SEXUAL VIOLENCE AND THE QUEST FOR GENDER JUSTICE: AN AFRICAN PERSPECTIVE*

By

Iyabode Ogunniran (Mrs.) (LL.M)

Lecturer in Law

University of Lagos

Lagos, Nigeria.

Being a paper delivered at the "Gender Unbound" Conference, University of Keele, United Kingdom, on 11th July, 2007.

SEXUAL VIOLENCE AND THE QUEST FOR GENDER JUSTICE: AN AFRICAN PERSPECTIVE*

> Sexual violence is pervasive throughout the world. Nearly one in four women experiences sexual violence by an intimate partner during her life, and as many as one-third of all girls are forced into their first sexual experience. Each year...thousands of young girls are genitally mutilated[1].

Introduction

Globally, millions of women are regularly subjected to violence and discrimination. Abuses against women are "relentless, systematic and widely tolerated if not explicitly condoned"[2]. In general, sexual violence against women is rooted in a global culture of discrimination which denies women equal rights with men and which legitimizes and sexualizes the violent appropriation of women's bodies for individual gratification or for political ends[3]

In Africa, sexual violence may be described as an epidemic with no known systems in place to effectively address the problem. In several parts of Africa, sexual violence is committed with impunity because state agencies operate within a system of gender bias and discriminatory practices. The situation is further compounded in countries involved in harm conflict: in which women and girls are subjected to the more grotesque types of gender based- sexual abuse and violation.[4]

It is generally accepted that law can be an instrument of social engineering. But it has been rightly observed that "howsoever the origin of law is conceptualized; it has the effect of treating men and women differently, either by consciously discriminating against women or by simply denying their existence or reality"[5]. The result is that when law is invited to check sexist distortions, it can hardly do so. Instead, it "systematically offends the values it seeks to serve, for in its very origin, it was conceptualized with a male bias"[6].

---

* IYABODE OGUNNIRAN, LL.M, Lecturer, Department of Public Law, Faculty of Law, University of Lagos, Nigeria.

[1]. A Fact Sheet on Sexual Violence: A Human Rights Violation. Available at http://www.amnestyusa.org/women/pdf/sexualviolence.pdf. (visited Feb.10, 2007).

[2]. Human Rights Watch: Women's Rights. Available at hrw.org (visited Mar. 15, 2007).

[3] . Fact Sheet on Sexual Violence, *supra* note 1.

[4]. Gender- Based Violence in Africa: The Critical Issues, Sexuality in Africa Magazine. Available at

[5] Ayodele V. Atsenuwa, *Feminist Jurisprudence: An Introduction* (Florence & Lambard (Nig.) Ltd 2001) p. 22.

[6] *Ibid.*

This 'maleness of law' led to the emergence of feminist jurisprudence and legal theory to challenge the traditional structure[7]. In its quest for justice, it is contended that the legal order is patriarchal and thus seek to analyse ways law has been used to maintain, reinforce and perpetuate patriarchy with a view to proposing fundamental changes[8].

This paper seeks to establish that the quest for social justice in recent times has led to the emergence of views which are critical of the social construct reinforced by law; especially on the legal approach to the question of male sexual violence against women. In several parts of Africa, the orthodox views still hold sway resulting in most cases in turning "male offences to female trials"[9]. This paper will attempt a comparative appraisal of this issue, focusing on the pervasive offences of rape, female genital mutilation and sexual harassment. Drawing on examples from about twelve African countries, we will discuss the issues against the background of modern feminist jurisprudence and suggest far reaching reforms.

The paper is divided into four parts. Part 1 briefly deals with the definition and forms of sexual violence within the context of various International Legal Instruments. Part 11 examines the theoretical underpinning of the social construct roles of male and female. In part 111, we attempt to illustrate the gravity of the problem by focusing on the gender issues arising from the offence of rape, female genital mutilation and sexual harassment. In part 1V, the concluding part, we will discuss our suggestions for reform on these issues.

1. Definition and Forms of Sexual Violence

The United Nation's Declaration on the Elimination of Violence Against Women, defines violence is "any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private

---

[7] Esther Vicente, "Feminist Legal Theory: My Own View from A Window in the Caribbean", 66 *Rev. Jur. U.P.R.* 1997 p. 211. Carol Smart, "Feminist Jurisprudence" in Peter Fitzapatrick (ed.) *Dangerous Supplements: Resistance and Renewal in Jurisprudence*, (London: Pluto 1991)

[8] M.D.A. Freeman, *Lloyds Introduction to Jurisprudence*, {6th ed. London, Sweet and Maxwell (International Students Edition), 1996} p. 1027. According to Kate Millet "our society... is patriarchy. The fact is evident at once if one recalls that the military, industry, technology, universities, science, political offices, finances- in short, every avenue of power within the society, including the coercive force of the police, is entirely in male hands". See Kate Millet, *Sexual Politics*, (New York: Doubleday 1971).

[9] Z. Adler, 'Rape on Trial', 1987, Chapter 7. Rape has been described as the most heinous offence that may be committed against a woman. However, societal attitude that 'when a woman says no she really means yes' and the insinuations that the woman 'asked for it' dissuades victims from seeking redress in court. Jadesola Akande, "Women and the Law" in Akintunde O. Obilade ed., Women in Law (Southern University Law Centre and Faculty of Law, University of Lagos, 1993), p.19.

life."[10]. In the same vein, it specifically defines violence against women to "include acts that inflict physical, mental or sexual harm or suffering, threat of such acts, coercion and other deprivation of liberty"[11]. Essentially, sexual violence is ingrained in this definition of violence. Thus, any act against a woman of a violent nature – which violates her, debases her dignity and/or causes her loss of self-esteem, is covered by this definition.

The World Health Organization (WHO) has identified about 8 types of sexual violence[12]. However, as already noted above, our focus in this paper shall be on rape, female genital mutilation and sexual harassment[13].

2. Theoretical Underpinning

According to H.L.A. Hart, *"few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question "What is law?"*[14] While some attempt to answer the question by reference to the source of law[15], others look to the purpose law (as opposed to other norms) serves in society[16]. Suffice it to say that there appears to be some consensus that as a normative order, law serves to organize/structure/engineer society by prescribing norms of behaviour and structuring relationships between *members qua members* and *members qua organs or institutions of human society*, whether individuals and institutions within and/or beyond a specific territory.[17] Thus, law may be used to construct new normative values and standards, categories or even identities[18].

But it must be stressed that the development of law is characterised by legal principles based on different understanding of law especially in relation to the legal recognition and protection of women[19]. Throughout the ages, the Natural law theorist[20] believed that since all human beings are equally endowed with reason by nature, they are all equal. But the

---

[10]See Fact Sheet on Sexual Violence: A Human Rights Violation, *supra*, note 1.
[11] *Ibid.* CEDAW General Recommendation 19.
[12] These are (i) rape within marriage, in dating relationship and by strangers, (ii) systematic rape during armed conflict, (iii) unwanted sexual advances or harassment including demanding sex in return for favour, (iv) forced marriage or cohabitation including marriage of child, (v) forced abortion, (vi) denial of right to use contraceptives or to adopt other measures to protect against sexually transmitted diseases, (vii) violent act against sexual integrity of women including female genital mutilation and obligatory inspection of virginity, (viii) forced prostitution and trafficking of people for the purpose of sexual exploitation. *Ibid.*
[13] For detailed definition of these concepts, see part III of this paper.
[14] H.L.A. Hart, *The Concept of Law*. (London: Oxford University Press, 1961) p.1.
[15] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, (7th ed. London, Sweet and Maxwell (International Students Edition), 2001) pp. 89-196.
[16] *Ibid* pp.659-672.
[17] M.D.A. Freeman, *Lloyds Introduction to Jurisprudence*, (6th ed. London, Sweet and Maxwell (International Students Edition), 1996) p. 935.
[18] Carol Smart, *Feminism and the Power of Law*, (London: Routledge, 1989) p.4
[19] See Atsenuwa, *supra*,p.9.
[20] Cicero, *De Re Publica*, p.21; III, 22.

classical natural law proponents made a distinction between men and women based on their perceived physical superiority of men[21]. This position influenced the Ancient laws of Athens and Rome and the effect was that women were treated as minors under the legal control of men. For instance in Athens, *" if unmarried, a woman was under the control of her father, brothers by the same father and paternal grandfather. Upon marriage the father conceded some control, but had power to dissolve his daughter's marriage against her wishes, whereas in some respects the husband had control. On her husband's death, a wife passed to the control of her sons or back to her father...Thus, a woman had no standing in law to raise a question regarding her marriage, just as she had no legal right to own or dispose of property... ".*[22] Women were denied social and legal capacity as they were seen as instruments of procreation. It has therefore been canvassed and rightly so that natural law did not effect any positive change in the status of women[23].

