the *Criminal Code Act* cover transsexuals.

According to section 30 of the *Criminal Code Act*, a male person under the age of 12 years is presumed to be incapable of having carnal knowledge. This is an irrebuttable presumption, which means that he cannot be guilty of the offence of rape or attempted rape, even if it is shown that he has reached puberty despite his age. He may, however, be convicted of indecent assault.

Since it is required that there must be genital penetration which a woman is incapable of doing, a woman would not be physically capable of committing the offence, but may be guilty of counselling or abetting rape. Interestingly, as put forward by Ijalaiye,<sup>7</sup> although a woman may not be physically capable of committing rape against a man or another woman, she may, however, be charged and found guilty of the offence of rape. This opinion he arrives at through the implications deduced under section 7 of the *Criminal Code*, which defines who a principal offender is. Section 7 provides that:

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it,-

- a) every person who actually does the act or makes the omission which constitutes the offence;

<sup>1</sup> Isabella Okagbue, *The Reform of Sexual Offences in Nigerian Criminal Law*, 2007, NIALS Press, p.4

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> The *Criminal Code Act* was in force in Northern Nigeria until 30 September 1960 and was replaced by the *Penal Code Act* on the 1 October 1960. The *Penal Code Act* is a prototype of the Indian *Penal Code*.

<sup>5</sup> These states are Sokoto, Kano, Kaduna, Katsina, Niger, Kebbi, Yobe, Taraba, Jigwa, Gombe and Bauchi.

<sup>6</sup> Cap. C38, *Laws of the Federation of Nigeria 2004*

<sup>7</sup> Ijalaiye, D A "Sexual Offences in Nigeria" *Nigerian Interfaculty Law Journal*, 1 June 1991; (1991) Vol. II [N.I.L.J.]

- b) every person who does or omits to do an act for the purpose of enabling or aiding another person to commit the offence;
- c) every person who aids another person committing the offence;
- d) every person who counsels or procures any other person to commit the offence.

Thus, whether one considers a woman in such a situation as either a principal in the first or second degree, or accessory before the fact, if her act is caught under any of the provisions in section 7, she would be considered as a principal offender of the crime of rape.

The legal principle that a woman gives an irrevocable consent to sexual enjoyment on marriage to her husband still exists. Since section 6 of the *Criminal Code Act* also defines unlawful carnal knowledge as “carnal connection which takes place otherwise than between a husband and wife”<sup>1</sup> this implies that a husband cannot be guilty of raping his wife.<sup>2</sup>

This exception is an old fashioned one, and is generally attributed to the fact that wives were viewed (and still are) as the husband’s chattel, having been bought by them.<sup>3</sup> The wife is taken to have given her irrevocable consent to sexual enjoyment to the husband on marrying him.<sup>4</sup> The law should, however, take cognisance of the fact that this should not mean that a woman has impliedly consented to accede to her husband’s unreasonable and inordinate demands for sex. However, where a husband uses force or violence against her, to exercise his right, he may be guilty of assault or wounding. The legal principle that a husband cannot rape his wife, would not apply in two situations. These are where the marriage has been dissolved or if a competent court has made a separation order which contains a clause that the wife is no longer bound to cohabit with her husband.<sup>5</sup>

As with English law, absence of consent from the victim is essential on a charge of rape. The prosecution must prove that the accused had carnal knowledge of the woman or girl he was accused of raping, without her consent. The issue as to what is not considered as consent as given by the *Criminal Code Act* is restricted to certain acts. Consent, which was obtained by force or by means of threats or intimidation of any kind or by fear of harm or by means of false and fraudulent representations, is no consent. It is also rape to have carnal knowledge of a woman by impersonating her husband. The English cases decided before the *Sexual Offences Act 2003* came into force such as *R v Flattery*, *R v Williams* and *R v Linekar* are good law under the *Criminal Code Act* with regard to the issue of consent.<sup>6</sup>

