



# INTERNATIONAL AND COMPARATIVE LAW REVIEW

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## **Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl**

**Oluyemisi Bamgbose**

### **Introduction**

Early experience is important. Children and the adolescents at these stages of life are more malleable than at the stage of adulthood. Initially, they can absorb whatever experiences they are exposed to and retain their effects indefinitely. The clues to later personality formation are therefore to be found primarily in that first encounter at these stages because the environment socialization is a clay molding process.

The travails of young adolescent girls who have been sexually assaulted under what can be referred to as difficult circumstances, difficult and painful to explain are unimaginable. All over the world, the adolescent girl is the girl whose life and body is most at risk.<sup>1</sup>

It is sad that many of them find it difficult to come out in the open to talk about the heinous act or expose the perpetrators. The reasons for such silence are sometimes cultural or legal! A wide range of discriminatory and violent practices are institutionalized in cultural traditions and therefore legitimated as social norms.

Under the African culture, the doing of certain acts or the omission of certain acts especially in relation to female sexuality, are regarded as taboos. A taboo in African Customary Law is something that is forbidden or prohibited by religion or custom of a particular people in a locality or society. It is prohibited from being breached on the pains of either punishment or the realization of undesirable consequences.

There are legal provisions in all legal systems in Africa addressing sexual matters. The issue that should be considered is the adequacy or the extent of the protection it gives to the victim who in this paper is the adolescent girl.

This paper examines the legal and cultural approaches to issues on Child Marriage/Forced Marriage, Female Circumcision, Rape/Sexual Assaults, Prostitution and Incest. The effects of the above acts on the adolescent girl are considered and the possible solutions to the problems caused are highlighted.

### **I. Law and Culture: The African Perspective**

The approach to an issue determines the outcome. In a culturally entrenched matter, care should be taken in imposing statutes. Outright condemnation or abandonment of local traditions this will only be met with indignation and resistance to change. It is in line with this that

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<sup>1</sup> Noolen Heyzer, *The Girl Child at Risk, "Development"* JOURNAL OF THE SOCIETY FOR INTERNATIONAL DEVELOPMENT at 58 1996 (1).

sexual matters in Africa are considered with an understanding of the law and culture.

Law

According to Gluckman, law is a set of rules accepted by all normal members of society as defining their rights and laying down reasonable ways in which persons ought to behave in relation to each other and things including ways of obtaining protection of one's right.<sup>2</sup>

In discussing the African concept of law, Driberg says, "law is part of the whole complex of culture and therefore only those who claim the same cultural inheritance come within the scope of its operation."<sup>3</sup> To Oyajobi, laws are made to govern the conducts of the people and they can be a powerful instrument of social and cultural transformation.<sup>4</sup>

In considering the term law there ARE certain traits and characteristics that it should have. By their prescriptive and injunctive character, both domestic and international law have the potential to proscribe harmful tradition. In reality, however, international laws are difficult to enforce. It is generally stated that law is not static. The law can and does change with times and the rapid development of social and economic changes. It is further generally agreed that law must avoid such traits as could make it barbaric and primitive and that it must not be repugnant to natural justice, equity and good conscience. A statement from a Nigerian Supreme Court judge in the case of Kimdey et al v. Military Governor of Gongola State et al. will conclude the discussion on law from the African perspective.<sup>5</sup> In Kimdey, Justice Karibi-Whyte said, "whatever the type of law, one of the characteristics of law is its flexibility and capacity for adoption. Law modifies itself to accord with changing social condition."

With the above discussion and the suggestions by authors of the relationship between law and culture, the concept of culture is examined below.

## II. Culture

Culture is generally defined as the shared ideas, norms, values and beliefs of a people and has both material and non-material components.<sup>6</sup> Ogunremi says culture is an important aspect of social life

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2 MaX Gluckman, *Essays on Lozi Land and Royal Property*, Rhodesia Livingstone PAPER NO 10 LIVINGSTONE, NORTH RHODESIA 1943).

3 DRIEBERG Esq., *African Concept of Law*, 16 J. COMP. LEG. INT'L L. 230-246 (1934).

4 A. Oyajobi & Ed. Margaret Schuler, "Women & Law Reform in Nigeria" in *Women, Law and Development in Africa*, at 167-169 (OEF International) (1990).

5 Amadu Essay & Adetanwa Odebiyi, *NIGERIAN WOMEN IN SOCIETY DEVELOPMENT* (Dokun Publishing House 1998).

6 *Id.*

which distinguishes man from non-man and one social organization from another.<sup>7</sup> The non-material component of culture comprises the inner behavior, attitudes, ideas, desires, values and the norms of the people. It also tends to dictate many of the societal social arrangements including gender role ideologies. It is difficult to trace the origin of culture because most of the ethnic groups have no form of written language.

Culture, like law, is not static. Oyewo refuted a statement made by an unknown writer who was alleged to have written thus, "customs bind the hands and feet of Africans so they never break forth." Oyewo asserted that customs and culture should be adaptive to change and never static. Chief Judge Osborn confirmed the above statement in the Nigerian case of *Lewis v Bankole*, where he stated that, "[o]ne of the striking features of West African native customs is its flexibility."<sup>8</sup> To further buttress this point, Howard stated that culture should but only be equated with history and tradition but should be seen from the contemporary perspective.<sup>9</sup> He added that African culture, in particular, incorporates things pre-colonial, colonial and contemporary as well as things social, economic and political. It is apparent that there is a relationship between the law and the culture of the people. Society has a cultural connotation, which is relative to that society.