Legal positivism was a reaction to the unverified dogma of natural law. It simply defines law as the sum total of the commands of the sovereign[24]. The implication is that since the rules would have been laid down, it forecloses the opportunity for probing the morality of law as well as evaluating its differential impact on men and women's lives[25]. Moreover, the rules were made by men and advertently, the observable world was the public sphere in contradistinction to the private sphere which particularly affects the women[26]. Therefore even with this theory, women were not accorded any recognition. Infact, by not regulating law in the private sphere, it reinforces the subordination of women in the society.

By the 18th Century, despite the revolution in Europe and England, the new sense of individuality sweeping through Europe did not apply to women as they were considered naturally inferior[27] In France for example, the ideals of liberty, equality and fraternity were used as weapons to attack feudalism. In America, independence was attained through challenge to the existing social arrangement. One would have thought that the democratic trail would protect the interest of women since they were equally involved in the struggle. Nye, arguing for a change said "*...was this democratic freedom only the freedom of the male entrepreneur to make money? Was the equality only the equality of self-made capitalists to sit in parliament with earls? Or were equality and liberty really principles of justice? If so, they must not just establish commercial interests, but the*

---

[21] Atsenuwa, *supra* p.11.

[22] J.P. Gould, Law, Custom and Myth: The Position of Women in Classical Athens, *Journal of Hellenic Studies* Vol. 100 (1980), 38 at p. 43.

[23] Atsenuwa, *supra* p.15.

[24] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, (7th ed. London, Sweet and Maxwell (International Students Edition), 2001) pp. 207-209. See also W. Rumble, *The Thought of John Austin* (1987).

[25] Atsenuwa, *supra* p.16.

[26] Ibid. Furthermore, the exclusion of customary law (alongside public international law and conventional constitutional) from jurisprudence ensures that legal analysis for the formulation of legal doctrine or theory never strays into the private sphere which basically concerns women.

[27] Atsenuwa, *supra* p. 47.

interests of everyone, including women"[28]. However, as Locke posited, the elements constituting civil society are households with the male as heads and where a misunderstanding occurred between husband and wife, 'the last determination ,the rule…naturally fall to the man's share as the abler and stronger'[29].

The philosophical perspectives on the relative legal position of male and females during this period were greatly reinforced by the writings of David Hume. According to him, David Hume, *'male are different from females, women virtues include natural sympathies which have no place in the moral relations between men where rules of justice hold sway'*[30]. The conclusion being that the participation of women in democratic attainment did not change the traditional jurisprudence whereby women were not considered as being relevant, hence derived little or no benefit in the society.

In the 20th century, legal realists, such as Karl Llewellyn, turned the perspective of law on "what officials do about disputes"[31]. According to Oliver Wendell Holmes, law is the prophecies of what the courts will do as against what a statute says[32]. Hence, law is actually the interpretation given to statutes by the courts. Due to the fact dominant prejudices on most societies are male biased; there is a yawning gap between laws as it is written and being interpreted. But in most cases, the officials simply interpret the law within the context of the overall societal milieu and its prejudices, which, as noted above has never been favourable to the position of women.

The main inference from the above is that different theories of law accorded varied status to men and women. However, the women were clothed with the garb of inferiority. According to Atsenuwa[33], *"...howsoever the origin of law is conceptualized; it has the effect of treating men and women differently, either by consciously discriminating against women or by simply denying their existence or reality. The result is that when law is invited to check sexist distortions, it can hardly do so. Instead, it systematically offends the values it seeks to serve, for in its very origin, it was conceptualized with a male bias"*[34].

As already reiterated, the perceived 'maleness of law' led to the emergence of feminist jurisprudence and legal theory to challenge the traditional structure. They contended that the legal order is patriarchal[35] and thus seek to analyse ways law has been used to maintain, reinforce and perpetuate patriarchy with a view to proposing fundamental changes. According to them, the "analytical frames of patriarchal law are not the spaces within which to create visions of feminist futures they urge alternatives"[36]. In the words of Clare Dalton, *"we can not only research what happens to women in the world shaped*

---

[28] *Ibid.* p.49.
[29] Peter Laslett (ed.) *Two Treatises on Government* (Cambridge University Press 1970) II, Sec 82.
[30] Quoted in Atsenuwa, *supra* p.50.
[31] J.W. Harris, *Legal Philosophies* (2nd ed. Butterworths 1997) p.99.
[32] *Ibid.*
[33] *Supra*, note 5.
[34] *Ibid.*
[35] *Lloyds Introduction to Jurisprudence*, supra note 8.
[36] *Ibid.*

by law, law's language and legal institutions, but challenge even the structure of legal thought as contingent and in some culturally specific sense male implying the need for radical changes than in the ameliorative amendations we have offered in the past"[37].

MacKinnon[38] emphasized gender and equality questions as the focal point of feminist jurisprudence. She stressed the prevalence of male dominance and female subjugation in every society and stressed that male dominance is sexual; i.e. men in particular if not men alone sexualize hierarchy. According to her, gender inequality has sexual dynamics and a theory of sexuality will treat sexuality as a social construct of male power, defined by men, forced on women constitutive in the meaning of gender. Law is maintaining this status quo by preserving a hierarchical system based on gender in which sex is inherently implicated. She therefore urged women to challenge this legal hegemony by presenting factual situations and experiences in which they have been involved[39].

The pioneering work of Carol Gilligan's resulted in another strand of this theory[40]. Her work revealed that when faced with moral judgments, female children exhibited ethics of care whilst male exhibit that of justice. She then canvassed that the difference between a man and a woman is a potential valuable resource which might serve as a better model of social organization and law than existing male characteristics and values. This feminist theory demanded that women moral voices and values be given equal weight in defining law as a normative system and structuring its institutions. They advocated moral equality of women and men despite differences in their sexual composition and functions.

African feminist jurisprudence considers customary law as separate and unique to state laws. Thus, what is commonly referred to as customary law today is not only the creation of the colonial state but also that of post-colonial states. They contend that state law and customary law co-exist only because both agreed in some aspects. As a matter of fact they both operate to reinforce themselves especially in the area of reinforcing the gendered nature of social arrangements. Thus, the emergent African feminist jurisprudence challenges the maleness of customary law particularly post-colonial customary law which constructs the femaleness of the African women[41].

It is not in contention that the International Bill of Human Rights[42] affirmed the equality of human beings and all individuals to enjoy rights without distinction. However, feminist jurisprudence articulates the rights of women with forceful commitment that it became a force to reckon with in the emergent human right discourse and movement. In its quest for justice for women, it brought to fore the recognition of violence against

---

[37] *Ibid* p. 1029.
[38] *Feminism Unmodified: Discourses on Life and Law*, (London: Harvard Univ. Press, 1987).
[39] This is discussed extensively in Atsenuwa, *supra* pp. 89-96.
[40] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982). See also Atsenuwa, *supra* pp. 103-109.
[41] Atsenuwa, *supra* p. 138.
[42] Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

women as a violation of human rights. It actually led to the development of the content of human rights treaties with gender flavour in a male oriented world, hence 'recharacterisation' of rights[43]. Specifically, the 1967 Declaration on the Elimination of Discrimination Against Women and the Declaration on the Equality of Women and Their Contribution to Development and Peace adopted by the World Conference on the International Women's Year held in Mexico in 1975 were significant milestones by the United Nations in the advancement of women's rights[44].