On a charge of rape, the mental element required is the intention to have sexual intercourse without the woman’s consent or with indifference as to whether she consented or not. Unfortunately, the principle in the decision in *D.P.P v Morgan*<sup>7</sup> is still good law, under the *Criminal Code Act*. The accused that pleads that he believed the woman was consenting does not bear the burden of establishing honest and reasonable mistake of fact under section 25 of the *Criminal Code Act*.<sup>8</sup> Thus, the prosecution not only has the burden of proving the *actus reus* (that is intercourse without the woman’s consent) and the *mens rea* (that is intention to have sexual intercourse with a girl or woman without her consent), but it must also prove as part of its case that the accused intended to have sexual intercourse without the woman’s consent. In practice, the few cases which have come before the courts show how difficult it is to prove rape, even though it is obvious that the accused committed the crime.<sup>9</sup>

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<sup>1</sup> The reference to ‘husband and wife’ under section 6 of the *Criminal Code Act* is not restricted to parties to a Christian marriage. Thus, such an act may also occur between parties who have conducted a valid marriage under another system, such as a customary law marriage.

<sup>2</sup> Also section 282(2) of the Penal Code provides that “Sexual intercourse by a man with his own wife is not rape if she has attained puberty.”

<sup>3</sup> For example, the Ibos, one of the main tribes in Nigeria expend large sums of money on their women as bride price when these women are getting married.

<sup>4</sup> See for example *R v Roberts* [1986] *Criminal Law Reports* 188, where Lord Justice O’Connor held that “The status of marriage involves that the woman has given her consent to her husband having intercourse with her during the subsistence of the marriage ... she cannot unilaterally withdraw it.

<sup>5</sup> Comparison can be made as to what happens under Islamic law with regard to a divorced woman. Her former husband can take her into bed during the waiting period, known as *idda*. Once this period is over (normally after 3 months), he ceases to have any rights over her. He will then be treated as a rapist if he forces himself on his ex-wife to have sexual intercourse with him.

<sup>6</sup> *Supra*, note 16

<sup>7</sup> *Supra*, note 21

<sup>8</sup> Section 25 of the *Criminal Code Act* which deals with mistake of fact provides that: “a person who does or omits to do an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operations of this rule may be excluded by the express of implied provisions of the law relating to the subject.”

<sup>9</sup> The case of *Solomon Okoyomon v The State* (1973) 1 ALL NLR 16 is a good example of this. In this case, the prosecutor, a girl of between 11 and 12 years of age testified that the accused raped her when she went to fetch firewood. Medical

It should be noted that if the facts in the case of *D.P.P v Morgan* were to occur, by virtue of section 7 of the *Criminal Code Act*, the husband may be treated as a principal offender.<sup>1</sup>

### 3.2 The crime of rape under the Penal Code Act

As already mentioned, the *Penal Code Act* applies in the Northern States of Nigeria. It is applicable to both Muslims and non-Muslims.

Section 282(1) of the *Penal Code Act* provides that:

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 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.

Although a woman cannot commit the offence of rape under the *Penal Code Act*, she may however be charged by the prosecution with abetting rape under section 83 of the Code.

Mere penetration under the *Penal Code Act* is sufficient to constitute the sexual intercourse necessary to the offence of rape. Cases under the *Penal Code Act* shows the importance the courts attach in providing evidence of penetration to a charge of rape.<sup>2</sup> However, the definition of rape under the *Penal Code Act* is narrower than that under the *Criminal Code Act* in the sense that where the latter uses the term “carnal knowledge” implying that penetration of the vagina could be done by penetration of a foreign object, the term “sexual intercourse” under the *Penal Code Act* implies that only a penis can penetrate a vagina.

