



Gender Transformation & Empowerment

A Policy Brief

Resource Center 2/6/2013

HIDDEN TRUTH:

A BATTLE WITHIN INDIVIDUALS

ADVANCING THE SEXUAL OFFENCES BILL

A POLICY BRIEF

Background and Introduction

Sexual violence takes place within a variety of settings, including the home, the work place, schools and community. In many cases, it begins in childhood or adolescence.

Sexual violence has a significant negative impact on the health of the population. The potential productive and sexual health consequences are numerous, i.e. unwanted pregnancy, sexually transmitted infections (STIs), immunodeficiency virus/ acquired immunodeficiency syndrome (HIV/AIDs) and increased risk for adaptation of risky sexual behaviors (e.g. early and increased sexual involvement, and exposure to older and multiple partners). The mental health consequences of sexual violence can be just as serious and long lasting.

Estimating the prevalence of sexual abuse and violence in the developing world is difficult due to the limited amount of research done on the subject. Cultural norms against reporting abuse also makes it difficult to assess accurately.

In Uganda, the prevalence of sexual abuse incidences is a matter of concern to the government, women human rights activists, child advocacy groups and the population at large. In spite of this situation there are obstacles existing within the law and practice related to handling of sexual offences that are an obstacle to a victim's justice. It is therefore imperative that some of these barriers are eliminated through legislation first and foremost.

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Statistics on selected sexual offences

Sexual Offences	status	2011	2010	2009	2008	2007
Defilement	Defilement suspects taken to court	3,836	3,401	4,433	4,124	–
	Defilement suspects arrested and charged in court	269	–	–	–	–
	Defilement cases convicted	–	–	467	333	–
	Defilement cases awaiting trial	–	–	–	3,791	
Total defilement cases recorded		7,690	7,564	7,360	8,635	12,230
Rape	Rape suspects arrested and charged in court.	269	252	240	239	
	Rape suspects convicted			12	3	
	Rape suspects acquitted				3	
	Rape suspects discharged				11	
	Rape cases awaiting trial				222	
Total rape cases recorded		520	709	619	1,536	239
Indecent assault		347	274	550		
Incest		12	12	45	79	
Bestiality					115	
Unnatural offenses		86	86	72		

Source: *Annual Crime and Road Safety Report: (2008–2011)*

The Annual Crime and Road Safety Report, 2012 indicates that defilement cases increased by 4% from the previous year, 2011.

The constitution of Uganda guarantees the respect for human dignity and protection from inhuman treatment. Uganda is a signatory to several regional and international Human Rights protocols and treaties that castigate sexual abuse and call for the adaptation of best practices for the protection of victims and measures to apprehend perpetrators.

The legislature is thereby obligated to consider the protections contained in the Uganda Constitution by domesticating the rights guaranteed under the various regional and international protocols to which she is signatory.

The sexual offences Bill was designed to amend the provisions of various enactments on sexual offences including procedural and evidential requirements during the trial of sexual offences.

The proposals originated from a study on the laws relating to rape, defilement and other offences in the Bill (April, 2000) by the Uganda Law Reform Commission. This followed an apparent upsurge in sexual offences in spite of the stringent laws in place that demonstrated a failure of the laws to adequately prevent the commission of the offences. The sexual offences Bill is a private member's Bill that sets out to:

- Consolidate the laws to sexual offences,
- Combat sexual violence,
- Provide for the punishment for sexual offences, and
- Provide for protection of victims during trial of sexual offences.

Why do we need a new law on sexual offences?

Whereas the penal code amendment took into consideration some of the key issues on sexual offences, a number of crucial aspects remain to be enacted including; the redefinition of the offence of rape, provisions for Marital sexual Assault, redefinition of defilement for persons with a mental disability, and lowering the standard of proof In sexual offences involving children among others elaborated upon below.

Many forms of forced sex for both men and women occur in the various communities in Uganda. The draft Bill proposes to redefine rape to make it broader and thereby capture more instances of violence against women and men which are currently not taken care of in existing legislation.