The above culminated in a very comprehensive universal instrument, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[45] explicitly prohibiting all forms of violence against women. It creates legally binding obligations on state parties and broadly provides that state parties should use law for the guarantee and protection of women's rights. Article 2 obligates state parties thus:

(a) to embody the principle of equality of men and women in their national constitutions or other appropriate legislation…and to ensure through law…the practical realization of this principle;
(b) to adopt appropriate legislative…measures including sanctions where appropriate, prohibiting all discrimination against women;
(c) to establish the legal protection of the rights of women on an equal basis with men…,
(d) to take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

About 177 countries (including African member states) have adopted this Convention. At the regional level, the African Charter on Human and People's Rights also enjoins all state parties to ensure the "elimination of all forms of discrimination against women" as well as the protection of rights of women" as stipulated in International Declarations and Conventions"[46]. Similarly, a 2003 Protocol to the African Charter[47] enjoins state parties to "adopt all necessary measures for the prevention, punishment and eradication of all forms of violence against women".

It is clear from the above that significant advancements have been recorded in the quest to advance the cause against sexual violence. There are legislations prohibiting various forms of sexual violence against women in several parts of the world,

---

[43] Atsenuwa, *supra* p. 150.
[44] Gasiokwu M.O.U. Human Rights, History Ideology & Law (Fab Educational Books Jos 2003) p.143.
[45] Convention on the Elimination of All Forms of Discrimination against Women adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force, 3rd September 1981 in accordance with Article 27(1).
[46] African Charter on Human and Peoples' Rights adopted at Nairobi on 26 June 1981, entry into force, 21 October 1986 in accordance with Article 63.
[47] Protocol to the African Charter on Human and people's Rights on the Rights of Women in Africa, adopted by the African Union in Mozambique on 11 July, 2003. As at July 25 2005, it has been ratified by 19 countries. However, no country from Central Africa has ratified and Libya is the only country in North Africa that has ratified. Available at http://wildaf-ao.org/eng,

including African countries. But the question remains: why have we achieved very little success on this issue despite the various efforts? The next section will look at the problem, with a focus on rape, female genital mutilation and sexual harassment.

3 Sexual Violence in Africa

3. i Rape

Rape is the type of sexual violence which is the height of violation of womanhood. It debases the dignity, and self-worth of the victim. The offence of *"rape has been described as a crime that is not comparable to any other form of violent crime. Unlike other crimes against the person, rape not only violates the victim's physical safety, but her sexual and psychological integrity. The act of rape is invasive, dehumanizing and humiliating. It is a crime akin to torture. Force, violence and subordination are central to the act of rape. The consequences for rape victim are severe and life-long and include the loss of the ability to trust, of freedom and identity"*[48].

Nevertheless, the offence of rape is so regularly committed in Africa today that it is reported to have become a crisis or an epidemic. South Africa, for example, has one of the highest per capita rates of reported rape cases in the world[49] . In Uganda, a feminist writer once alerted that sexual abuse especially rape has assumed an epidemic proportion. Indeed, there were widespread demonstrations against the problem on 17, December, 2001[50]. In Ghana, a recent comprehensive survey revealed that {f} or 18% of the total sample of women and girls, their first sexual intercourse was by force.[51] Also, police statistics showed that reported cases of rape in Accra increased from 384 in 1991 to 1,043 in 1995, a rate of 71.3%.[52] In Nigeria, although there are no detailed statistics on the issue, our experience in legal practice convinces us that rape is also a common phenomenon.[53]

---

[48] South African Law Commission, Sexual Offences: The Substantive Law 65 (secs 3.4.1.1-3.4.1.2) (1999). See also Cynthia Grant Bowman and Akua Kuenyehia, *Women and Law in Sub- Sahara Africa* (Sedco Publishing Ltd 2003) p. 340.

[49] See Violence in South Africa compiled by The Human Rights Institute of South Africa (HURISA) 2005. Between April 2003 and March 2004, 52,733 rapes and attempted rapes were reported to the South African police. This is equal to a ratio of 113.7 per 100,000 of the population, available at http://www.saps.gov.za/statistics/reports/crimestats/2004/categories.htm and click on category: rape.

[50] Sylvia Tamale, 'Law Reform and Women's Rights in Uganda', (1993) *E. Af. J. Peace & Human Rts.*164, 183.

[51] Breaking The Silence & Challenging The Myths of Violence against Women & Children in Ghana, Report of a National Study on Violence 1999.

[52] Ellen Bortei-Doku Aryeetey & Akua Kuenyia, "Violence against Women in Ghana" in Akua Kuenyia ed. Women & Law in West Africa: Situational Analysis of Some Key Issues Affecting Women (1998) p.287.

[53] *C.O.P v Anyawu*, MIK/A/236/99. The girl in question was six years old, the defence counsel asked her series of unimaginable questions on sex considering her age. Even though it was a 1999 case, up till the present, it is yet to be concluded.

The question which inevitably arises is this – why is the offence of rape so prevalent in Africa? Is it the absence of law or the ineffectiveness of the legal regimes? It is submitted that the problem is largely due to the legal definition of the offence; an offshoot of the theoretical problems enumerated above. Let us look at the definition and legal elements of rape in some countries to illustrate the problem. .

It is noteworthy that rape is a criminal offence in most (if not all) African countries. Under the Nigerian Criminal Code[54], section 357 provides that:

> *"any person who has unlawful canal knowledge of a woman or girl without 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 fraudulent representation as to the nature of the act or in the case of a married woman by impersonating her husband is guilty of an offence which is called rape."*

The statutory provision in Kenya is somewhat similar to Nigeria's except that it is expressly described as a felony.[55] Equally relevant here is the Tanzanian penal provisions on the issue which also include the phrase "*without consent of the woman*" as an element. However it also contains some innovative provisions. Section 130(3) states that *"whoever being in a position of authority takes advantage of his official position, and commits rape on a girl or woman in his official position...is liable"*. This provision is more encompassing as it considers rape from a perspective hitherto considered irrelevant but common place in African societies. (Executives and their female employees, teachers and students, religious leaders and their female worshippers etc). In addition, the victims do not need to show evidence of resistance such as physical injuries to the body to prove that sexual intercourse took place without consent.[56]

The definition of rape in the Southern African countries is broader and more comprehensive. For example, the Namibian Combating of Rape Act[57] states that *"any person (in this Act referred to as perpetrator) who intentionally under coercive circumstances[58] (a) commits or continue to commit a sexual act with another person; or (b) causes another person to commit a sexual act with the perpetrator or with a third person shall be guilty of the offence of rape"*. Perhaps to leave no room for misinterpretation, the provisions explicitly cover some circumstances. Thus section 3 (1) of the Act provides as follows:

(aa) where the complainant has suffered grievous bodily or mental harm as a result of the rape:
(bb) the complainant is under the age of thirteen years or is by reason of age exceptionally vulnerable;

---

[54]Cap C38, Laws of the Federation 2004.
[55] Laws of Kenya, Penal Code, Caps 139-141, 144 at 139.
[56] Tanzania, Sexual Offences Special Provisions Act, 1998 Caps 130, 132, 138c.
[57] Namibian Combating of Rape Act, No 8 of 2000.
[58] This is defined in section 2 to include application of physical force, threats (whether verbal or through conduct), using intoxicating liquor or any drug and even sleep.

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;
(dd) the convicted person is infected with any serious sexually transmitted disease and at the time of the commission of the rape knows that he or she is so infected;
(ee) the convicted person is is one of a group of two or more persons participating in the commission of the rape; or
(ff) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape…

The peculiar provisions relating to young victims who are susceptible to rape due to their ages and vulnerability are highly commendable. Also, providing for situations of sexually transmitted diseases especially at this period of HIV/AIDS pandemic is forward looking[59].

3. ii. Definition of Rape and Gender Issues.
The definitions of rape in the various jurisdictions contain some elements which are prejudicial to the fair and just enforcement of the law. Some of these elements and the gender issues arising there from are considered below.

3. ii (a) Consent.

