UNIVERSITY OF IBADAN

# JOURNAL of PRIVATE AND BUSINESS LAW



JOURNAL OF PRIVATE & BUSINESS LAW

(2002) 2 J.P.B.L.

University of Ibadan

# Journal of Private and Business Law

ISBN 1595-2495



2002

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Journal of Private and Business Law
Faculty of Law
University of Ibadan, Ibadan.

*Printed by:*
**MICDEK Printers, Lagos.**
Tel: 0803 337 7474

Volume 2, 2002

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# A RELECTION ON THE PAST, PRESENT AND FUTURE OF RAPE LAW

*BY*

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Rape is an offence that poses enormous problem in all societies. The offence is without doubt a serious one; highly reprehensible both in the moral sense and its contempt for the personal integrity and autonomy of the female victim. Rape is a violent crime that may involve force or intimidation and may be accompanied with physical injury or inflict mental and psychological damage. It is an offence that is rarely committed accidentally or unpremeditated.

Many centuries before Christ, biblical records show that rape was treated as an offence against an unmarried woman's father, rather than on the person of the woman. The punishment was to pay the father fifty shekels (an equivalent of one and a quarter pound of silver or eighty-eight dollars) and the offender in addition was expected to marry the girl[1].

Rape than any other crime reflects the imprint of evolving social values, practices and understanding. In recent times, reform of rape laws has been a key item on the feminist agenda across Europe and most states in the United States of America had considered or passed some form of rape reform legislation.

In the United States, the reform started in the late 1960 and the early 1970's. The main goals of the reformers were to re-define the offence of rape and replace the single crime known as rape with a series of graded offences. This was to be done by defining the presence or absence of aggravating conditions; changing the consent standard by eliminating the requirement that the victim should physically resist the attacker; eliminating the requirement that the victims testimony be corroborated, restricting the type of evidence admissible about the victims prior sexual conduct, and making the offence more gender neutral.

The history of the law of rape in the early centuries reflected the social attitude towards sexual behaviour. Traditionally, the offence of rape is protective in purpose. Before the latter part of the nineteenth century, rape statutes applied only to the conduct of males who forcibly rape females. This was largely because the purpose behind proscriptions was to protect the chastity of women and thus their property value to their fathers, husbands or brothers.

At the time, females were not considered as beings that have inherent rights but the chattel of a dominant male in her life. This was the position at common law and was reflected in the law of rape that was codified. This was the position of the law in England until the nineteenth century.

The penal laws in Nigeria contained in the Criminal Code and Penal Code applicable in Southern and Northern Nigeria respectively, greatly reflect the common law position in England. The rape laws in the United States before the recent reforms were greatly influenced by the common law in England because of the effect of the early British settlers in what is now known as the United States of America.

The change in social attitude since the nineteenth century necessitated the fundamental reforms in the law relating to rape. This was in addition to the need to deliver coherent and clear protection from abuse and exploitation and the need to achieve a just and tolerant society in accordance with the various Charters on Human Rights.

The reforms going on in the law of rape is wide spread in Europe and in the United States of America. In Africa, the reforms in this area of criminal law are not so significant with Nigeria not witnessing any reform in the law of rape for the past four decades.

This paper highlights the reforms that has been witnessed in the law of rape in England and the United States and suggests areas in which the law of rape in Nigeria can be improved.

## Traditional Rape Laws versus Recent Development in the Law of Rape

The evolving social values are reflected in the changes and reform in the law of rape. At early common law and for many centuries thereafter, the definition of rape reflected the social attitude; rape was defined as carnal knowledge of a woman forcibly and against her will by a man. However recent developments and reforms in the law of rape show that the law is broader, the emphasis on the element of force is less rigid and the method of prosecution more flexible. Reforms in the law of rape are discussed below:

### The word Rape

At early common law and for many centuries, rape was defined as the carnal knowledge of a woman forcibly and against her will[2]. The term rape has been used to describe this offence and in many jurisdictions of the world, this term has remained.

[1] Deuteronomy 22:28-29 - New King James Version.
[2] 4 William Blackstone commentaries 210 1769.