The *Penal Code Act* does not define what consent is but describes what consent is not. Even then, it goes without saying that absence of consent from the victim is an essential ingredient to a charge of rape.<sup>3</sup> The consent must not be obtained by force, fraud or misrepresentation.<sup>4</sup> Apart from the various instances which the sections list as to what would not constitute consent, it is interesting to note that rape is still committed even where a girl who is under 14 years of age or of unsound mind consents.<sup>5</sup>

The *Penal Code Act* also makes specific provision in relation to children under 16 years of age, who have been sexually assaulted by those in positions of authority. Section 283 provides that any consent given by the girl under the age of 16 to her teacher, guardian or any person entrusted with her care or education is not valid consent. The prosecution will still need to prove lack of consent in those situations where the girl is between 14 and 16 years of age and the consent is not given to her teacher, guardian or any person entrusted with her care.

Whereas a male person under 12 years old is presumed incapable of having carnal knowledge under the *Criminal Code Act*, no such provision is made under the *Penal Code Act*. There is, therefore, nothing to stop the prosecution from charging a child over 7 years of age, for example, for rape if it can be shown that he has attained a sufficient maturity of understanding to judge the nature and consequence of his act.<sup>6</sup>

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evidence showed that her hymen had been torn and that she was suffering from a venereal disease. No evidence was provided as proof as to how long her hymen had been torn or by whom, or that the defendant had a venereal disease similar to that found in the prosecutor's vagina. On appeal to the Supreme Court, it was held that the prosecution failed to establish satisfactorily penetration as required by the Criminal Code and that the proper offence for which the defendant could be charged was attempted rape and not rape.

<sup>1</sup> *Supra*, note 11

<sup>2</sup> The case of *Ellison Ibo v Zaria Native Authority* (1962) N.N.C.N 30 is a good example of this. Although the doctor in this case reported a small rupture, he did not specify what part of the girl's body was penetrated. The High Court refused to accept his statement as sufficient evidence of penetration of the girl's vagina.

<sup>3</sup> Section 39 of the *Penal Code Act*. The comment on this section in the *Penal Code Act* on consent states that consent is an act of reason and involves a presumption that the person giving a consent has weighed up the pros and cons of the matter which he has consented.

<sup>4</sup> Section 39(a) of the *Penal Code Act*

<sup>5</sup> Section 39(b) and (c) of the *Penal Code Act*

<sup>6</sup> Section 50 of the *Penal Code Act*. This section provides that no act is an offence which is done by: a child under 7 years of age or a child above 7 years of age, but under 12 years of age who has not attained sufficient maturity of understanding to judge the nature and consequences of such act. Thus a child 7 years and 12 years is protected from criminal prosecution where it is shown that such a child who has been accused of a criminal act, such as rape, had not reached a standard of

The principle in the decision of *D.P.P. v Morgan* is also applicable under the *Penal Code Act*. However, although a husband cannot commit rape on his wife,<sup>1</sup> he will be liable under section 83 of the *Penal Code Act* as an abettor, if the situation in *D.P.P. v Morgan* were to occur, as the section provides that “where several persons are engaged or concerned in the commission of a criminal act each person may be guilty of a different offence or offences by means of that act.” Also, in the *D.P.P. v Morgan* type of case, if during the rape, the husband were to be around, he will be punished as a principal offender by virtue of section 90 of the *Penal Code Act*. Thus, actual presence when the act of rape is being committed and prior abetment by virtue of this section will be taken as having participated in the offence of rape.<sup>2</sup>

### 3.3 The Sharia Penal Code

We shall be considering the Sharia Penal Code for Zamfara State, as this was the first state to implement Sharia law. The law on rape in the other states, which also adopted Sharia law, are similar to that of Zamfara State. Rape is criminalized under the Sharia Penal Laws.

The *Sharia Penal Code Law* came into operation on 27<sup>th</sup> January 2000. The Code applies to:

- 1) Every person who professes the Islamic faith and/or every other person who voluntarily consents to the exercise of the jurisdiction of any of Sharia Courts established under the Sharia Courts (Administration of Justice and Certain Consequential Changes) Law, 1999 ...
- 2) (Any) other Court of Law in the State presided over by a Muslim that so desires it may apply the provision of this Law on any person or persons who profess or professes the Islamic faith and/or any other person who voluntarily consents to be tried and be liable to punishment under the provisions of this Law...<sup>3</sup>

As with the *Criminal Code Act* and *Penal Code Act*, rape under the *Sharia Penal Code Law* is not gender neutral. Section 128 of the *Sharia Penal Code Law* defines rape as follows:

- 1) A man is said to commit rape who, save in the case referred in subsection (b), has sexual intercourse with a woman in any of the following circumstances:-
  - (i) against her will;
  - (ii) without her consent
  - (iii) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;
  - (iv) 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;
  - (v) with or without her consent, when she is under fifteen years of age or of unsound mind.