In almost all the jurisdictions, lack of consent of the victim is very central in establishing the offence of rape. The guilt of the accused person depends on the absence of consent on the part of the victim. Not only must the accused perform the act, he must also have had the intention to have sexual intercourse with the victim without her consent or must be recklessly indifferent as to whether she is consenting or not[60]. The critical issue therefore is how the victim will be able to prove *actus reus* of the crime. In practice, the victims face great difficulties unless they can show overt signs of fairly serious injury.[61] In one case in which I was involved as a counsel holding watching brief for the complainant, the greatest challenge of the prosecution was how to prove lack of consent.[62]

---

[59] Many of the Northern countries are basically Islamic countries operating the shariah legal system. The Moroccan *Mudawwana* and the Algerian Family Code of 1984 sanctioned a model of the family as an extended patrilineage in which male kin have privileges and men have power over women. In comparison, Tunisian Code of Personal Status of 1956 entrenched nuclear family and women's rights. See Mounira M. Charrad, *States and Women's Rights, The Making of Post Colonial Tunisia, Algeria, and Morocco* (University of California Press 2001).p.162, 215. Generally, the Algerian constitution prohibits gender discrimination, available at AFROL Gender Profile-Algeria.htm. Article 5 of the Moroccan states that all Moroccan citizens are equal before the law, Equality Now Submission to UN Human Rights Committee 67th Session, October 1999. Similarly, under the Tunisian constitution, all citizens have equal rights and responsibilities, available at afrol News-Tunisia Gender Profile.htm. In almost all these states, there are penal or criminal laws specifically prohibiting rape.

[60] D.P.P. v Morgan (1975) 2 All E.R. 347. See generally Okonkwo & Naish, *Criminal law in Nigeria* (2nd edition Spectrum Books Ltd) pp. 273-274.
[61] Confronting Violence. A manual for Commonwealth Action, 1992, p. 85.
[62] *C.O.P v Anyawu, supra,* note 53.

The injustice that may result is captured vividly in the Nigerian case of *Ogabi v The Republic*.[63] In that case, the appellant did not deny having had sexual intercourse with the prosecutrix but contended that he did so with her consent. He was convicted by the High Court and sentenced to a term of imprisonment. Upon his appeal to the Supreme Court, the court held that the presence of injury on the private part of the rape victim is not conclusive proof of absence of consent to the sexual act and the failure of the prosecution to call material witness who approximate as closely as possible as to what may be described as an eye-witness was prejudicial to the case of prosecution. Hence the appeal was allowed.

It has been suggested that due to the stereotype of how women behave sexually and particularly when faced with sexual assault, the distinction between submission and consent is blurred.[64] A woman who submits due to fear might be misinterpreted by judges unfamiliar with the psycho-dynamics of stress in violent situations.[65] Moreover, women are expected to be passive partners to be seduced rather than active partners in sexual encounters. Hence, the court infers from her passivity her consent to the sexual intercourse. In the same vein, where she is forced to have sexual intercourse, she is expected to fight back.[66] One can imagine how much resistance a fifteen year old girl can put up against a group of four boys/men intending to rape her. It is submitted that in the African context where virginity and preservation of virtues are highly regarded, it is inconceivable that a girl or woman would easily concoct a story of rape at the risk of the attendant problem of stigmatization. It is further submitted that the Tanzanian provision that evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent is a step in the right direction and a leading light to other African countries.[67]

Closely related to this is the question of *mens rea* in the proof of lack of consent. In other words, that the accused must also have the intention to have sexual intercourse with the victim without her consent or must be recklessly indifferent as to whether she is consenting or not.[68] The prosecution must prove that the woman did not consent and that her male attacker was aware she was not consenting.[69] Since it is a subjective rather than an objective test to prove intention to have sexual intercourse, it becomes difficult (indeed almost impossible) to prove lack of consent. In a case in Swaziland,[70] it was held that to in order to show lack of consent, the woman is expected to report the rape incident at the earliest opportunity to whosoever she sees. According to the court:

---

[63] (1965) NMLR p.364.
[64] Alice Armstrong, 'Consent in Rape Cases in Swaziland: A Woman's Rights to Decide', (1986) *4 Zimbabwe L.Rev.* pp.112-15, 118-24.
[65] *Ibid.*
[66] *Ibid.*
[67] *Supra*, section 130 (4) (b)
[68] *D.P.P. v Morgan*, *supra*, 347. Okonkwo & Naish, *supra*, pp. 273-274.
[69] Armstrong, *supra* note 64.
[70] *Mkhwanazi v R* 1979-81 SLR 83.

"... a complaint is not to be taken as proof of the acts complained of and can only be legitimately used to show that the complainant's conduct was consistent with the complainant's testimony, to negative the complainant having consented to the intercourse..."[71]

Thus, failure to report immediately to any person she sees may vitiate her claim of lack of consent. This proposition, it is submitted, is nothing but cruelty towards rape victims. For various studies on the response of rape victims showed that half of the victims tend towards withdrawal syndrome instead of blurting out their feelings and fear.[72] This provision of 'immediate complaint doctrine' is highly undesirable since the victim may still be in a state of confusion, shock and intense pains. A rule that a woman who had just passed through such an ordeal must instantaneously recount the event to another person depicts the disregard for women in African societies.

3. (ii) (b) Evidentiary Rules

Most African legal systems allow the defence to cross-examine the rape victim about her sexual history. For example, by section 211 of the Nigerian Evidence Act,[73] evidence may be led to show that the victim is generally of immoral character, her previous sexual history with other men as well as the accused. Similarly, the Kenyan Evidence Act allows the defence in cases of sexual nature to adduce evidence that the complainant is of general immoral character.[74] In Morocco, the burden of proof is on the woman to proof her "good morality".[75] It has been rightly argued by Oyajobi that the fact that the prosecutrix gave consent to having sexual intercourse with the accused on a previous occasion has no relevance to determining whether she gave consent on the alleged occasion.[76] In most criminal offences, there is conditions precedent for allowing bad character evidence of the complainant. It is difficult to understand the rationale for the special treatment in rape cases.

Equally puzzling is the admissibility of evidence of previous sexual history with other men. It is submitted that this approach leaves room for debasing women's dignity. After going through such a traumatic experience, the victim in prosecuting the case and fighting for justice is made to expose her private life for public scrutiny. Certainly, that will be more than any woman had bargained for; hence the choice of enduring the humiliation of rape in silence.[77]

---

[71] *Ibid.*
[72] Armstrong, *supra* note 64. Cynthia Grant Bowman and Akua Kuenyehia, supra, pp. 347-348.

[73] Cap E14, Laws of the Federation, 2004.
[74] Cynthia Grant Bowman and Akua Kuenyehia, *supra*, 371.
[75] See Morocco, Equality Now Submission to UN Human Rights Committee 67th Session, October 1999.
[76] "Better Protection for Women and Children Under the Law" in Awa Kalu and Yemi Osinbajo eds, Women and Children Under Nigerian Law (Federal Ministry of Justice Law Review Series Vol.6) p.20.
[77] T.O. Ifaturoti, "The Law of Rape and Legal Reforms in Nigeria" in *Unilag Readings in Law* E.O. Akanki ed, (Faculty of Law University of Lagos 1999) p. 150.

3. (ii) (c) Corroboration.

It is an established rule of practice that the evidence of a complainant in sexual offences must be corroborated.[78] The Nigerian Supreme Court in *Ibeakanna v Queen*[79] said *"it is an established practice in criminal law that though corroboration of the evidence of the prosecutrix in a rape case is not essential in law, it is, in practice always looked for and it is also the practice to warn the jury against the danger of acting upon her uncorroborated testimony".*[80] In *R v Baskerville*[81], corroboration was defined as *"evidence which implicates the accused, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it".*[82] In essence, the story of the rape victim must be supported by extraneous evidence connecting the accused to the rape. But in most cases, the act would have been performed in the private or secluded place free from the public glare. The victim would have to depend on her direct evidence such as her appearance, medical examination immediately the offence was committed, statement to the police etc. In *Edet Iko v State*,[83] the Supreme Court of Nigeria held that the fact that the girl said the accused inserted his penis into her vagina is not ipso *facto* sufficient proof of penetration in the absence of corroborative evidence which must implicate the appellant before he could be found guilty of rape! In yet another Nigerian case, despite the fact that medical evidence revealed the vagina was very tender with some brownish discharge with a group of bacteria yeast cells, the court held that the medical examination did not link the appellant directly with the condition of the prosecutrix's private part as he was not medically examined to confirm if he had a similar disease. Hence he was convicted for attempted rape only[84].

In South Africa, the cautionary rules require the court to exercise additional care when assessing the credibility of a rape survivor, particularly when her testimony is not corroborated.[85] However, a survey conducted revealed that many women would in fact have washed away traces of what had happened from their bodies before reporting in a bid to remove from themselves the unclean memories.[86] In reality, for a rape victim to

---

[78] Celestine I. Nyamu and James T. Gathii, "Towards Reform in the Law of Rape and Related Sexual Offences in Kenya" in Kivutha Kibwana ed. In Women and Autonomy in Kenya: Law Reform and the Quest for Gender Equality 1994 p. 150-57, 166-67. Cynthia Grant Bowman and Akua Kuenyehia, *supra*,p. 357.