In England, the term rape has been used repeatedly under common law and in subsequent legislations which reformed the law of rape under the Sexual Offences Act of 1956 as substituted by section 142 of the Criminal Justice and Public Order Act 1994, the term rape has continually described the offence of sexual intercourse by a man with a person whether vaginal or anal without consent. In the United States of America, the term rape is still used in some states while others have changed the term from rape to sexual assault[3]. In some jurisdictions, the offence is now classified as statutory rape as against common law rape[4]. Statutory rape involves sexual intercourse with an underage person as opposed to common law rape which is sexual intercourse with a female adult. Statutory rape derives it name from the fact that legislation as opposed to the judiciary which developed the common law, stepped in to enact statutes to create a new type of offence. The defining feature of statutory rape is the chronological age of the victim. In some other jurisdictions in the United States, rape is graded with different punishment according to the seriousness. Under the American Law, Institute Model Penal Code, rape ordinarily is either a first or second-degree felony depending on the seriousness. However there are other offences created where there is sexual intercourse. For example, the Maryland code, defines second degree rape as when a person engages in vaginal intercourse with another person by force or threat of force against the will and without the consent of another person or where the person is under fourteen years of age and the person performing the act is at least four years older than the victim[5].

In New Jersey, the offence generally known as rape in other jurisdictions is referred to as sexual assault but graded according to severity. Hence, there is the offence known as aggravated sexual offence which involves sexual penetration under a variety of very serious circumstances such as when the victim is less than 13 years of age or the assault entails the use of force and the infliction of severe personal injury. In the State of Wisconsin, different degrees of sexual assaults replaced the formal offence of rape with graded punishment according to the seriousness.[6] In some other states in the United States of America, the term rape was not replaced but the elements of the offence were changed to become more gender neutral.

In Nigeria, the term rape is used both in the Criminal and Penal Codes[7]. In the Criminal Code, the term carnal knowledge is used to define the offence of rape while in the Penal Code the words sexual intercourse is used.

[3] Section 213: (1) of the American Law Institute Model Penal Code. The term rape is still used.
[4] Brody D. C, Acker J. R, Logan W. A *Criminal Law* Aspen Publication Gaithersburg 2001
[5] Maryland Code 1992. Section 463(a)
[6] The Law of Wisconsin, WI ST 940.225
[7] Section 357 Criminal Code Act Cap 77 Laws of the Federation of Nigeria 1990; see also section 282 Penal Code.

**Carnal knowledge**

This is the traditional term for sexual intercourse. For many centuries and at early common law, rape was defined as the carnal knowledge of a woman forcibly and against her will[8]. In England, the term carnal knowledge has been substituted with the word sexual intercourse[9].

In the United States of America, the common law term was used for many centuries until recent changes in some jurisdiction[10]. The term is still used in some states while other states have discarded the term for such terms as sexual or vaginal intercourse[11].

In New Jersey, the statutory language for the rape statute of 1978 is almost identical to the state's first rape statute in 1796 and the term "carnal knowledge" is still used[12].

Under the American Law Institute Model Penal Code, the term sexual intercourse has replaced carnal knowledge in the definition of rape[13].

In Nigeria, the term carnal knowledge is still used to define the offence of rape under the Criminal Code[14]. The term is defined as being complete upon penetration

Under the Penal Code in Northern Nigeria, the term sexual intercourse is used to define rape and it is explained as being complete upon mere penetration.[15]

**The Element of Penetration**

Penetration is an element of carnal knowledge[16] or sexual intercourse. It is described under common law as when the male organ reaches the vagina lip known in medical terms as the "labia menora". The common law description is still the position in Nigeria for the element of penetration in rape offences.

In England, before the amendment of the 1956 Act, the offence of rape was limited to vagina intercourse which is complete on penetration as described under common law. Recent developments in the law of rape show that the actus reus of rape is committed if the sexual intercourse is vaginal or anal.This makes the common law definition obsolete. In England, reforms and discussions for further reforms are recurring issues. In recent times, it was

[8] 4 William Blackstone Commentaries 210 1769
[9] Section 1 Sexual 142 Criminal Justice and Public Order Act 1994
[10] In 1996, the first rape law in New Jersey provided in [part "That any person who shall have carnal knowledge of a woman forcibly against her will.....
[11] Section 463(a) Maryland Code 1992
[12] Brody, D.C et al Supra p. 431
[13] See Section 213.1(1)
[14] Section 375
[15] Section 282
[16] Section 6 Criminal; see also section 282 Penal Code



recommended that rape should be extended to include the penetration of the mouth by the penis[17].