#### *A. Culture and the African Adolescent Girl*

The African girl is born into a culture of male supremacy. This is a feature of the African traditional society that is patriarchal in structure. This structure enables the male to dominate the female and gives him control over female sexuality. The male in the traditional African culture, lords his words over the family and his word is law. Daughters, in particular, dare not disobey the fathers' wishes and wives, especially the child brides, dare not disobey the husbands' wishes. Females are subjugated to the males' will and even forced to submit to the man's will at their own expense and revulsion.

In particular, the African culture dictates that children conform to the demands of parents without hesitation. Disobedience, which is very rare, results into physical reprisal, denial of material support, and ostracism by the family or visitation of an unseen evil force because such disobedience is regarded as a taboo. There is no doubt that certain cultural practices, in relation to sexual matters, amount to acts of violence. Going by the definition of Hanmer, violence is both the use and

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7 G. O. OGUNREMI & M.O. OPE, OYE & S. OYEWESO, *BADAGRY: A STUDY IN HISTORY CULTURE AND TRADITION OF AN ANCIENT CITY*, (Rex Charles Publication 1994).

8 *Lewis v. Bankole*, (1908) 1 NIG. L. REP. pg 81 at 83.

9 RHODA E. HOWARD, *HUMAN RIGHTS IN COMMONWEALTH AFRICA* (Rowman Littlefield 1986).

threat of force, and both compel or constrain women to behave or not to behave in given ways.

With the above exposition on the African culture, the law and the position of the adolescent girl under the African culture, certain sexual matters in relation to the adolescent girl are considered from cultural and legal perspectives.

### **III. Sexual Issues, Cultural Practices and the Law**

In contemporary times, the issue of sexuality is an aspect of reproductive rights, which is internationally recognized as critical to the advancement and promotion of adolescent human rights. However, under the African culture, open discussions on certain issues on sexuality are regarded as taboo. Cultural norms forbid the teaching about sexual relations and each person is supposed to find out all there is know by experience. Paradoxically, there are some cultural practices having sexual connotations that young adolescent girls are encouraged to become involved in and in which they are tutored from childhood. Such issues relate to the puberty stage of the adolescent girl and are commonly linked with rituals, festivity and celebrations. Closely linked with these cultural practices that have an effect on the sexuality of the adolescent girl are various myths that ensure conformity. Some of these cultural practices are discussed below:

#### *A. Child Marriage/Forced Marriage*

Child marriage and forced marriage are closely knitted. Under many African traditional cultures, the marriage of a girl is entirely the responsibility of her father if she has not attained the age of puberty. The father gives her away to a person of his choice without consulting her or her mother.

The practices of early marriage with all its sexual implications exist amongst people in certain parts of Africa. Under the TIV culture in Nigeria, girls are generally treated as "parcels to be exchanged in marriage." In an exchanged forced marriage known as "Kwase Yamwn Sha," a male family member exchanges his adolescent sister or ward for a girl in another family who then becomes his wife. In this type of marriage, the young adolescent girls are forced into marriage without being able to make a choice. Such girls are usually exchanged to a man who is elderly, ugly, diseased or disabled.<sup>10</sup>

In Kenya, child marriages are not unique to a certain clan but exist in several cultures. Among the Maasai people in Kenya, as soon as

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<sup>10</sup> DENNIS ITYAYVAR, *THE CHANGING SOCIO-ECONOMIC ROLE OF TIV WOMEN*, (Nigeria University Press Ltd. 1992).

a girl is circumcised she is married at the age of twelve.<sup>11</sup> In the Hausa culture of Northern Nigeria, the culture of “Kunya” meaning modesty or shyness encourages girls to remain shy and obedient. The effect on sexuality is the forced marriage to an older man without question.<sup>12</sup>

According to Usman, young girls that are forced into early marriages are indecently assaulted or “raped” by such older men.<sup>13</sup> She further described a horrifying practice where such older husbands resort to incising, cutting or puncturing the genital of the young girls with sharp objects or blades to allow penetration during intercourse.<sup>14</sup> This act has direct bearing on another sexual issue known as “marital rape” which, unfortunately, is not recognized in most of the legal systems in Africa.

In most parts of the Hausa land, child marriages are the rule rather than the exception. Children are usually married off between the ages of twelve and thirteen in large towns, and at younger ages in villages. In some parts of rural Hausa lands, a girl is married away to a boy or man at the very early age of five or six. It is said that such a young child goes to her marriage home at this age and is nursed and generally brought up by her husband. However, the husband does not have sexual relations with her until he thinks she is ready for it and certainly not below the age of twelve. In spite of the prevalence of child/forced marriages in many African countries, there are legal provisions prohibiting sexual intercourse with any girl under the age of fourteen.<sup>15</sup> There is also a national policy on population in Nigeria that discourages early marriage.<sup>16</sup>

Several reasons are adduced to support the cultural practice of child/forced marriage. The following are just a few of the reasons given. First, it prevents premarital sexual relationships. There is the belief that if a young girl is left unmarried after puberty she is bound to have premarital sexual relationships. Also, under many African cultures, the preservation of virginity before marriage is cherished, honored, rewarded and celebrated. The parents of a virgin bride are rewarded with gifts, the virgin is cherished by her husband and honored by his family. In the

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11 Atsango Chesoni, Bado Mapambano—Kenya *Women Demand their Rights, The FIDA (K) ANN. REP. LEG. STAT. KENYA WOMEN* (1997).