[79] (1963) 2 SCNLR p.191.

[80] Ibid. pp.194-195.

[81] (1916-17) All ER 38.

[82] *Ibid.* p.34 per Lord Reading CJ.

[83] (2001) 14 NWLR (Pt 732) p.221at 245. Per Kalgo JSC, in a charge of rape where the only evidence is that of the complainant it requires corroboration. Such corroborative evidence must confirm that sexual intercourse has taken place; that it took place without the consent of the woman and that the accused person was the man who committed the crime. See also *Simon Okoyomon v The State* (1972) 1 NMLR 292.

[84] *Jegede v State* (2001) 1 NWLR (pt 695) p.623.

[85] Human Rights Watch, Violence Against Women in South Africa: The State Response to Domestic Violence and Rape 1995 p. 98-107.

[86] Carol Smart, 'Woman, Crime and Criminology: A Feminist Critique' 1976 p.121. T.O. Ifaturoti, *supra*, p.153.

successfully establish corroboration, it is like the proverbial case of camel passing through the eyes of the needle.

Added to these is the attitude of the public and the law enforcement agencies to rape victims. The male dominated police force unfortunately perceives women as objects of sexual pleasures. In most cases, rape victims narrating their ordeals are often jeered and ridiculed. A Human Rights Watch study in South Africa found that the police in most cases refuse to help victims "and they lose file and otherwise defeat cases either out of incompetence or bribery by the offenders.[87] In Swaziland, police investigation led to low conviction rates; and in Morocco only 17 cases of rape were reported in one particular year.[88]

Moreover, the evidence of rape victims are often held suspect. Judges, magistrates and prosecutors all bring their own stereotypes to bear in determining rape cases. The general perception of a rape victim is that of some hapless, weeping woman violently attacked by a stranger. If you do not fit that stereotype, most people will not believe the victim's story. Indeed, the prosecutors often distinguish between rape by a stranger and an acquaintance. It is only where the offence is committed by the former coupled with physical injuries that charges are filed.[89] In several countries, the trial may drag on for several years with the complainant not being able to adjust to normal life. Meanwhile her identity may not be protected during the trial and her entire life may become public knowledge. Consequently, the victims do not get true succor from the judicial system. For what is supposed to be a man's offence is often turned into a woman's trial.

3. iii Female Genital Mutilation

Female genital mutilation (FGM) can be described as the physical destruction of the female sex organ.[90] The World Health Organization defines it as comprising all procedures that involve the partial or total removal of the female external genetalia and/or injury to the female organs for cultural or any other non therapeutic reasons.[91]

It is estimated that 85 to 114 million girls and women are genitally mutilated worldwide; and about 2 million girls are at the risk of female genital mutilation every year. In

---

[87] Human Rights Watch, *supra*, note 81.

[88] The World Organisation Against Torture (OMCT) operating the SOS- TORTURE NETWORK. The urgent appeal issued by the network on behalf of victims or potential victims of violence reach more than 90,000 governmental institutions, non-governmental organizations, association and interest group. Available at http://www.omct.org/pdf/VAW/ MoroccoENG2003.pdf

[89] Human Rights Watch, *supra*, note 81.

[90] A.A Borokini, "Female Genital Mutilation: A Gross Violation of Women's Rights" in Borokini ed, *Kogi Essays in Law* (Stabak Books and Publishers 2006), p.122.

[91] See Fighting Female Genital Mutilation in Africa, afrol news. Available at fgm in Africa.htm.

developing countries, including about 26 African countries,[92] studies have shown that over 130 million girls and women have been subjected to this.[93]

Generally speaking, the practice and ***modus operandi*** of female genital mutilation varies from on culture to the other. It may be carried out at infancy or when the girl is of marriageable age (i.e. 14-16 years). In Nigeria, for example amongst the Ijaw and riverine areas of Delta, Ebonyi and Rivers states, this practice takes place as early as a few days after the birth or as late as just prior to marriage or after first pregnancy.[94] It's also been reported that in Egypt, 96% of the married women have undergone some sort of FGM and 70% of school girls are expected to do the same.[95]

It is apposite at this juncture to briefly consider the diverse forms of female genital mutilation. Perhaps the commonest type is ***Clitoridectomy*** which involves partial or total removal of the clitoris; the most sensitive part of a girl or woman.[96] The second and most serious is ***Infibulation***. In this case, apart from removing the clitoris, some part or all the *labia minora* is cut off and incisions are made in the *labia majora* to create raw surfaces. The raw surfaces are either stitched together or kept in contact by pressure until they heal as a hood of skin which covers the urethra and most of the vagina. A small opening is created for urine and menstrual flow and when finally healed leave a very large scar.[97] Another variant of this is the excision of the prepuce with or without excision of part or all of the clitoris.[98]

The underlying basis of female genital mutilation in most African societies is the woman must be complacent and give passive submission during intercourse with to total disregard for her sexuality! Several reasons have been adduced for this practice.[99] For instance, that it enhances the husband's sexual pleasure as it makes vagina intercourse more desirable than clitoris stimulation. Also, it safeguards virginity and cures sexual deviances like frigidity, lesbianism and excessive sexual arousal[100]. Women are portrayed as objects of male sexual desire without any separate existence other than to fulfill male sexual lust. Her total life is dependent on acceptability by the men as the case in some

---

[92] Nahid Toubia, "Female Genital Mutilation", in Julie Peter and Andrea Wolper eds., Women's Human Rights, Human Rights: International Feminist Perspectives 1995 pp. 224-37. Cynthia Grant Bowman and Akua Kuenyehia, *supra*, p.426.

[93] Anika, R. and Nahid, T. Female Genital Mutilation, A Guide to Laws and Policies World Wide CRLP and Research, Action and Information Network for the Bodily Integrity of Women (Zed Books UK 2000).

[94] Nkolika Ijeoma Aniekwe, The Right to Reproductive Health- Prospects and Opportunities for Legal Obligations, Research Seminar 1 presented in partial fulfillment of the requirement for the award of Ph.D Degree in Law at the Seminar Room, Faculty of Law, University of Lagos on 7th March 2006 p.42.

[95] Egypt: Female genital mutilation persists in Egypt despite Renewed Opposition. Available at WLUML News and Views2.htm

[96] Nahid Toubia, Female Genital Mutilation *supra*, note 88. Cynthia Grant Bowman and Akua Kuenyehia, *supra*, p. 427. Cynthia Grant Bowman and Akua Kuenyehia, *supra*, pp. 427-428.

[97] Nahid Toubia, supra,

[98] Fighting Female Genital Mutilation in Africa, *supra*, note 87.

[99] In Kenya, among the Kikuyu, a lady that is not circumcised can never get a husband. See A.A Borokini, Female Genital Mutilation, *supra*, p.124. See generally, Repudiating Repugnant Customs: The Call to Ban FGM in Nigeria, a publication of Women's Centre for Peace and Development (WOPED) 2000 pp.40-45.