In the United States of America, sexual penetration is an element of sexual intercourse[18]. Traditionally, penetration was defined as penis – vaginal penetration only. Today however, the traditional definition is obsolete, as the law does not require a rape victim to be a woman only with the recognition of male rape. Moreover, the law

recognizes that objects other than the male penis can be used to commit rape. Penetration under the jurisdiction however slight is sufficient.

Under the Nigerian law, penetration in rape cases still follows the traditional definition of penis – vaginal connection. There are other offences that punish acts of sexual intercourse which is not according to the traditional definition. An example of such an offence is known as unnatural offences against the order of nature[19].

**Victims of Rape**

Rape is traditionally a sex-based offence. Under common law rape, victims are only of the female sex while the offenders are males. This is logical because the traditional definition of rape was the use of the male organ to penetrate the female vagina. This common law position remains the law in Nigeria. Under the Criminal Code, the victim must be a "woman" or a "girl"[20] and the same emphasis is found in the Penal Code[21].

In England, the law regarding the victims of rape has changed from the traditional common law position. The law provides that

> *"A man commits rape if he has sexual intercourse with a* ***person*** *(emphasis mine) whether vaginal or anal"*[22].
> *The use of the word "person" enlarges the scope of persons who can be victims of rape to include the male gender. Moreover this development extends to the definition of rape to include vaginal and anal penetration making it possible for both males and females to be victims of rape.*

In the United States, there is a modification of the law of rape in this area which hitherto had always protected the females. In nearly all states, rape is now a gender-neutral offence in relation to the victims.

[17] Setting the Boundaries: Reforming the Law on Sex Offences (2000), Home Office. Discussed by Lacey 'Beset by Boundaries: The Home Office Review of Sex Offences (2001) Crim LR 3
[18] New Jersey Code of Criminal Justice 2C: 14-2C(i) defines sexual Assault as the Commission of Sexual Penetration with another person
[19] Section 284 Penal Code; Section 7 Criminal Code
[20] Section 357
[21] Section 282
[22] Section 1 Sexual Offences Act

**The Element of Consent**

Rape is not the only offence which requires non-consent as an element of proof. However, no other crime has defined non-consent as is required in rape cases. Lack of consent is a distinct element of the crime of rape, this element if another significant area that has witnessed changes in the law of rape. It has for many centuries been viewed as a key element in the definition of rape. This requirement of rape is not defined in the statute but it is afforded its judicial meaning as applied in cases involving common law rape. Under common law proof of lack of consent, the victim was expected to show that she resisted to her utmost, a requirement often entailing actual physical resistance to the sexual advance. Mere verbal objection from the victim under the common law rule did not suffice. In 1889, the Supreme Court of Nebraska reversed a conviction and held that voluntary submission by a woman while she has the power to resist, no matter how reluctantly yield removes from the act, essential element of the crime of rape[23]. In 1906, a Wisconsin court defined non-consent as utmost resistance[24]. The court held that the victim had not adequately demonstrated her non consent not only must there be entire absence of mental consent or absent but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist penetration of her person and this must be shown to resist until the otherwise is consummated. In this case, the act a stated that the girl only said, "Let me go"; her screams in articulate and that absence of trousers and form clothing was incredible. The reasoning for this position was based on the fact that a woman is expected to be jealous of her chastity and should shudder at the bare thought of dishonor and is expected to resist to her utmost.

This position under the common law rule show the importance and rigidity attached to the requirement of lack of consent. The resistance element expected from the victim raises a presumption of distrust of women victims and general suspicion of women victims of rape.

The views expressed by the courts under the common law rule could be explained for that era, considering the circumstances and the society. The judges then were all men because women were not allowed to practice law. Another reason was the importance attached to female chastity and virginity and the purported view that any woman at that period will resist to the utmost any attempt to violate her person.

However, these show contradictions in the purported views of the members of the society at the time. According to Estrich, a system of law

[23] People V Dohring 59 NY 374 1874

[24] Brown V State 127 Wis 199 (1906); See also State V Burgdorf 53 Mo 65, 67 1867 1873. The Missouri Supreme Court held that passive policy or a mere half way referring to the resistance of the victim would not do.



which at that time treated women in matters ranging from ownership of property and in relating to participation in the society as passive and powerless, nonetheless demand that in matters of sex a woman should now be strong aggressive and powerful to resist violation on her person[25]. The case of Muller V Oregon[26] illustrates the position of women in the early nineteenth century. The court upheld the Oregon law restricting hours of work for women by invoking scientific and sociological materials linking female biology and female dependence.