Mere penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Under Chapter 1 of the Code, which provides general explanations and definitions to terms used in the Code, an explanation is given as to what constitutes invalid consent.

An invalid consent, is consent given;-

- (a) by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or
- (b) by a person who, from unsoundness of mind or involuntary intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
- (c) by a person who is under eighteen years of age or has not attained puberty.

Rape under Sharia law discriminates against women. The case of Safiya Hussaini Tungar-tudu is a

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maturity sufficient to justify a court convicting him.

<sup>1</sup> Section 282(2) of the Penal Code Act provides that “sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.” As the Act does not specify what age or physical growth may determine a young wife’s puberty, it may be implied from section 282(1)(e) of the Act that the young wife must have at least attained fourteen years of age even if she matures earlier than this age.

<sup>2</sup> For example, in *Peter and Anor v The State* (1977) N.N.L.R 81 it was held before the Federal Court of Appeal when applying section 90 of the Penal Code that once an abettor is found to be present at the commission of an offence he abetted, he automatically becomes a principal offender. The trial court must then convict such a person for the main offence and not for abetment.

<sup>3</sup> Section 3(1) and (2) Sharia Penal Code for Zamfara State



good example of this. Safiya had been condemned to death by stoning by an Islamic court for the crime of adultery, even though she claimed that she had been raped. Also, the reputation of a woman reporting the fact that she has been raped and the man she accuses highlights how Sharia law discriminates against women, on the bare allegation of that woman without any supporting or collaborating evidence. For example, where there are no witnesses to the rape, and the man whom the woman accuses of raping her is of a good character, (in the sense that he is not known to have a disposition to such crimes) and the woman is not of good character, the woman is not believed and is punishable for *zina*<sup>1</sup> unless she retracts her accusation.<sup>2</sup> On the other hand, if she is of good character, it is argued that she should be punished while others hold the view that the man should be liable in damages if he does not swear the oath to exonerate himself.<sup>3</sup> The law thus deprives women of protection from rape.

In line with the *Criminal Code Act* and *Penal Code Act*, marital rape is not recognised under the *Sharia Penal Code Law*. This is because, Islam considers a “wife as a fertile land to be utilized for sex as a means of procreation. Marriage is one of the recommended duties and considered to be a righteous duty for Muslims and is encouraged by Islam... By virtue of marriage, sexual intercourse between husband and wife is treated as a good deed and for this act; both (husband and wife) would be rewarded provided they adhere to the permissible norms and proper etiquette to the effect.”<sup>4</sup>

#### 4. The Violence Against Persons (Prohibition) Bill (VAPP- Bill)

##### 4.1 History of the Bill

The VAPP-Bill came about as a result of lobbying from over fifty NGOs<sup>5</sup> in Nigeria, to have a legal framework which addresses and prevents sexual violence in the country.<sup>6</sup> The bill is a collection of nine draft bills in the form of executive and private member bills, which were before the national and states Houses of Assembly.<sup>7</sup> It was necessary to collate these bills in order to have a single legislation which addressed all issues with regard to gender-based violence in Nigeria. Originally titled the ‘*Violence against Women (Prohibition) Bill, 2003*,’ the bill was renamed to its current name in order to ‘ensure for the protection of a greater number of people and gain wider acceptance for the passage of the bill into law.’<sup>8</sup> The bill had been before the National Assembly since 2002. Though it was finally passed by the House of Representatives on the 14<sup>th</sup> March 2013,<sup>9</sup> it took almost a year before it was sent to Senate.<sup>10</sup> It passed through its second reading at the floor of Senate on 16<sup>th</sup> October 2014, but this was as a result of demands from NGO’s and civil societies. The delay by Senate to pass this bill into law has caused a lot of outcry from the Legislative Advocacy Coalition on Violence against Women (LACVAW) and civil societies.<sup>11</sup>