[100] Nahid Toubia, Female Genital Mutilation *supra*, note 88.

cultures where no man will marry her or the husband would regard her as unclean where not circumcised and return her back to her parents.[101] It is has been contended and rightly so that female genital mutilation is a cultural practice that absolutely subjugates women and put them in an inferior position to men.[102]

There is no doubt that all over Africa, that act of female genital mutilation is entrenched in the tradition to the extent that it is a *taboo* not to be uncircumcised. But studies have shown that the negative consequences on women are far- reaching. The Regional Plan of Action to Accelerate the Elimination of Female Genital Mutilation in Africa has identified varied psycho-social consequences; in the short and long term. Short term effects include pain, shock, excessive bleeding, urinary retention and infections. The long term effects include primary infertility, risk of transmission of blood borne diseases such as Hepatitis B and HIV/AIDS from the use of unsterilised instruments, menstrual disorder, obstructed labour, high incidence of still birth and in some instances death.[103] For example, in Tanzania, in December, 1996, out of about 5000 girls mutilated in one ceremony, 20 died from medical complications![104]

In view of the grave consequences of female genital mutilation and the "loud" voice of the opponents of the practice, 15 African countries have legislated against the practice. Thus FGM is a criminal offence in Burkina Fasso, Central Africa Republic, Djibouti, Egypt, Ghana, Kenya, Somalia, Togo and Senegal amongst others.[105] Other countries presently have bills on FGM before the parliament.[106] In Ghana, Section 69 A of the 1994 Amendment to Ghana's Penal Code states that "whoever excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and clitoris of another person commits an offence and shall be guilty of a second degree felony and liable on

---

[101] Isabelle Gunning writes that in Sudan, an uncircumcised girl or woman has few prospects of marriage. See Isabbelle R. Gunning, 'Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries', *23 Colum. Hum. Rts. L. Rev.*

[102] Nahid Toubia, Female Genital Mutilation *supra*, note 88. However, according to Amede Obiora the antagonist of female genital mutilation based on the premise that men exert total control over social life are obscure of the fact that men and women are bound together in social units, institutions and categories that cross-cut gender divisions. That women control over the ritual of female genital mutilation can be located as a source of strength and power. See Amede Obiora, 'Bridges and Barricades:Rethinking Polemics and Intransigence in the Campaign against Female Circumcision', 47 *Case W.Res L.Rev.* 275 (1995).

[103] World Health Organisation (WHO) Regional Office for Africa, 1997.

[104] See afrol news, 'Tanzania fail to enforce law against Female Genital Mutilation'. Available at http://www.afrol.com/html/News2001/tan007_fgm.htm.

[105] The states also include Chad, Cote d'Ivoire, Ethiopia, Guinea, Senegal, South Africa and Tanzania. See Centre for Reproductive Rights 'Female Genital Mutilation (FGM): Legal Prohibitions Worldwide'. Available at http://www.reproductiverights.org/pub_fac_fgmicpd.html.

[106] In Nigeria for instance, there was a draft bill before former National Assembly (elections were conducted in 2007 and fresh Assembly members elected) tagged 'Elimination of Violence from Society Bill'. Though the bill covers all forms of violence and applies to men and women alike, it was initiated to address discriminatory and harmful practices against women. See Nigeria: We've Gone far in Justice Sector Reform- Bayo Ojo. Availabla at all Africa.com. Some states have equally outlawed FGM, Ebonyi Sate Law (2000) on the Abolition of Harmful Traditional Practices against Women and Children, Edo State Female Genital Mutilation (FGM) Prohibition Law 2000 and Cross River State Girl Child marriage and Female Circumcision (Prohibition) Law 2000.

conviction to imprisonment of not less than three years.[107] In the same vein, the Tanzanian Sexual Offences Special Provisions Act, 1998 provides that "anyone having custody of a girl under eighteen years of age… who causes her to undergo female genital mutilation … commits an offence of cruelty to children". The penalty for the offence is imprisonment for up to fifteen years, a fine of up to three hundred thousand shillings or both imprisonment and fine as well as payment of compensation by the perpetrator to the victim.[108]

A survey conducted by Amnesty International and United States government on the prevalence of female genital mutilation in Africa is quite illustrative of the practice in these jurisdictions in spite of the penal provisions against the practice.[109]

The results of the Survey show that FGM is widely practiced in East Africa more than any other region. For example, the rate of prevalence in Djibouti and Somalia is 98% whilst Eritrea is 95%. Sudan followed closely with 90%. Also, the three types of FGM are practiced in Eritrea and Ethiopia and two types in Djibouti and Sudan. The only form of FGM practiced in Somalia is ***infibulation***, the most severe form of FGM. In West Africa, Mali recorded 94% whilst Nigeria and Gambia have 60-90%. Sierra Leone recorded 90%. In addition, the three types are practiced in Mali and Nigeria and two types in Gambia. For North Africa, Egypt has the highest rate of prevalence with 85-95% with the three types being practiced. Amazingly, South African countries are not included but the candid issue is that FGM is endemic in Africa.

It is submitted that the rate of prevalence in this part of the world is frightening, an all encompassing solution are needed very urgently required. We will propose far reaching reforms later in this paper.

---

[107] Ghana Act of 1994 amending the 1960 Criminal Code.

[108] Section 169 (A), the penal code was amended and this new section was added. Available at http://www.parliament.go.tz/polis/PAMS/Docs/41998.pdf.

[109] The data states the country, prevalence and types. (i) Benin, 5-50%, excision (ii) Burkinna Faso, up to 70%, excision (iii) Cameroon, local, clitorisdectomy &excision (iv) Central Africa Republic, 45-50%, clitorisdectomy &excision (v) Chad, 60%, excision and infibulation (vi) Cote d'Ivoire, up to 60%, excision (vii) Democratic Republic of Congo, local excision (viii) Djibouti, 98%, excision and infibulation (ix) Egypt, 85-95%, clitorisdectomy, excision & infibulation (x) Eritrea, 95%, clitorisdectomy, excision & infibulation (xi) Ethiopia, 95%, clitorisdectomy, excision & infibulation (xii) Gambia, 60-90%, excision and infibulation (xiii) Ghana, 15-30%, excision (xiv) Guinea, 65-90%, clitorisdectomy, excision & infibulation (xv) Guinea Bissau, local, clitorisdectomy, excision (xvi) Kenya, 50%, clitorisdectomy, excision & infibulation (xvii) Liberia, 50%, excision (xviii) Mali, 94%, clitorisdectomy, excision & infibulation (xix) Mauritania, 25%, clitorisdectomy and excision (xx) Niger, local, excision (xxi) Nigeria, 60-90%, clitorisdectomy, excision & infibulation (xxii) Senegal, 20%, excision (xxiii) Sierra Leone, 90%, excision (xiv) Somalia, 98%, infibulation (xxv) Sudan, 90%, infibulation and excision (xxvi) Tanzania, 18%, infibulation and excision (xxvii) Togo, 12%, excision (xxviii) Uganda, local, clitorisdectomy and excision. See Fighting Female Genital Mutilation in Africa, *supra*, note 87.

3. iv. Sexual Harassment.

Sexual harassment has been defined as the "unwanted imposition of sexual requirement in the context of unequal power".[110] The Committee on the Elimination of All Forms of Discrimination Against Women defines it as, *"...such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or action".*

Sexual harassment is recognized by the United Nations as a form of violence against women. In the 1993 Declaration on the Elimination of Violence Against Women, "violence" against women is defined to include physical, sexual and psychological violence (including rape, sexual abuse, sexual harassment and intimidation) occurring at work.

Legal approaches to sexual harassment are diverse. However, two broad categories are generally recognized, i.e. Quid Pro Quo sexual harassment and Hostile Work Environment sexual harassment. The former refers to a situation in which a superior officer requires his subordinate to perform sexual favours in exchange for continued employment or job benefits. Hostile work environment sexual harassment on the other hand, refers to a situation in which the work environment unreasonably interferes with an individual work penance or creates an intimidating, hostile or offensive working environment.[111]

The fundamental distinction between the two categories of sexual harassment appears to be that in the case of Quid Pro Quo- liability depends on whether or not the alleged aggressor is superior or co-worker of the complainant. Only the former is regarded as being in a position to "harass" the victim. A co-worker, having co-coordinating authority has no power to "harass" the victim. But in the case of hostile work environment sexual harassment anybody including co-workers may be liable because proof of superior authority is not a sine- qua-non for liability.[112]

In several African countries, sexual harassment is a common place. Studies have shown that sexual harassment is so rampant that in some countries that it sometime became a national embarrassment. In Egypt for example, after a two-day orgy of harassment in down town Cairo which became a national issue, a commentator described sexual harassment as a "reality which exists in every street in Egypt"[113]. Also, in South Africa, it

---

[110] Catherine Mackinon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979).
[111] Ngozi Udombana, "Sexual Harassment of Women in the Workplace: A Case for Socio-Legal Intervention" in O. Daudu and Kenneth Irabor eds., The Challenges of Commercial Law: Essays in Honour of Umaru Abdullahi (Lagos: Treasure Hall Consult, 2005) pp 1-36.
[112] This distinction is clearly set forth in the South African Code on Sexual Harassment: Code of Good Practice in Handling Sexual Harassment Cases, Section 4(1) (d).
[113] See the report and various commentaries on the issue at http://www.globalvoiceonline.org/2006/11/02.

was found in some studies that as much as 74% of female employees within the working environment had been subjected to one form of sexual harassment or the other.[114]

In Nigeria, sexual harassment has been described as a very common occurrence in almost every work environment. In a 1993 survey by the Civil Liberty Organization, it was revealed that the rate of sexual harassment of females ranged between 45% and 48% in the Eastern and Western States of Nigeria respectively[115]. In a recent survey by Okoro and Obozokhai, in a Southern state, it was found that sexual harassment is very common on the streets and was viewed by the youths as a norm. Also, that 82% of females, (compared to 48% males) had experienced sexual harassment.[116] In South Africa, *"it is well documented that sexual harassment is a serious problem in spite of underreporting which makes it impossible to ascertain the true extent of sexual harassment, studies have confirmed its prevalence in the workplace"*[117].