In another case, the court upheld a law that women who were not the wives or daughters of tavern owners should not be permitted to work as bartenders[27].

> *The societal bias of women in the pre-nineteenth century was so deeply entrenched and widespread that it was reflected in judicial pronouncement. In 1873, the Supreme Court of Illinois upheld Illinois authority to deny the admission to the Bar of a woman qualified in all respects except sex. One of the justices in the case went as far as stating that*
>
> *"It was divine law of the creator that a woman should not practice law"*[28]

This attitude has however changed and discrimination based on sex is unconstitutional[29].

In recent decades, the rigidity attached to the requirement of lack of consent and the utmost resistance element has been relaxed.

In England, the requirement of lack of consent is still an essential feature of the actus reus of rape but the absence of consent does not have to be demonstrated by offering resistance or by communication it to the accused[30].

In the United States, lack of consent is still an essential requirement in proof of rape. However, there have been noticeable changes in the resistance element. This is not to say that chastity is not valuable but the claim to it is not so rigid. This has being attributed to the response to claims that physical resistance can serve to worsen the injuries suffered by the victims.

In the United States, the resistance requirement apart from being discriminative as highlighted above, have been found to be selective. The race to which the defendant belongs may affect the degree of resistance expected from the victim. A white female victim may not show as much resistance when

[25] Estrich Susan *Real Rape* ( Cambridge, Mass: Harvard University Press 1987)pg 31

[26] 208 US 412 1908

[27] Goesart V Clearly 335 US 464 1948

[28] Bradwell V Illinois 83 US (16 Wall) 130 (1873)

[29] Reid V Reid 404 US 71 (1971); See also Section – 1999 Constitution of the Federal Republic of Nigeria (Promulgation)

[30] R V Malone 1998 2 C A R 447; see also R V Howard 1965 3 A E R 684, 1966 1 WLR 13; R V Lang 1975 62 CAR 50

attacked by a black man as would be expected of a black female victim attacked by a black male defendant. With the relaxation of the resistance requirement, this racial discrimination is not so prominent.

There arise problems in the issue of defining the concept of consent. The problem has arisen in explaining the difference between real consent and mere submission and the court in Olugboja's case found out that the dividing line may be difficult to draw[31]. The court therefore decided to leave the matter to the jury. In the latter case of McAllister where the approach in Olugboja was applied, the flaws in the principle in Olugboja's case were pointed out[32].

This resulted in a recommendation for reform in setting the Boundaries that the concept of consent in rape should be defined as free agreement and that a non-exhaustive list of examples when free agreement is not present should be set out. Such areas highlighted include submission out of force, threat, fear of serious harm, or where victim is unconscious or lacks understanding of the purpose of the act, or is mistaken as to identity of the accused or the nature of the act.

In Nigeria, the requirement of consent is essential. However, there is no great emphasis on the resistance element as it operates in England and the United States. The courts have stated that the consent must be real and consent as a result of force threat or fear vitiates consent[33].

The Penal Code also states that a consent given by a person under fourteen years of age is not consent[34].

**Marital Rape Exception**

Another aspect of the evolving history of the law of rape involves what is known as marital rape exception until recently, rape within marriage was legal. This rule dates back to the ancient common law view that the legal institution of marriage barred the state from prosecuting a husband for rape even if intercourse was accomplished against the consent of the wife.

Since 1799, Hume expressed the view that a husband is immuned from prosecution of his wife. Sir Matthew Hales, a seventeenth century English jurist wrote a treatise on English law and this invariable became authority for the marital rape exception under common law. In discussing the crime of rape and possible defenses he said that the husband cannot be guilty of rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself for his kind into her husband which

31 1982 Q B 320
32 1996 10 Archibold News 2 CA
33 Section 39 Penal Code
34 Id



she cannot retract[35]. Though, there was no authority cited by Hale, this extra-judicial declaration made over 300 years ago became a binding rule under common law and cited as rule of law. At the time Hale wrote the treatise matrimonial vows were not retractable neither was the conjugal rights. Since the times of Hale, the attitude towards permanency of marriage have changed and it has been argued that the rules formulated under vastly different conditions need not prevail when conditions change[36].