Presently, section 117 of the penal code defines rape as:

“Unlawful carnal knowledge of a woman or girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or in case of a married woman, by personating her husband”

The phrase carnal knowledge refers to penetration of a penis into a woman's vagina. Thus if a man forcibly penetrates a woman's anus, or if he forcibly inserts any other object into her or anus or forces oral sex or cunnilingus such conduct does not amount to rape although it may constitute other less serious offences such as indecent assault or carnal knowledge against the order of nature under section 128 of the penal code. The Bill therefore;

1. Redefines a sexual act to include penetration of the vagina, mouth or anus, however slight, of any person by sexual organ or use of any object or organ on a sexual organ. It also proposes that rape should not be limited to an act of immorality but should constitute an act of violence against the person.
2. Takes into account instances of a female person who aids a male person in perpetrating the rape of another female as having committed rape herself under the general rule of principle offenders which covers not only a person who actually does the act which constitutes the offence, but also those who help that person in engaging in that unlawful act. The Bill proposes that rape is defined as forceful performance of sexual act by any one person on another person.
3. Proposes that a provision for the offence of marital sexual assault is made within the law. At present, sexual intercourse without a woman's consent can only be unlawful if it is outside marriage. The law exempts a husband from the offence of raping his wife as consent is presumed from the fact of marriage. The only exemption to this rule is in instances where a decreenisi has been pronounced in divorce proceedings.
4. Introduces aggravated circumstances in instances of rape; these include transmission of incurable disease, instances where the victim is an infant or a person of advanced age, the amount of force

used, and the extent of harm inflicted on the victim. It proposes that the offender should face a graver penalty of life imprisonment where these aggravated circumstances are occasioned on the victim.

5. Strengthens the provisions on abduction for purpose of sexual intercourse or marriage. The current law provides for elopement. It is stipulated that any person who elopes with a married woman or man or entices or causes a married woman or man to elope with him, commits an offence. The penalty is presently set at a maximum of six months imprisonment and six hundred shillings for the person who agrees to elope and twelve months and two hundred shillings for the person who entices another to elope.
6. Proposes to eliminate the cultural practice of abduction for marriage. Abduction literally means to illegally take away using force, deception, or kidnap. Under the law, abduction is an offence. Despite its illegal status, study findings indicate that in some communities in Uganda, the process of acquiring a wife begins with abduction of the girl by a future husband. Under such circumstances, the act of rape and defilement are not regarded as sexual offences.
7. Provides for defilement of persons who lack the mental capacity to consent to sexual acts. This is termed as defilement of idiots and imbeciles within the penal code Act. The pertinent issues that arose on the subject were the derogatory definitions of the offence, the lack of gender neutrality of the provisions, the lack of a definition for an “idiot” or imbecile and the inadequate penalty for those who defiled such persons.
8. Seeks to improve the procedures pertaining to the management and trial of sexual offences. One of the key challenges to the successful prosecution of any sexual offence is the stigma of reporting a sexual assault or rape for both women and men.
9. Key to management of this stigma is victim case handling. The requirement for proper victim care is crucial for successful prosecution and cuts across from the reporting to the trial stages. The ideal standard for victim support is to have both medical and legal services availed simultaneously.

According to the world Health organization guidelines for medico–legal care for victims of sexual violence;

“In some countries, the health and medico–legal components of the service are provided at different times, in different places and by different people. Such a process is inefficient, unnecessary and most importantly, places an unwanted burden on the victim. The ideal is that the medico–legal and the healthservices are provided simultaneously; that is to say, at the same time, in the same location and preferably by the same health practitioner. Policy–makers and health workers are encouraged to develop this model of service provision.”