At this juncture, it is apposite to stress that sexual harassment is a "silent" form of violence on women with far-reaching negative consequences. Apart from restricting liberty, choices and activities of women, it often results in intimidation, forced isolation and destruction of women's self-esteem[118]. Unfortunately, it is one area of violence and discrimination against women accorded the least attention and recognition in most African countries.

In recent times, however some progress appears to have been made in certain countries. In Benin Republic, for example, the Parliament recently made sexual harassment illegal in schools, at work and in the home[119]. Also, in Kenya, after several years of agitation (and sometimes bloody protests) lawmakers had included a ban on sexual harassment in their Sexual Offences Bill in July, 2006[120].

In Togo, NGOs have also initiated a bill that if passed by the legislators will see anyone using threats, gestures or force to gain sexual favours punished under the country's legal

---

[114] Managay Reddi, Sexual harassment in the workplace: do we need new legislation? (1994) Gender and The New South African Legal Order pp.109-19. see generally, Cynthia Grant Bowman and Akua Kuenyehia, *supra*, pp. 560-572.

[115] See Thereza Akumadu, Patterns of Abuse of Women's Rights in Employment and Police Custody in Nigeria (Lagos: Civil Liberties Organization, 1995) pp. 9-11.

[116] Sexual Harassment: The Experience of Out of School Teenagers in Benin City, Nigeria (2005) p.3

[117] Deborah Zalnese, 'The Effectiveness of Employment Equity Act and the Code of Good Practice in Reducing Sexual Harassment" (2001) *17 S.A.J.R.* p.503.

[118] See generally Deborah Zalesne, 'Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal to Social Norms', (2002) *25 Harvard Women's L.J* 143.

[119] See "Benin Bans Harassment Law...reporting that The National Assembly of Benin voted to outlaw sexual harassment on 17th July, 2006; available at http://www.women'snews.org/article.cfm

[120] See Jane Dwasi, supra, at p. 143, reporting that despite bloody protests, the Kenyan Government has failed to make any effort to amend the Constitution to criminalize sexual harassment. However, Kenya has enacted a law against sexual crimes; including gang rape, sexual harassment and child trafficking in 2006: Feminist Daily News @ http://ww.feministorg/nes/newsbyte/uswirestory.aspof 7/24.2006

system. The NGOs have proposed that sexual harassment be punished by one to five years imprisonment and a fine of 100,000 – 500,000 CFA Francs.[121]

South Africa appears to be the only African country which has provided a robust legal framework for dealing with sexual harassment. The Employment Equity Act 1998 ushered in a legal regime which has been described as progressive and complaint with the international best practice on the issue. In general terms, the Act:

> Defines prohibited conduct,
> Detail procedures to address the problem and present its occurrence and
> Provides for civil sanctions to the harasser.

Furthermore, the government of South Africa has created two entities that are involved in sexual harassment monitoring, enforcement and policy-making- The South African Human Rights Commission and South African Commission on Gender Equity. Whilst the former, inter-alia assists sexual harassment complainants in instituting proceedings in equality court, the latter undertakes research on sexual harassment for the benefit of the parliament and other authorities and education and investigations relating to sexual harassment.[122]

4. *Conclusions and Suggestions for Reform.*

As seen above, it is extremely difficult, if not impossible, to achieve justice for victims of sexual violence. The current dispensation perpetuates gender injustice and call for major reforms.

In respect of the offence of rape, the issue of consent and "immediate complaint doctrine" are the greatest obstacles of the victims in the quest for justice. Several non-African countries have overcome this problem by shifting away from the question of whether the complainant consented to the sexual act and tailoring legislative reforms towards the question of whether the accused had used force in order to have sex with the complainant.[123] This approach will lessen the burden of proof on the complainants which will inevitably enhance the prosecution and conviction of rape victims.

On the issue of ***mens rea*** in the proof of rape, two possible reforms have been suggested. First, a shift in the burden of proof where the accused is required to proof in his defence on the balance of probability that he believed the victim to be consenting. Secondly, as it the case in Australia and New Zealand, applying the reasonable man's test (i.e. objective

---

[121] See "Sexual Harassment Bill Proposed in Togo @ http://ww.afrol.com/categories/women/wom

[122] This is in consonance with Commission on Gender Equity Act and Promotion of Equality and Prevention of Unfair Discrimination Act, 2000,

[123] Cynthia Grant Bowman and Akua Kuenyehia, *supra*, p. 342

test) to the question of whether or not the accused believes that the victim consented during the act.[124] It is submitted that the two approaches are not foreign to the African legal system. For example, in Nigeria, whilst the defenses of insanity and alibi are proved on a balance of probabilities, the reasonable man's test is applied to the proof of provocation and mistake.[125]

Another major area for reform is in the area of evidentiary rules in rape cases. The role of law as an instrument of social engineering must be the protection of sexual choices.[126] The law must protect the privacy of women, including rape victims. South Africa has gone a step further than other African countries by not allowing admission of information on the victim's sexual history in general but her sexual history with the defendant.[127] But it is arguable that the basis for accepting such evidence is suspect. Obviously, the fact that a woman has gone to bed with a man once does not necessarily imply that she gave her consent in the present case. In England, evidence of character and previous sexual history of the complainant can only be given on application and by leave of court.[128] But in New South Wales (Australia) evidence of sexual reputation is absolutely prohibited.[129] It is submitted that the sexual history of the complainant should be de-emphasized in a rape trial. The real issue before the court should be whether the accused forcibly had sexual intercourse with the victim. Whether the accused is a friend or stranger to the accused is immaterial.

Perhaps the most ludicrous requirement in rape cases is corroborative evidence. Since the offence of rape often committed in private with only the victim and assailant as parties, it is almost impossible for the evidence to be corroborated. Where the victim submitted to sexual intercourse out of fear, suffers no injury or delays in reporting the rape, the prosecutors will be unable to put together enough evidence to corroborate her story.[130] Most importantly, medical evidence which is very necessary in rape cases may not be available as the accused may have bolted away immediately after the act. Therefore, the strict rules of corroboration must be relaxed in rape cases. This is achievable where the issue of consent is reformed as earlier suggested. Although the court will still require corroboration as a matter of practice, it will be, to a large extent, at the judges' discretion.

The role of the law enforcement agencies in rape cases also deserves special attention. In most African countries, the policemen who handle rape cases have no specialized knowledge or competency to deal with the issues involved. According to Ibidapo-Obe, the first policing strategy in tackling rape cases is to train persons within the police to

---

[124] *Ibid.* p.348.
[125] Okonkwo & Naish, *supra*, pp. 105-107, 241-242.
[126] J. Temkin, The Limit of Reckless Rape, 1983 *Crim. L.R.*p.5 at 7.
[127] Cynthia Grant Bowman and Akua Kuenyehia, *supra*, p.372.
[128] Section 2 Sexual Offences (Amendment) Act 1976 (England and Wales). See also pp.151-152.
[129] Section 409 (b) Crimes Act, 1900. Ifa, ibid.
[130] C.E. Legrand, 'Rape and Rape Laws: Sexism in Society and Law (1973) *California Law Review,* Vol.61, p.919.

acquire necessary psychological and sociological expertise to handle rape cases.[131] In addition, the police should deploy more female personnel to the rape complaints' desk and/or use fairly senior officers to receive victims' complaints.[132] This will be akin to the Hillbrow Rape Reporting Centre in Johannesburg which centralizes the reporting, immediate medical examination and counseling services to rape victims. Also specially trained female officers are deployed to handle the rape cases.[133] The significance of this approach cannot be over-emphasized as it will make justice to be more easily accessible to victims of rape. In North Africa, the scenario is somewhat different as rape may become a capital offence in some jurisdictions if it is committed with use of violence or threat of a weapon.[134]

However, punishing the accused person usually leaves the victim in no better position – apart from the psychological relief that her aggressor has been brought to book. The Tanzanian Sexual Offences Act, which provides for compensation to rape victims, is strongly commended to other African countries.[135] Legal assistance should also be provided to the victims to enable them pursue their cases to the logical conclusion.