12 Amadu Sesay & Adetanwa Odebiyi, *supra* note 5.

13 Hajara Usman, *Reproductive Health and Rights: The case of Northern Nigerian Hausa Women*, AFRICAN DEVELOPMENT XXII, No. 1, at 79—94 (1997).

14 *Id.*

15 Criminal Code of Ghana, Section 2a; Penal Code of the Empire of Ethiopia 195.7; Penal Code of Kenya, Chapter 63 s. 145; Penal Code—Laws of Northern Nigeria, chapter 89, 5.282(1) b; Criminal Code, Chapter 77 s.218.

16 FEDERAL REPORT OF NIGERIA, NATIONAL POLICY ON POPULATION FOR DEVELOPMENT,, UNITY PROGRESS AND SELF-RELIANCE (1988).



traditional societies, there is a celebration immediately the marriage is consummated and the bride is found to be a virgin. Similarly, there is the unjustified belief that a child bride comes to learn and venerate her husband from a very early age and will become firmly attached to him as she grows older. This is not always true as there have been cases of expressed hatred by the brides towards the chosen husbands leading to the child brides killing these husbands and running away. There is also the belief that at such a young age, a young adolescent girl has not reached the age of defiance and would accept her father's choice of a husband as a "good choice of a wise and matured father." Also, it is alleged that at such a young age, adolescents are more likely to be influenced in their choice of a husband based on affluence and looks. It is said that parents decide to marry them off before they make rash decisions. Lastly there is a mistaken notion by some older men who take child brides that sexual relation with young girls reenergizes them as men.<sup>17</sup> There is no doubt that the cultural practices of forced/child marriages are capable of abuse. Greedy parents may marry off their daughters to older men for mercenary purposes while others give out adolescent children to royalties for purposes of prestige.

#### *B. Female Circumcision/Female Genital Mutilation (FGM)*

Female Circumcision, popularly known as Female Genital Mutilation, hereinafter referred to as FGM, is culturally considered proof of femininity and a "demonstration of a woman's courage." FGM is a collective name given to several different traditional ritualistic practices that involve the actual cutting of female genitals, either totally or partially, and the removal of sexual organ. There are basically three types of practices and they are briefly discussed below:

*Clitoridectomy:* The partial or total amputation of the clitoris, which is the female sexual organ.

*Excision:* The amputation of both the clitoris and the inner lips.

*Infibulations:* The removal of the clitoris, some or all of the labia minora and incisions in the labia majora to create a raw surface. These raw surfaces are either stitched together or kept in contact until the skin heals as a hood covering the urethra and most of the vagina.

Traditionally, FGM is carried out in unhygienic surroundings with the same instruments used for several girls as group excision is common. However, in modern days, practitioners are more aware of the risk of tetanus, HIV/Aids and extensive hemorrhaging.

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<sup>17</sup> See [www.washingtonpost.com/wp.dyn/world/Africa/](http://www.washingtonpost.com/wp.dyn/world/Africa/)

This cultural practice, affecting the sexuality of the female adolescent upon who it is commonly practiced, crosses all social classes and backgrounds. In recent times, an increasing number of educated parents are opposed to it, but are sometimes powerless in the face of stiff cultural pressure. It is interesting to note that women are the perpetrators and have been accused of being the strongest supporters. In Burkina-Faso a magistrate claimed that in almost all cases of excision brought to trial it is mothers-in-law, grandmothers, aunts, and mothers who took the initiative to have the child excised.<sup>18</sup>

In many Africa cultures, childhood ends by custom at puberty or marriage. It is very rare in African traditional cultures for the transition from childhood to adulthood to be measured by a precise date and a chronological age. FGM, therefore, has a symbolic value associated with adulthood and it is an important part of the initiation right of young women.

### C. Cultural Practices

Under the Burkinabe culture in Burkina-Faso, excision takes place after the harvest and it is followed with music, dancing and feasting. In Peru, near Bobo-Dioulasso in Burkina-Faso, a girl is excised on the day of marriage itself and later honored with a festive ceremony. In recent times, the initiation aspect of excision no longer exists because females are now excised at a very young age. In Nigeria and Burkina-Faso, infibulations are less practiced and variations in the age at which excisions take place exist.