Since 1980's, the courts have gradually whittled down the effect of this rule. In two Scottish cases, in 1983 and 1985 respectively, the courts convicted the husbands for rape of the wives[37]. In 1989, the courts further whittled down the effect of the rule by holding that the husband while living with the wife could be guilty of rape[38]. The pronouncement of Lord Justice – General Emslie is of particular relevance. He stated that

*"The fiction of implied consent had no useful purpose to serve today in the law of rape in Scotland"*

In 1991, the English law followed suit. Before 1991, the Sexual Offences Act 1956 defined rape as unlawful sexual intercourse. The term unlawful was interpreted to mean extra-marital, therefore exempting sexual intercourse during marriage from rape. In the case of R v R the House of Lords, held that in the light of the position of the modern society, the irrebutable presumption should be abandoned and that consequently a husband could be convicted of rape if he had intercourse with his wife without her consent just as could any man who had intercourse with a woman without her consent[39]. By virtue of the substituted section 1 of the Sexual Offence Act 1956, the word unlawful has been deleted[40].

In the United States of America, by the mid 1980, many states came to a rethink of the rational of marital rape exception. The case of State V Smith in New Jersey was one of the decisions to re-evaluate legal and social tenets undermining the marital rape exception[41]. The New Jersey Code expressly excludes marriage to the victim as a defence against prosecution of sexual crimes. Pashman, J. in State V Smith further stated that marital rape exception is offensive to the ideals of personal liberty and the rule is not sound.

In America, the marital rape exception is largely but not totally

35 1 Hale History of Pleas of Common p. 629
36 Pashman J. in State V Smith 426 A.2d 38 (NJ 1981)
37 HM Advocate V Duffy 1983 SLT 7, HM Advocate V Paxton 1985 SLT 96
38 Stallard V HM Advocate 1989 SLT 469
39 1991.2 AER 257
40 See also Section 142 (2a) Criminal Justice and Public Order Act 1994
41 Section 426 A. 2d 38 (New Jersey) 1981

abandoned. Idaho and South Carolina laws are examples of States where this rule has not totally been abolished[42].

In Nigeria, marital rape exception is still recognized. By virtue of section 6 of the Criminal Code, the term "Unlawful carnal knowledge" means that sexual intercourse within marriage is not included in the definition of rape.

In Northern Nigeria, the Penal Code clearly states "Sexual intercourse by a man with his own wife is not rape if she has attained to puberty[43].

## Age of Consent

The age of consent will be discussed with the age of criminal responsibility. The [44] age of criminal responsibility has generated a lot of arguments and some jurisdictions have reviewed this aspect of the law. Different legal systems have set ages below which a person cannot be criminally responsible for an offence. In England, the relevant age is ten years, in Scotland, eight years in the United States of America and in Nigeria it is seven years[45]. There are set ages below which male sexual potency is presumed impossible. Until 1993, when the Sexual Offences Act 1993 was passed in England, this irrebutable presumption applied to boys under the age of fourteen years. After the Act, the relevant age is now the age of criminal responsibility which is ten and in Scotland eight. In some other jurisdictions, it is lower.

The age of consent in relation to sexual offences varies from one jurisdiction to the other. In England, the age of consent is sixteen years. In Northern Ireland, a child below the age of seventeen years is incapable of giving valid consent in sexual offences while the age is lower in some European countries. In Spain and Malta, it is twelve years, in Slovia, Iceland and Italy, fourteen years and in Denmark and Sweden, fifteen years[46]. There are arguments for and against the set ages of consent. In England, the argument for the higher age compared to other jurisdiction is to protect the young against sexual abuse. Card however argues that a better method to protect the young against such abuse is to have specific offences created. An example of such an offence has been created in the Sexual "Offence known as Abuse of Trust.