##### 4.2 The VAPP-Bill

The VAPP-Bill is gender neutral, acknowledging the right to one’s freedom and security.<sup>12</sup> This right includes the right to be free from all forms of violence in private or public spheres, and also during peace or conflict

<sup>1</sup> In the Sharia Penal Code Law rape is treated as a form of *zina*. *Zina* under Section 126 of the Sharia Penal Code Law is thus defined as “Whoever, being a man or a woman fully responsible, has sexual intercourse through the genital of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act, is guilty of the offence of *zina*.”

Section 127 of the Sharia Penal Code Law provides that the offence of *zina* shall be punished: (a) with canning of one hundred lashes if unmarried, and shall also be liable to imprisonment for a term of one year or (b) if married, with stoning to death. (*rajm*)

<sup>2</sup> Oba, A. A. “Women and the Proof of Illegal Sexual Intercourse (Zina) under the Shari’ah Penal Codes” in Landmark Cases and Essays in Honour of Kehinde Sofola.

<sup>3</sup> *Ibid.*

<sup>4</sup> Shabbir M. Outlines of Criminal Law and Justice in Islam, p. 221

<sup>5</sup> These NGOs are collectively known as Legislative Advocacy Coalition on Violence against Women (LACVAW)

<sup>6</sup> Recommendations UPR Nigeria – Women’s International ... [www.wilpfinternational.org/wp.../Recommendations-UPR-Nigeria.pdf](http://www.wilpfinternational.org/wp.../Recommendations-UPR-Nigeria.pdf) (accessed 14/02/15); “Fresh Push for Passage of Violence Against Persons Bill ...” <https://nationalmirroronline.net.../foundation-seeks-passage-of-violence-against...> (accessed 14/02/15)

<sup>7</sup> *Ibid.*, “Fresh Push for Passage of Violence Against Persons Bill ...”

<sup>8</sup> *Ibid.*

<sup>9</sup> This was the third reading of the bill before the House of Representatives when it was passed. The first reading was on the 8<sup>th</sup> February 2012, and the second reading on the 21<sup>st</sup> June 2013. Violence against Persons (Prohibition) Bill, 2013 (H.B. 191). “The VAPP Bill and Related Documents – (FIDA) Nigeria” [www.fida.org/ng/index.php/80-resources/180-theVAPP-bill-at-a-glance](http://www.fida.org/ng/index.php/80-resources/180-theVAPP-bill-at-a-glance) (accessed 14/03/15)

<sup>10</sup> “Women decry lawmakers attitude towards GBV in Nigeria ...” [www.vanguardngr.com.../women-decry-lawmakers-attitude-towards-gb](http://www.vanguardngr.com.../women-decry-lawmakers-attitude-towards-gb) (accessed 14/02/15)

<sup>11</sup> *Supra*, note 52, “Fresh Push for Passage of Violence against Persons Bill ...”; The Nigerian Senate: Pass the VAPP Bill into Law – Avazz [https://secure.avazz.org.../The\\_Nigerian\\_Senate\\_Pass\\_the\\_VAPP\\_Bill\\_in...](https://secure.avazz.org.../The_Nigerian_Senate_Pass_the_VAPP_Bill_in...) (accessed 14/02/15)

<sup>12</sup> *Supra*, note 55

situations.<sup>1</sup> The bill seeks to eliminate gender-based violence within the Nigerian society in private or public life.<sup>2</sup> It prohibits all forms of violence such as physical, sexual, psychological, domestic, and harmful traditional practices.<sup>3</sup> It also seeks to provide maximum protection and effective remedies for victims and punishment for offenders.<sup>4</sup>