In the cultures of the Ijaws and Etsakos in the Bendel State of Nigeria, FGM is a premarital ritual.<sup>19</sup> However, among the Urhobos and Isokos of Delta State of Nigeria, it is performed during a woman's first pregnancy.<sup>20</sup> According to Eliah, the Sabinu people of Uganda cling to the age-old tradition of female circumcision.<sup>21</sup> Under this culture, the preparation for the initiation ceremony of circumcision commences in the month of December of every year. This includes feasting, dancing and secret briefing which leads into a public celebration on the day the circumcision is done. According to Koso—Thomas, among the Mendes in Sierra Leone, the loud drumming, singing, dancing and shouting is

18 LUCIE A. KERE & ISABELLA TAPSOBA, CHARITY WILL NOT LIBERATE WOMEN: FEMALE GENITAL MUTILATION IN BURKINA FASO, PRIVATE DECISIONS PUBLIC DEBATE, (Pano Publication 1994).

19 R. Myers & F. Omorodion & A. Isemalumhe & G. Akenzua, *Circumcision: Its Nature and Practice Among Some Ethnic Groups in Southern Nigeria*, 21 SOCIAL SCIENCE AND MEDICAL, 581, 585, at 19 (1985).

20 Sam Efeharo, *Why we Circumcise our Pregnant Women*, VANGUARD, Jan. 19, at 10 (1993).

21 E. Eliah, *Uganda's Sabinu People Research for a Healthier People*, POPULI, The UNFPA MAG., Vol. 23, no. 1 (March 1994).

said to drown the cries of female initiates during the ceremonial circumcision.<sup>22</sup>

Female circumcision is a deeply rooted African practice held with much pride. Under the Samburu culture in East Africa, it is a rite of passage in which the girl is formally initiated to womanhood. Young girls are informed at a very young age about the importance of circumcision through songs and dances designed to have this message sunk deep into them. The circumcision ceremony is organized in a home and friends are invited to share in the "joy" of the family and in the passage of the young girl into adulthood.<sup>23</sup> To show the importance of female circumcision among the Somali tribe in Kenya, there is a saying that "an uncircumcised girl is like a rotten carcass in the center of the house" and a circumcised girl is like a rose flower in a desert shrub."<sup>24</sup>

#### Legal Provisions

In all the countries where FGM is prevalent, the government has attempted to address the problems arising from the practice through means other than statutes. However, all the countries have constitutional provisions that could be used to address FGM.<sup>25</sup> Only very few countries specifically criminalize the practice of FGM, among which are Ghana and Burkina-Faso.<sup>26</sup> Many other countries have provisions in their respective penal laws that prohibit assaults or infliction of bodily harm to any person. In addition to these legal provisions, there are health policies in many of the African countries addressing the practice of FGM.<sup>27</sup>

FGM is geographically common and widespread in Africa though unknown in certain African countries. Statistics show that the prevalence in Ethiopia is 90%, Nigeria 60%, Ghana 30% and Tanzania 10%.<sup>28</sup> The practice is insignificant in South Africa and Zimbabwe and not practiced at all in Southern Sudan, and some Arabic speaking countries of Northern Africa, with the exception of Egypt.<sup>29</sup>

#### IV. Origins and Myths of FGM

The origin of FGM is difficult to trace because its origin is not documented or written. The elders in various cultures have given

22 THOMAS O. KOSO, *THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION*, (Dotesios Ltd. 1987).

23 Ambia Noor, *Female Circumcision: Pride or Prejudice*, BAOBAB No. 16 (March 1995).

24 *Id.*

25 Eth. Const., Art. 35; Gha. Const., Art. 2b(2); Niger. Const. Sect. 34 (1999).

26 *Supra* note 15.

27 HEALTH POLICY OF THE TRANSITIONAL GOVERNMENT OF ETHIOPIA (1995); GHANA'S MINISTRY OF HEALTH, NATIONAL REPRODUCTIVE HEALTH SERVICE POLICY AND STANDARD (1996).

28 Kere and Tapsoba *supra* note 18.

29 NABUD TOUBIA, *FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION*, (Rainbo, 1995).

conflicting stories that make it difficult to trace the historical background. A few of the myths surrounding FGM are highlighted below. A retired teacher in his sixties says the practice of FGM can be traced back to a mythical Eden and it was God's punishment for disobedience and sexual excess.<sup>30</sup> According to some old illiterate women, "[t]he clitoris is unaesthetic. It is ridiculous, a useless cockscomb. It is shameful to drag such a thing around."<sup>31</sup> The clitoris is a male organ that must be removed for a woman to be true to her female gender.<sup>32</sup> Efararo stated that there is the myth that the clitoris is an impure organ and if it touched the head of a baby being born it would kill it or make the man impotent.<sup>33</sup> Also, it is alleged that uncircumcised women bring bad luck.<sup>34</sup>

According to Dawla, it is said that FGM is a necessary rite of passage to womanhood.<sup>35</sup> Kere and Tapsoda "have stated that some elders claimed that the origin of excision can be linked to the polygamy of ancient kings and chiefs who excised their wives to tame them, sober them and keep them faithful."<sup>36</sup> In a village in Bini, in the former Bendel State of Nigeria, the origin of FGM is traced to the 15th century. It is alleged that the king of the village issued a Decree that all females had to be circumcised after he consulted with an oracle regarding his wife's stillbirth and infant deaths.<sup>37</sup>

Sabiny legend in Uganda traced the origin of FGM to a young girl who was once stricken by a long period of disease causing her to become thin and weak. A witch doctor prescribed the venting of bad blood through genital cutting and it was alleged that she lived. Overtime, FGM practice grew as a preventive measure.<sup>38</sup> Eliah also stated another version of the origin of FGM amongst the Sabiny when he said that the practice has its roots in the occupation of the Sabiny men.<sup>39</sup> It is said that Sabiny men were hunters who went away from home for long periods of time. To enhance social stability and control the sex drive of the women, the female genital was cut to keep the women faithful to their husbands.