## Punishment for Rape

This is an area that has undergone reforms over the centuries. Biblical examples which date back to several centuries ago show that an offender o

[42] Idaho Code Section 18-6107 (1999) See also The South Carolina Code 16 – 3658
[43] Section 282 (2) Penal Code
[44] Section 7 of the Criminal Code; Section 50 of the Penal Code states that a child above seven years (7 but below twelve (12) years who has not attained sufficient maturity of understanding sufficient maturity o understanding to judge the native and consequences of acts is not liable.
[45] Card, R 20 Supra p. 264
[46] Deuteronomy 22:25-29 New King James Version



rape was required to pay an amount of money to the father of the female victim and is expected to marry her in order not to put a societal stigma on her[47]. Another illustrative biblical example was the case of the defilement of a virgin girl which resulted in the revenge by her brothers on the family of the offender by eliminating them[48].

In the history of the punishment of rape, death penalty was a form of punishment that was common in many jurisdictions in Europe and America. In 1925, eighteen states in the United States, including the District of Columbia and the Federal Government authorized capital punishment for the rape of an adult female[49]. By 1970, the number had declined to sixteen states and the Federal government. After the case of Furman V Georgia, which invalidated most death penalty statutes, most states dropped the death penalty for rape[50]. Some states revised their statute in line with the Furman V Georgia mandate and revived death penalty for rape offences while other states completely dropped this form of punishment.

In recent decades, rape is still considered a very serious offence. In England, the punishment for rape is a custodial sentence for life unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justifies it not doing so[51].

[52] In the United States, there are still debates on whether the offence of rape should carry a death penalty. In 1977, the United States Supreme Court held that the imposition of a death sentence for the rape of an adult woman was grossly out of proportion to the severity of the crime and thus violated the Eighth Amendment to the United States Constitution as a cruel and unusual punishment[53]. The court stated

> "Rape without doubt deserves a serious punishment but in terms of moral depravity and of the injury to the person and to the public.....The murderer kills, the rapist if no more than that, does not. Life is over for the victim, of the murderer, for the rape victim, life is not over and normally not beyond repair. We have the abiding conviction that the death penalty which is unique in its severity and irrevocability is an excessive penalty for the rapist who as such does not take human life

The punishment for rape in America varies from State to State. In

Genesis 43:1-26 New King James Version
Brody, Acker and Logan (2001) Supra p.134
Furman V Georgia 408 U.S 238
Section 109 of the Power of Criminal Courts (sentencing) Act 2000
Coker V Georgia 433 US 584 1977
Section 463 Maryland Code
685 SO 2d 1063 at 1070 (LA 1996)

Maryland, rape is a felony punishable with a term of imprisonment for a term not exceeding twenty years[54]. In Wisconsin, the punishment for sexual assault (a term used for rape) varies according to the degree of seriousness. It ranges from imprisonment not exceeding sixty years for first-degree sexual assault to ten years or a fine of not more than ten thousand dollars.

In Georgia, the punishment for the rape of a child less than twelve years of age is death penalty. The Louisiana Supreme Court upheld the constitutionality of the death
sentence in the rape of children in State V Wilson[55] stating that because of the appalling nature of the crime, the severity of the harm inflicted upon the victim and the harm imposed on the society, this form of punishment is not an excessive penalty[56].

In Nigeria, the punishment for rape is a life sentence under the two codes. In addition, the Penal Code prescribes a fine[57].

**Reforms in the Procedural Law of Rape**

Procedurally, proof of the offence of rape under the criminal justice system has undergone reforms. Rape prosecution typically is a highly emotional proceeding that depends on difficult factual determination requiring the court to decide if sexual encounter occurred without consent.

Criminal procedure of rape cases has raised a great many controversial legal issues and poses challenge in the criminal justice system. This reflects age old, yet, revolving views of sexual behaviour. The reforms that are being witnessed and highlighted below are long overdue.

1. **Corroboration**

In proof of a rape offence, the laws of England, America and Nigeria require corroboration. The justification for this rule is that women lie. Stories of rape are frequently regarded as lies and fantasies. Though this preposition has never been tested, it appears that the courts adhere to the rule of corroboration and judgments based on the rule show the bias underlying the adherence to it. In the 1935 case of State V Wuff, the court held that "the corroboration rule is required because of the psychic complexes of errant young girls and women coming before the court which take the form of contriving false charges of sexual offence[58]. In the Arizona case of Power V State, the court also held that

[54] Tyler Linder "Towards a Redefinition of Rape" New Law Journal. June 24 1994
[55] Section 358 Criminal Code Act; Section 283 Penal Code
[56] 194 Minn 271 (1935)
[57] 43 Arizona 329 at 332 (1934)
[58] Glanville Williams "Corroboration in Sexual Cases Criminal Law Review 1962 October 662-671



*"If proof of opportunity to commit the crime were alone sufficient to sustain a conviction no man would be safe"*[59].