The above reforms should be complemented by a trial system which recognizes and respects the rights of rape victims. There is a need for a total re-orientation of prosecutors and judges involved in the trial of rape cases. Rape cases should be conducted in private and the identities of the victims protected. In a case in which I was involved, the fact that victim – a nine year old girl gave evidence in the open court was not an interesting sight at all. As noted above, the current system has the unwitting effect of turning a man's offence into a female's trial. It is suggested that the entire rape proceedings must project an atmosphere disposed to ensuring that justice is done to all the parties – without putting the victim on the slaughter's table.

The issue of female genital mutilation presents peculiar problem in that its pervasiveness and seriousness is not appreciated in most countries. Thus, the first and perhaps the most important step towards its eradication is to recognize its embeddedness.[136] Hence, the beginning of any reform initiative should be an intensive awareness creation especially at the grass- root and community levels; stressing the harmful nature of the practice especially with the spread of HIV/AIDS. The media has a dual role to play in this respect. First, as an agent of change and second in positively projecting women within the society. This will inevitably lead to a re-orientation of the people and change of attitude about the practice. It is submitted that an intense and consistent enlightenment campaign will not

---

[131] "Policing Response to Vulnerable Groups: A Review of Strategies for Tackling Crimes Against Women and Children" in Oluduro, Owoyemi eds., Trends in Nigeria Law: Essays in Honour of Oba Olateru-Olagbegi III (Ibadan, Constallation Nig Ltd Publishers 2007) p.87.

[132] *Ibid.*

[133] Cynthia Grant Bowman and Akua Kuenyehia, *supra*, p.359.

[134] See Vital Voices, Protecting Women's Human Rights in the Middle East and North Africa. Available at http://www.vitalvoices.org/DesktopDefault.aspx?page-id=376.

[135] Tanzania Act, note 108.

[136] Erika Sussman, 'Contending with Culture: An Analysis of Female Genital Mutilation Act of 1996' (1998) *31 Cornell Int'L L.J.* p.193,216.

only serve as a preventive strategy but will provide the springboard for gradual elimination of the practice from the various societies..

Secondly, the enforcement mechanism for female genital mutilation must be activated in most countries. As noted above, female genital mutilation has been criminalized in many African countries. However, not many countries have successfully prosecuted the offence. [137] In Kenya, a Provincial Court's order preventing a father from forcing his two daughters to undergo FGM has been described as historic.[138] This is indeed a welcome development; that will provide some check for the promoters of this harmful practice. Closely knitted is the need for legal framework to protect and support anti FMG campaigners who stand the risk of attack by the traditionalists. Adequate enforcement of the law will greatly assist in curbing the activities of those who perform this dastardly act.

Thirdly, it has been suggested that since the practice of female genital mutilation is *"rooted in the intricate web of habits, attitudes and values along with both functional and symbolical connotation... of loss of an important tradition,*[139] provision of a suitable alternative practice may suffice. For example, in the Meru region of Kenya, a national Kenyan Women's Organization (Maendeleo yaWanawake) in collaboration with an American-based non governmental organization (Program for Appropriate Technology in Health) developed an alternative rite to female genital mutilation tagged 'circumcision through words'.[140] The essence of this programme is that it captures the cultural significance of the practice of female genital mutilation whilst jettisoning the dangerous aspect of it. Girls who are at the age of circumcision are brought together for one week of seclusion, they are taught about their roles as women, parents and community leaders as well as given practical information on health, reproduction, self esteem etc. At the end of the week, the programe is rounded up with a community wide celebration of songs, dance and feasting affirming their new roles in the community. This initiative has proven to be a huge success as shown by the upsurge in the number of participants after one year.[141] This laudable initiative is worthy of emulation by other African counties; subject to such modifications as may be necessary to suit individual communities and societies.

Fourthly, the role of Non- Governmental Organizations (NGOs) in this matter cannot be over-emphasized. Considering the enormity of this problem, it is imperative that the matter be taken more seriously by the various stakeholders, especially the NGOs. It is submitted that the issue of funding of the anti Female genital nutilationgm initiatives also require a new approach. Undoubtedly, most African countries would require international financial assistance in this regard. The opposition to the eradication of female genital mutilation in some come communities stem from the fact that it serves s a means of subsistence for the caretakers of the tradition. It may be no more than a wishful thinking

---

[137] There are reports of prosecution or arrest in cases involving FGM in Burkinna Faso, Egypt, Senegal, Sierra Leone and Ghana. Supra, note 105.

[138] See afrolnews, Kenya Court prevents father from mutilating daughters. Available at http://www.afrol.com/html/categoriesWomen/won021_fgm_Kenya2.htm.

[139] Amede Obiora, *supra*, Cynthia, *supra*, p.438

[140] Cynthia, *supra,* p.449. for more on initiation through words, see 'Women'se news, New Ritual Replaces FGM' available at http://www.womense.org/articlecfm/dyn/aid/1284.

[141] Ibid.

to expect such communities to jettison the act without adequate financial assistance to start them off in another vocation.

The United Nations Development for Women (UNIFEM) is a case in point. One of their many areas of activities is providing funds as well as collaborating with developing nations to stop gender-based violence. The Trust Fund initiative that (UNIFEM) set up in Uganda worked with the police by establishing special units for investigating cases of violence, coordinating civic leaders and sensitizing communities.[142] If the leaders take the initiative to source for these grants they are available. It is equally apposite to say that since corruption is the bane of several African countries, the political will must be present to channel such funds for the right purposes.

Apart from the above, it our view that the overall significance of education on this cannot be over stressed. In particular, girls must be exposed to the ills of this practice as early as possible. In Nigeria, the National Baseline survey conducted showed the role of literature and folklore in the subjugation of women. It explained how they reveal values and attitudes that transmit, justify or validate harmful traditional practices that portray the image of women negatively. Also, that the idea of inferiority of women and their subordinate status to men is entrenched and re-enforced through cultural beliefs and customs embedded in their various societal folklore and literature and this made women to refuse to change their status quo. A revision of the education curriculum is indispensable if we are to properly reposition women in our societies.

As suggested by Dawit Seble[143] since culture is dynamic, folklore and literature could be reconstructed to eradicate harmful traditional practices affecting girls by incorporating into the school curriculum literary works that portray role models such as important women historical characters. In addition, we are of the view that their male counterparts should also be involved in theses studies so that they can learn at a very young age that women are human beings to be loved and appreciated and not as possessions or objects of abuse.

Finally, the issue of sexual harassment demands a new approach entirely. The present situation whereby the issue is treated with utmost levity is unacceptable. In countries where it has been criminalized, the enforcement machineries should be stepped up to ensure that the perpetrators are brought to justice[144]. To this end, massive enlightenment campaigns should be organized to apprise women of their rights and also put the perpetrators in check.

---

[142] See UNIFEM UK, available at http://www.unifemuk.org/unifem-at-a-glance-2.php.

[143] African Women in the Diaspora and the Problem of Female Genital Mutilation 1995, ASA Women's Caucus Newsletter.

[144] In a landmark case in Ghana, the Commission on Human Rights and Administrative Justice(CHRAJ) found the Fan Airways boss guilty of sexually harassing a former employee and awarded c5million in favour of the complainant. Cynthia, *supra,* p.572.

However, on a general note, our view is that the ad-hoc approach to the problem of sexual harassment in most African countries cannot deliver the much desired reform(s) on the issue. Even in countries where it has been criminalized, the laws are honoured more in breach than in observance. Consequently, a holistic approach, covering all aspects of the issue is recommended. Education, easy access to justice, compensation for victims, monitoring and compliance, institutional support, funding, etc are some of the germane issues for consideration. The South African position, already noted above is a commendable starting for other African countries.