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30 Kere and Tapsoda, *supra* note 18.

31 *Id.*

32 *Id.*

33 Efararo, *supra* note 20.

34 *Id.*

35 Dawla, *The Political and Legal Struggle over FGM in Egypt before and after the International Conference on Population and Development*, Intersection between Health and Human Rights (1995).

36 Kere and Tapsoda, *supra* note 18.

37 Myers, Omorodion, Isemalumbre and Akenzua, *supra* note 19 at 585 (1985).

38 E. Eliah, *Uganda's Sabiny People Reaching for a Healthier People*, THE UNFPA MAG., Vol. 23 NO 1 March (1994).

39 *Id.*

Considering the origin and the myths surrounding FGM in Africa, it is evidently a confirmation of male dominance under the African culture.

Despite the legal provisions and health policies against FGM in many countries, the practice is still prevalent. Many reasons have been adduced for this, some of which are discussed below. There is the reluctance to break away from traditional beliefs and the desire to continue and maintain traditional practices. These beliefs are strongly held by elderly family members who believe that tradition must continue. The reluctance to break away from age long and age-old practices symbolizes the shared heritage of ethnic groups. Religion has been attributed to the continuance of FGM, however, this reason is not buttressed by any provision in the Bible or the Koran. There is a lot of societal pressure on young girls in certain cultures to undergo FGM.

The pressure is exerted on uncircumcised girls through various ways including by being ostracized, condemned, excluded from the social circle and ridiculed through jesting. There are reports of women who succumbed to social pressure and voluntarily agreed to undergo FGM. According to Lawrence, in a certain culture in Calabar area of Cross River State of Nigeria, uncircumcised girls face derision when they quarrel with circumcised girls.<sup>40</sup> It is said that a girl makes a particular clicking sound with her tongue during a disagreement implying that the girl she is arguing with is uncircumcised. If the girl is indeed uncircumcised she is shamed by the act. However, if it is found that she is circumcised and falsely accused, so serious is the insult that the person who accuses her is fined. In some cultures, female circumcision is the traditional ritual that confers full social acceptability and integration on the adolescent girl. It is said to confer full membership on a person to her ethnic group and to the social privileges and benefits of that ethnic group. It satisfies the deep-seated "need to belong."<sup>41</sup> Other reasons adduced are: maintenance of feminine hygiene,<sup>42</sup> pursuit of aesthetics,<sup>43</sup> enhancement of fertility, preservation of virginity, and prevention of promiscuity.

It is noteworthy that the cultural practice of FGM is on the decrease with the concerted efforts of the government and non-governmental organizations.

### *A. Rape and Defilement*

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40 H. Lawrence, *Excising a Harmful Tradition*, 1992 GUARDIAN, JUNE 11 at 9.

41 OLAYINKA KOSO-THOMAS, *THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION*, 9 (1987).

42 Myers, *supra* note 37, at 585.

43 O. Odujinrin & C. Akintoye & M. Oyediran, *A Study of Female Circumcision in Nigeria*, 8 WEST AFRICAN JOURNAL OF MEDICINE, 183, 183(1989).

Historically, the law of rape sought to give protection to a father's interest in the virginity of his daughter. In *People v. Liberta*, the court held that the purpose behind early rape laws was to protect the chastity of women and thus their property value for their father and husband.<sup>44</sup> Rape remains largely under-represented in the official statistics because of the hostility of members of the society and even the legal system towards the victim.

### *1. Rape and Culture*

Cultural inhibitions and taboos about sexual activities restrain victims from acknowledging personal victimization. There is the unjustified belief that sexual victimization is solicited for. Public knowledge about an incidence of rape on a female victim brings stigmatization, hostility and ostracizing.

Much importance is attached to virginity under the African culture, therefore, rape victims are considered unmarriedable or of less value in the context of being assessed for marriage. Public acknowledgement of rape incidence is highly discouraged by family members because of the selfish reason that it brings shame on the family and because in certain cultures, rites of purification may be performed for cleansing of the raped victim.

### *B. Law and Rape*

Legally, rape is a crime in all-legal systems in Africa.<sup>45</sup> However, under the Criminal Justice System, not much protection is given to the victim of rape especially during the prosecution of the case against the offender. An example is the application of evidentiary rule that favors defendants to the detriment of the victim. In Nigeria, Ghana and South Africa, cautionary rules are applied during the prosecution of rape cases, which require the court to take additional care in accepting the uncorroborated evidence of the victim. In South Africa, Zimbabwe, and Nigeria, the victims' prior sexual history may be admitted. The laws also allow evidence of past sexual activities of a victim of rape during prosecution. In Ghana, forceful resistance to rape must be shown by the prosecution to establish lack of consent to rape.<sup>46</sup>

In addition the victim, as the complainant and prosecutor, must give evidence while the accused is not compelled to do so as well. The evidence of the victim in most cases is given in public. In South Africa, a regional legal model is found where a sexual offence court was

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<sup>44</sup> *People v. Liberta*, 64 N.Y.2d 154 (N.Y. 1984).