Glanville Williams claimed that corroboration is required because sexual cases are particularly subject to the danger of deliberate false charges resulting from sexual neurosis, fantasy jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed[60].

The requirement reflected the distrust by requiring other proof beyond the evidence of the victim. This creates problems for the victims of rape because it is an offense which is rarely done under public glare with witnesses. Corroborative evidence that has been required includes bruises, torn clothing and the state of the environment in which the offence took place. The effect of this is that in cases where the victim did not offer any resistance but did not consent to sexual intercourse, proof of rape was difficult.

In England and Scotland, there are fundamental reforms in this regard. The Criminal Justice Bill now contain clauses which would abolish the rule which require a judge to remind a jury that it is dangerous to convict on the uncorroborated evidence of the complainant in the rape trial in England and Wales.

In Nigeria, corroboration is required in the proof of rape.

**Cross-examination**

The ordeal of rape victims is exacerbated by their experiences of the criminal trial process. Under common law, trial judges are under a duty to restrain unnecessary protracted cross-examination[61]. They are to ensure that cross-examination is not conducted in an unfair or oppressive manner[62].

In Hobb V Tin Ling, Sankey LJ held that a trial judge should exercise discretion to prevent improper cross examination if questions relate to matters so remote as to have negligible impact on the credibility of the witness[63]. Many studies have recorded the
experiences of the complainant of rape. Victims' Support described the experiences of victims as patronizing, humiliating, and worse than the rape[64]. Complainants claimed they were asked intrusive and inappropriate questions about their private lives and the treatment of the court was traumatic. Lee's claims that the complainants are usually scrutinized during cross examination about their private lives, past lives and this centers on the life

[59] Kalia 1975 Criminal Law Review 181; Mechanical and General Invention co Ltd and Lehwess V Austic Motor Co Ltd 1935 AC 346
[60] Wongkam-Ming V R 1980 AC 247
[61] 1929 2 KB 1 at 51
[62] Victims Support Women, Rape and the Criminal Justice System 1996, London. Victims Support
[63] Lees S 1996 Carnal Knowledge Rape on Trial London: Harmish Hamilton
[64] Kalvin H and Zeisel H The American Jury 1996 Boston

style finances, habits, marital status and drinking habits[65]. Kalvin and Zeisel are of the opinion that there is no other justification for such an attitude except to discredit the victim in the eyes of the jury or judge rather than eliciting evidence[66]. Moreover, this has an overall effect on the performance of a victim as witness in court. Under the criminal justice system, great importance is attached to oral performance of witnesses in court. An angry upset and confused witness is less able to answer questions effectively. The essence of all these is to "break" or destroy the witness[67].

Defence counsels have also been accused and criticized as being unduly aggressive and intimidating. The fact that such information is usually of little value reaffirms the need for reforms.

In England, the Home office have put into operation plans to ease the court ordeal faced by complainants of rape[68]. The courts have realized that if trial judges exercised greater control or tighter rein over defending counsel, there would be fewer calls for the reform of rape trial[69].

There is no doubt that there is a limit to judicial intervention by a trial judge and there are dangers in overstepping the boundaries as it could lead to quashing of the conviction on the ground of material irregularity in the trial[70].

The trial judge must not be seen as advancing the case of one side[71]. The judge is an arbiter not an inquisitor. The judge must remain impartial though allowed to come to the aid of a party in distress[72].

There has been an attempt to reform this procedure. The Home Office recommended that the defendant should be denied the right to personally cross-examine complainants in cases of rape and serious sexual assault[73]. This recommendation has been criticized by the Criminal Bar Association and Bar Council in England. The Association claims that the move might infringe Article 6 of the European Convention on Human Rights. There are other attempts by the Bar Association in England and Wales to ensure fairness in the course of cross-examination. The Code of Conduct of the Bar in England and Wales lays down guidelines for the conduct of cross-examination. Under the guidelines, a practicing barrister is not allowed to make statements or ask questions