The bill is divided into six parts and also has a schedule section. Part 1 provides for offences under the bill such as rape, inflicting physical injury on a person, female circumcision or genital mutilation, harmful widowhood practices, spousal/partner battery and harmful traditional practices<sup>5</sup>. Part 2 provides for the court's jurisdiction and the issuance of Protection Order.<sup>6</sup> Part 3 calls for the registration of service providers with the state government, the appointment of protection officers, and the appointment of coordinator for prevention of domestic violence and defines dangerous sexual offenders.<sup>7</sup> Part 4 mandates the National Agency for the Prohibition of Trafficking in Persons and other related matters (NAPTIP) to administer the provisions of the bill and collaborate with relevant stakeholders including faith based organizations.<sup>8</sup> Part 5 provides for the enforcement of any act of violence defined under the bill which relate to offences committed or proceedings instituted before the commencement of the bill under such Acts as the *Criminal Code*, *Penal Code*, *Criminal Procedure Code*.<sup>9</sup> Part 5, also provides that offences under these Acts which are similar to those in the bill are superseded.<sup>10</sup> Part 6 defines various terms such as perpetrator and victim. A perpetrator is defined as any person who commits or allegedly commits any act of violence as defined in the bill. The definition of a victim<sup>11</sup> is broad in that it includes immediate family members or dependants of the direct victim. Also, persons who have suffered harm in intervening to assist the victims in distress.

#### 4.3 Rape under the VAPP-Bill

The definition of rape under the VAPP-Bill is broader than that found in the *Criminal Code*, *Penal Code* and under the *Sharia Penal Code*. Under the bill, a person commits the offence of rape if:

- (a) he/she intentionally penetrates the vagina, anus or mouth of another person with any other part of his/her body or anything else.
- (b) the other person does not consent to the penetration or
- (c) the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or addictive capable of taking away the will of such person or in the case of a married person by impersonating his/her spouse/partner<sup>12</sup>

Thus, the bill takes into account the fact that a person can be raped through the vagina, anus or mouth. A person may also be raped with an object. The bill also recognises men as victims of sexual offences such as rape. Marital rape under the bill is also an offence. The bill also recognises gang rape where the act is committed by a group of persons.<sup>13</sup>

A person convicted of the crime of rape would be liable to imprisonment for life.<sup>14</sup> In the case of the offender being under the age of fourteen years, that person 'shall be liable to a minimum of fourteen years imprisonment and in all other cases to a minimum of twelve years imprisonment without an option of fine.'<sup>15</sup> In the case of gang rape, those persons convicted jointly or severally shall be liable to a maximum of twenty years imprisonment, without the option of a fine.<sup>16</sup>

#### 5. Conclusion

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Sections 1 – 26; *Ibid.*

<sup>6</sup> Sections 27 – 37, *supra* note 55

<sup>7</sup> Sections 38 – 41, *supra* note 55

<sup>8</sup> Section 42, *supra* note 55

<sup>9</sup> Section 43(1), *supra* note 55

<sup>10</sup> Section 43(2), *supra* note 55

<sup>11</sup> Victim is defined as 'any person or persons, who individually or collectively, have suffered harm, including physical and mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of this Bill and/or the criminal laws of the country. Victim also includes the immediate family or dependants of the direct victim and any other person who has suffered harm in intervening to assist victims in distress.'

<sup>12</sup> Part 1, section, 1(1), *supra* note 55

<sup>13</sup> Part 1, section 1(3), *Ibid*

<sup>14</sup> Part 1, section 1(2), *supra* note 55

<sup>15</sup> *Ibid*

<sup>16</sup> Part 1, section 1(3), *supra* 55

This paper has examined the law of rape in England and Wales and in Nigeria. Whilst England and Wales have amended their laws on rape in line with the occurrence of rapes in today's society, sadly those of Nigeria remain archaic and inadequate, even though such violence is on the rise within her society. Most of the victims of rape in Nigeria are women and children.<sup>1</sup> The Legislative Advocacy Coalition on Violence against Women (LACVAW) spent years in trying to get sexual violence, including rape recognised as crimes which should not be condoned in Nigeria. Unfortunately, Nigerian parliamentarians, who are mostly males, have not realised the urgency and importance of getting these offences passed into law. This obviously portrays the attitude of most men in a patriarchy society towards gender-based violence. If the VAPP-Bill is not passed into law by Senate before the expiration of the current Senate, it would have to be returned before it when a new Senate is inaugurated.<sup>2</sup> This would mean a further delay in getting the bill passed into law.