<sup>45</sup> Criminal Code sect. 357 (Nigeria); Penal Code sect. 39 & 282(1)b (Kenya); Penal Code sect. 139 (Kenya); Penal Code art. 589 (Ethiopia); Criminal Code sect. 2a (Ghana).

<sup>46</sup> Women of the World: Laws and Policies Affecting their Reproductive Lives, in THE CENTER FOR REPRODUCTIVE LAW POLICY (Anglophone Africa ed., XXX).

established in 1992. It addresses the problem of a criminal justice systems' hostility to rape victims and provides specially trained prosecutors for rape cases. It also provides separate waiting rooms for the victims and the accused and provides for the presence of trained rape specialists during interrogation.

According to Oloruntimehin, the embarrassing position in which a sexually assaulted victim is put and the social stigma may be part of the reasons why only one in about twenty cases of sexual assaults is reported.<sup>47</sup> Another legal issue in rape cases that affects the adolescent girl is the need for corroboration of the evidence of the victim. This is not a legal requirement in all countries.<sup>48</sup> In Nigeria, the need for corroboration is a rule of practice and not a rule of law. Chief Judge Ademola of Western Nigeria, said:

"It is not a rule of law that in sexual offences, an accused person should not be convicted on the uncorroborated evidence of the prosecutrix, but the proper direction is that it is not safe to convict on the uncorroborated evidence of the prosecutrix but that the jury may, having paying attention to the warning, nevertheless convict if they are satisfied of the truth of the evidence."<sup>49</sup>

It is unfortunate that with the high rate of child marriage in Africa, marital rape is not recognized as a crime in most African legal systems. In Nigeria and Ghana, rape is not recognized as a crime, but South Africa does recognize it as such.<sup>50</sup> In Kenya, there has been controversy as to whether marital rape is recognized under the Kenyan Penal Code.<sup>51</sup> It is, however, clear from Section 145 (2) of the Kenya Penal Code that an accused has a defense if he had reason to believe that a girl under the age of fourteen is his wife. With these cultural and legal approaches to cases of rape in Africa countries, the result is the low reporting of rapes. Victims adduce several reasons some of which are listed below for the low reporting of rape: stigmatization, hostility, shame on the family, being ostracized, becoming unmarriageable in the society, and inadequate legal protection.

### C. Prostitution

Many African countries have a large number of adolescents living and surviving on the street as prostitutes. This situation is contrary to known cultural values where young people are under the protection of

47 O. Oloruntimehin, *Women in Crime: A Sociological Perspective*, in THE SYMPOSIUM ORGANIZED BY WOMEN IN UNIFORM, 8 (Lagos, Nigeria ed. 1992).

48 GREOFF FELTOE, GUIDE TO THE CRIMINAL LAW OF ZIMBABWE 120 (1989).

49 *General of Police v. Summola*, [1957] Western Region of Nigeria Law Report. 23 (W. Nigeria).

50 Prevention of Family Violence Act, No. 133 (1993) (S. Africa).

51 DAILY NATION (1998).

their parents, extended family members and the community as a whole.<sup>52</sup> In many of these African countries, the right to life of the adolescent is being flagrantly abused and cultural values have broken down resulting in the proliferation of prostitutes.

### *1. Culture and Prostitution*

Culturally, morality in African societies demand premarital virginity.<sup>53</sup> According to Busia, prostitution is regarded as disgraceful, frowned upon and not condoned.<sup>54</sup> So serious was the stand against prostitution that stern measures were taken against young girls involved in the practice. According to Little, certain clans bar prostitutes from attending clan functions.<sup>55</sup> In many other cultures, prostitution is an anathema and the prostitute carries out certain rites of purification so that disability of prostitution is removed formally before the prostitute is allowed back in the community.<sup>56</sup> So much importance is attached to the virginity of a young girl that parents exercise control over their daughters. However, this cultural attitude is disappearing and, in recent times, premarital sex is common and even encouraged for economic benefits. The practice of parents and guardians encouraging and offering their young girls has not only been a matter of concern and embarrassment for the state government, but a cry for help by the paramount traditional ruler has been made soliciting international assistance from the Embassies of countries where the young adolescent girls are mostly found.

### *2. Law and Prostitution*

Prostitution per se is not a crime. It is only a crime in relation to persons who assist, induce, encourage, trade, aid and or abet prostitution.<sup>57</sup> Various studies have revealed that an important factor for the high rate of prostitution is the economic factor.<sup>58</sup> The underlying factor that continues to plague most African countries is poverty.

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52 O. Bamgbose, *Teenage Prostitution and the Future of Female Adolescence in Nigeria*, in THE 7TH BIENNIAL CONFERENCE OF THE EUROPEAN ASSOCIATION FOR RESEARCH ON ADOLESCENCE JENA, GERMANY MAY 31-JUNE 4 (2000).