[65] K. Evan 1993. The Golden Rule of Advocacy 1993 London Blackstone p. 99
[66] Home Office Speaking up for Justice: Report of the Interdepartmental Working group on the Treatment of vulnerable or intimidated Witnesses in the Criminal Justice System. 1998. London. Home Office
[67] Ellison Louise "Cross examination in Rape Trial 1998 Criminal Law Review 669
[68] R V Sharp 1994 98 CAR 144
[69] R V Rabbit 1931 23 CAR 112
[70] P Devlin – The judge 1979 Oxford University Press p.62
[71] Home Office, Speaking Up for Justice: Report of the Interdepartmental Working group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (1998, London: Home Office)
[72] Part VI Para 610(e) General Council of the Bar of England and Wales Code of Conduct of the Bar of England and Wales 1997. London Bar Council
[73] Lees S 1996 supra



which are merely scandalous or intended or calculated only to insult or annoy either a witness or some other person[74]. However, according to Lee, the Code is usually breached[75]. There is also a move to re-examine the ethical boundaries between the defense counsel's duty to promote and protect fearlessly and by all proper lawful means his client's best interest and the rules laid down by the Code of Conduct[76].

The reform in this area of the prosecution of rape cases will go a long way in resolving the problem of low reportability in rape cases. The law has also protected victims as witnesses. There are moves to reform the treatment of victims of crimes generally. Basic standards for the treatment of victims are now contained in the Victims Charter[77].

In the United States of America, there is the emergence of the rape shield laws. These laws developed as a response to anachronistic and sexist views that a woman who had sexual relations in the past was more likely to be consenting to sexual relations with criminal defendant. This resulted at common law to the practice that rape victims could be examined about sexual behaviour with the defendant and other third parties. However in the 1970's, the courts began to rethink the permissibility of such evidence, the usefulness and effects. This led to the rape shield law which recognized that intrusion into the sexual life of the victims were not only prejudicial and embarrassing but also a practical barrier to many victims reporting sexual crimes. The rape shield law however does not protect the victim to the disadvantage of the defendant. The law recognizes that despite its potential embarrassing nature, there are occasions that such evidence will be allowed to preserve the right of the accused to fair trial[78]. In recent times, the rape shield laws are very much in use in many states.

## Anonymousity in Rape Cases

Estrich classifies rape as real rape and date or acquaintance rape. Real rape is one in which the victim and the offender are unknown to each other. Due to the anonymity of the offender, it was in the past years a task if not impossible for the law enforcement officers to identify and arrest the offender.

[74] M Blake, A Ashworth "Some Ethical Issues in prosecuting and Defending Criminal Cases 1998 CLR 16
[75] Home Office: The Victims Charter: A Statement of the Service standard for victims of Crime (1996), London. HMSO. The first victims charter of 1990 claimed to set out the rights and expectation of victims of crime to the effect that they deserve to be treated with both sympathy and respect and that any upset and hardship connected with the victims involvement with the criminal justice system should be minimized (Home Office Victims Charter: A statement of the Rights of Victims of Crime 1990 London HMSO
[76] Shockley V State 585 SW 2d 645 Tennessee Criminal Appeal 1978
[77] Parker, S. G. (2001) Establishing Victim Service within a Law Enforcement Agency: The Austic Experience National Criminal Justice Resource centre publication # 185334 (2001)
[78] Cole, G. G. and Christopher G. S. The American System of Criminal Justice Wadsworth 9th ed

However, with more advanced technology and scientific advancement such as the introduction of the Deoxyribonucleic Acid Test (DNA) test), the problems have eased though not solved in resolving the identity of the offender if and when he is apprehended.

### Law Enforcement and Investigation in Rape Cases

There have been complaints of law enforcement agents being insensitive in cases involving sexual offences. Many reasons have been adduced for this which includes the fact that there are many law enforcement agencies within a single jurisdiction with different philosophy, protocol, practice and expertise in handling different cases[79]. Other reasons given are the personal attitude in handling such cases.

In some jurisdiction, special detectives or specialized officers are being trained to deal with the special needs of victims of rape. For example, in New York, the Onondaga County various agencies have created an abused persons unit with officers who are special trained to handle different cases of abuse[80].

In addition, collaborative efforts between different agencies involved in handling of rape cases have been advocated[81]

[79] Eistein, SG and Barbara E. Smith 2000 "Victim-oriented Multi-disciplinary Responses to statutory Rape Training guide, Department of Justice Office for Victims of Crime 2000