Once the bill is eventually passed into law, NGO's and civil societies will still need to sensitize communities, advocates and the Police and all other relevant stakeholders as to the law, bearing in mind Nigeria's patriarchy society, her culture and tradition. Victims of rape will need to be encouraged to bring their cases to court without feeling that they will be stigmatized. Advocates, who are trained on the sensitivity of gender-based violence crimes, need to be encouraged to bring these cases to court not just for the money which they would obtain in bringing the case to court, but for justice that will be obtained for the victims. Once perpetrators of rape and other gender-based violence crimes are prosecuted, other perpetrators would be deterred from committing these crimes, especially as the bill provides harsher sentences for these crimes.

Nigeria has ratified many international instruments such as the *Rome Statute*,<sup>3</sup> *The African Charter on Human and People's Rights*,<sup>4</sup> *The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*,<sup>5</sup> and the *Convention to Eliminate Discrimination against Women (CEDAW)*<sup>6</sup> all of which aim to protect the rights of women. Except for the African Charter on Human and People's Rights which Nigeria has domesticated,<sup>7</sup> all other international instruments mentioned are yet to be implemented as part of her laws.<sup>8</sup> Sadly, these international instruments cannot be relied on at the domestic level in getting perpetrators of sexual offences convicted.

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<sup>1</sup> An Ipas reports 207 rape cases in Nigeria in 2013. 119 of the victims of these rapes were between the ages of 12 and 17. "Ipas seeks compensation for rape victims" <http://allafrica.com/stories/201410200620.html> (accessed 14/05/15). Also fifty percent of Nigerian women are regularly abused by their husbands, with two-thirds of them experiencing physical, sexual or psychological abuse. "Violence Against Persons Prohibition Bill in Nigeria" <https://www.change.org/.../violence-against-persons-prohibition-bill-in-n...> (accessed 14/05/15)

<sup>2</sup> The Nigerian Senate: Pass the VAPP Bill into Law – Avazz, *supra* note 56

<sup>3</sup> Nigeria signed the Rome Statute on 1 June 2000 and ratified it on 27 September 2001. It has however not domesticated the Rome Statute in its laws. "State Parties to the Rome Statute – ICC" [www.icc.cpi.int/.../the%states%20\[artoes%20%20the%20rome%20st...](http://www.icc.cpi.int/.../the%states%20[artoes%20%20the%20rome%20st...) (accessed 14/05/15)

<sup>4</sup> African (Banjul) Charter on Human and Peoples Rights, adopted June 27, 1981, OAU, Doc. CAB/LEG/67/3 rev 5, 21 I. L. M. 58 (1982), entered into force Oct 21, 1986. It was ratified by Nigeria on 22 June 1983 and implemented into Nigeria's domestic law as the African Charter on Human and People's Rights (Ratification and Enforcement Act) CAP A9, Laws of the Federation of Nigeria 2004

<sup>5</sup> The Protocol has been dubbed the 'African Women's Protocol'. Nigeria ratified the Protocol on 16 December 2004

<sup>6</sup> Nigeria signed CEDAW on 23 April 1984 and ratified it on 13 June 1985.

<sup>7</sup> *Supra*, note 48

<sup>8</sup> Under section 12(1) of the Nigerian Constitution, "No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into the law by the National Assembly." Section 12(1) Constitution of the Federal Republic of Nigeria 1999, Cap. C23 Laws of the Federation of Nigeria 2004