53 B. Feyisetan & A. R. Pebley, *Premarital Sexuality in Urban Nigeria*, STUDIES IN FAMILY PLANNING, 20 (6) 1989, at 343-354.

54 K. A. Busia, *Social Survey of Sekondi Takorando*, GOVERNMENT PRINTER, 1950, at 107-108.

55 KENNETH LITTLE, *AFRICAN WOMEN IN TOWNS: AN ASPECT OF AFRICA'S SOCIAL REVOLUTION*, 73 (1974).

56 *Id.*

57 Penal Code sect. 275, 276, 278, 281; Criminal Code sect. 223, 224.

58 K. DAVIS, *PROSTITUTION AND CONTEMPORARY SOCIAL PROBLEMS*, (R. Merton et. al. eds., Brace Jovanovich Inc. 1991).



According to Orubuloye, many adolescents who get involved in prostitution see it as a coping strategy to improve family income, provide for their basic needs and to pay for school.<sup>59</sup> Other reasons adduced include unemployment, rapid urbanization, the quest for material things, changing social values, peer influence, and forced or child marriage. In Nigeria, in particular, the Federal Government has taken this problem seriously and has set up different committees to address the issue.

### 3. *Incest*

Incest is considered taboo and legally wrong under many African cultures. Most cultures forbid sexual relationship or marriage between persons who are related by blood irrespective of how distanced the blood relationship may be. The involvement of young girls in incestuous relations with fathers, brothers and uncles has been shown to be an extremely disturbing and traumatic experience. This is because such exploitation takes place within the family unit and may go unreported for several years.

### 4. *Culture and Incest*

The strong cultural belief in the taboo associated with incest, the selfish reason of shame on the family, the fear of breaking a family unit through the process of prosecution and probable imprisonment are some of the reasons why incest continues to be perpetuated on young girls in many African cultures.

The patriarchal culture where the man of the house is Lord over the family and his word amounts to law within the house encourages incest. Culturally, young girls in the house dare not disobey the fathers or uncles wishes. Such young girls are completely subjugated to their will, and forced by circumstances to submit to the wills and desires of such relatives even at their own expense and revulsion which allows the repulsive practice to continue. The sexual molestation of a young girl by her own father, brother or uncle with the overbearing moral and cultural influence should take the place of violence and offer of resistance required in rape cases committed by an accused having no blood relationship.

### 5. *Law and Incest*

Not all legal systems specifically prohibit incest as a crime. In Kenya, incest is a crime against morals and not against persons.<sup>60</sup> This exposes the underlying philosophy that the provision is more about

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59 I. O. ORUBULOYE & J.C. CALDWELL & P. CALDWELL, COMMERCIAL SEX WORKERS IN NIGERIA: THE SHADOW OF AIDS IN SEXUAL NETWORKING AND AIDS IN SUB-SAHARAN AFRICA, (J. C. Caldwell & Australian National Universities eds.) (1994).

60 Penal Code sect. 166 (Kenya).

sexually controlling females than protecting them from sexual assaults. The punishment is five years.

In Nigeria, incest is prohibited both under civil law and criminal law. Under civil law, incestuous relationships are forbidden by prohibiting marriages between persons of certain consanguinity and affinity.<sup>61</sup> Under the Criminal law, incest is forbidden by prohibiting sexual relationships between certain family members. Southern Nigeria's Criminal Code, which is applicable, does not prohibit incest as a crime. However, in the Eastern State of Nigeria, incest is an offence.<sup>62</sup> In Nigeria, the Penal Code that is applicable to the States in the North prohibits incest as a crime and the punishment is seven years.<sup>63</sup>

The heinous nature of Incest was well captured by a Supreme Court decision as follows:

"The factor of moral ascendancy of the parent over the child should be given greater weight by the court and considered doubly repulsive where the outrage is perpetuated on ones own flesh and blood for the culprit is reduced to lower than the lowly animal. Such a father is unfettered by social inhibition when it mates with its own kin. A man who rapes his daughter violates not only her purity and her trust but also the mores of his society, which he scornfully defied. By inflicting his animal greed on her in a disgusting coercion of incestuous lust, he forfeits all respect as a human being."<sup>64</sup>

In the Philippines, incest carries a death sentence.<sup>65</sup> It is advocated that all African countries should adopt the position of the Philippines to address the plight of young girls. However, reasons for the lack of reporting of incestuous acts include: the strong belief in the taboo associated with incest, the selfish reason by the family shame, the fear of prosecution and probable imprisonment, and the patriarchal African culture that encourages total obedience by the adolescent girl.

## V. Sexual Matters in Africa: The Journey So Far

There is no doubt that there are positive changes in the way sexual matters are addressed both culturally and legally in Africa in recent times. Society generally, and women in particular, are responding to changes around the world and familiar relationship is losing hold. The journey however is still far. The practice is not a recent thing but it dates

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61 Matrimonial Causes Act, §3 (Nigeria 1970).

62 Cap 110 (1963).

63 Section 309, Cap 3 (1990).

64 *People v. Ramos*, 1 b S.C.R.A. 400, (1998).

65 *Preserving their Purity: Fighting against the Sexual Exploitation of Children*, The Human Rights Agenda, Official monthly Bulletin of the Institute of Human Rights, UNIVERSITY OF THE PHILIPPINES LAW CENTER, Vol. No. 3, Issue No. 10, October 1998.

back to the beginning of 100AD when Christian missionaries tried to eradicate the cultural practice of FGM. The strategies adopted failed because of strong social pressure. In the early sixties, the awareness campaigns that the government of the first Republic of Burkina-Faso undertook were largely ineffective because of the reluctance to do away with the cultural practice.

With the discussions above, it is clear that changing the attitude of people to a culture is still a difficult process because of the entrenched socio-cultural beliefs. It is noteworthy that some of the reasons given for the continuance of the cultural practices are no longer valid. Therefore, the following African proverb is applicable, “[a]s [the] condition[s] governing life change and particularly as old ailment yields to improved prevention and treatment, certain traditions become unnecessary.” There are multifaceted efforts to protect the adolescent girl from the effects of culture and the law in issues concerning her sexuality. Some of these are discussed below and a few recommendations made.

#### *A. Use of Legislations*

The changing or enacting of laws does not necessarily mean the changing of the mind. The enactment of a law can only be effective where awareness programs precede it.

#### *B. International Treaties*

Most of the countries discussed in this paper have ratified numerous major international human right treaties, which are relevant to the protection of the rights of the adolescent girl. The international treaties include: The Convention on the Rights of the Child 1989, and The Convention on the Elimination of All Forms of Discrimination Against Women 1979. All the above treaties contain provisions that prohibit children from being subjected to torture or cruel inhibition or degrading treatment or requires the government to take appropriate measures to eliminate harmful social and cultural practices. By their prescriptive and injunctive character, both domestic and international laws have the potential to proscribe harmful cultures.

#### *C. National Laws*

Given that a nation’s constitution is the highest source of domestic law, the Constitutions of most African countries contain provisions explicitly prohibiting practices that are dehumanizing or injurious to the physical well being of a person. Only a few African countries have specific legislations against these sexual practices.

*1. Motivation in education for female education brings enlightenment and knowledge.*

With education, some females in the present generation have refused to tow the line of the family lineage and refused to indulge in these harmful cultural practices. In Nigeria, the Bornu State Government passed an Edict banning the withdrawal of young girls from schools for purposes of marriage. Defaulting parents and guardians become amenable to prosecution. This action is a step in the right direction, though it is practically difficult to enforce.

### *2. Awareness Campaigns*

All segments of the society must be informed of the dangers arising from these sexual practices. Dramas and concerts can be used to spread information against the evils of these practices. This can be done through films, dramas particularly in local dialect. Awareness campaigns with posters, leaflets and press dossiers are also advocated. Religious organizations can be of great assistance in the awareness campaign. Leaders of these organizations should be trained and encouraged to speak out about the practices that endanger the life of the female adolescent at every opportunity they have. Law enforcement agents have to be properly trained on this issue. There have been problems in the past with them in that they do not have a proper understanding of the magnitude of the harm being done to the society at large through some legal and cultural practices relating to sexual matters. The proper training of such personnel including recruiting of female police officers to handle sensitive cases of sexual assaults will go along way in the detection of offenders who hitherto had not been reported and brought to book.

### *3. Community Conscientisation and Involvement of Traditional Leaders*

For awareness, programs at the grassroots level should operate with the full support and cooperation of the community leaders. In traditional societies, the voice of the leader is respected. Being the custodians of culture, they must be educated and informed about the dynamic nature of culture, the preservation of traditions that are positive and the examination of practices and beliefs passed down through several generations in the light of contemporary values and knowledge in order to ascertain whether the culture deserves to be perpetuated.

### *D. Active Involvement of Non-governmental Organizations (NGO'S)*

NGO'S have played an important part.

## **CONCLUSION**

Within a dynamic notion of culture, the issue of the protection of the sexuality of the adolescent girl is essential to cultural survival and continuity. The preservation of cultural identity and promotion of social and political cohesion are legitimate objectives. However, the right to

belong, to contribute and to participate in ones community, as a full member should not be conditioned on the price of human suffering. This practice put young girls in the unjust position of having to jeopardize either their right to health and bodily integrity or the esteemed privilege of social acceptance. Their full right to full social integration should not be conditioned on the waiver of their constitutional guaranteed right to life, health and dignity of their person.

There are many problems within our culture that adolescent girls have to contend with. It has been argued that the morality and personality of an individual are shaped by the culture and the history of a given society. It is true that adolescent girls have rights and culture should not be used as an excuse for human rights abuses. It is also a fact that cultural practices are subject to Universal Human Rights Limitation. What is needed now is for the society at large to take note of the cry of the adolescent girl. Each sector has a duty to perform and a part to play. The pooling of efforts is the solution to her cry.

The government must manifest an even stronger political will, the non-governmental agencies must intensify their vigilance and campaigns against the acts discussed above must continue for the populace must be educated and informed about the continuous cry for help of the adolescent girl.

The focus of attention must shift from mainly punitive steps against the offender to preventive measures for the adolescent girl. No amount of penalty to the perpetrators can hope to repair the damages caused to these young ones. Reparation is not the answer to their cry because their purity must remain unscathed and preserved for them to enjoy their adolescent life now and their adult life in the future.