A critic of the Bill;

- The Sexual Offences Bill does take cognizance of key elements of sexual offences stipulated in the penal code in regard to rape, defilement and other sexual offences. However, regarding the Uganda Law Reform Commission (ULRC) study on sexual offences (April, 2000), the Bill omits almost the entire section on procedural and evidential requirements including protection of the victim.
- The Bill does not address itself to the current advances in information technology and how this can be applied to perpetuate sexual violence. In addition, electronic technology such as closed circuit television (CCTV) and video recordings while mentioned in the ULRC study as a means for provision of evidentiary requirements; is not mentioned in the Bill in this dual capacity i.e. the perpetuation of sexual violence or provision of evidence in such matters. On one hand, CCTV and IT can be abused in incidences of sexual relations between consenting adults to perpetuate sexual violence. While on the other hand, stringent legislation on IT and pornography has an immense bearing in breaking child paedophile criminal rings that encourage digital sharing of images.

Some elements of the penal code not incorporated into the Bill but which do have bearing on the perpetuation of sexual offences for purposes of cross reference include:

- Clause 172. **Adulteration of food or drink.....** to make the article noxious as food or drink..... This is particularly important in the sense that it has a bearing on one's state of mind with dire consequences on an individual's thoughts, words and deeds; with consequences that can lead to commission of the second omissions.
- Chapter XVII. **Defamation.** Particularly clause 179 on definition of libel and clause 180 on definition of defamatory matter. Defamation is intrinsically linked to sexual offences where it is applied in a manner injurious to one's reputation and social standing. This is also very closely linked to Gender-based violence. The case of an individual who was once threatened with social, political and religious isolation illustrates this point. On the other hand, innocent victims who have found themselves at the receiving end of "role plays" and various forms of psychological trauma with the intention of defamation of a sexual nature and have had no recourse to justice is a lacunae in law that this Bill must address bearing in mind the gravity of the matter and the challenges to execute the evidentiary requirements.
- Chapter XLI. **Conspiracies.** Clause 390 conspiracy to commit felony, clause 391 conspiracy to commit misdemeanor and clause 392 other conspiracies (b) to cause injury to the person or reputation of any persons and (d) to injure any person in his or her trade profession. One may ask, how does a co-ordinated ring of GBV and sexual violence perpetrators emerge that functions within and across borders, targets individuals in the most heinous manner, renders one's ability to work, earn gainful employment and provide for their family redundant, causes unprecedented levels of stress leading to physical and emotional imbalance including psychological disorders. What legal protection does an individual or group of individuals have from such machinery?

Specific recommendations in relation to the sexual offences Bill:

1. **Definitions.** The Bill should include the following definitions:
 - a. Indecent assault or practices which as defined to include any act done with the intention of physically impairing the dignity of another person without physically getting in contact with them.
 - b. Sexual harassment.
 - c. Sexual Act. The Bill indicates that "Sexual act" does not include contact, exposure, insertion or genital stimulation done by a hand or any harmful object... (b) For reasonable necessary body search by law enforcement agencies. This provision is an affront on individual dignity and prone to abuse.
2. Clause 7 on administering substance for purpose of committing a sexual act. This should be cross-referenced with adulteration of food and drink and include a provision for independent testing to determine the causative factors.
3. Clause 9 on sexual harassment should include the provision for indecent assault or practices as indicated in the definitions above. Further means of sexual harassment should include print and electronic media, advertising and acts individuals of sexual nature e.g. a man holding his crotch while looking at a woman suggestively. For the print media, it should be noted that the inability to enforce levels of decency in relation to victim identity as well as explicit imaging, is in itself a form of sexual harassment.
4. Clause 27. Payment of compensation to victims of defilement. This is consistent with the panel code. However, for purposes of defining a more progressive legislation, it should be expanded to include the victims of all sexual offences as stipulated in this Act bearing in mind that the provision indicates that "..... the victim of the offence be paid compensation by the offender for any physical, sexual or psychological harm caused to the victim by the offence...".
5. Clause 31. Extra-territorial jurisdiction. This provides for jurisdiction under the laws of Uganda for offences committed by a citizen or resident of Uganda outside the country in relation to another

citizen or resident. What action does the state take to protect the rights of the victim in incidences when the violator is not a Ugandan citizen or resident?

The Bill should further be cross referenced with international instruments that Uganda has ratified/ is signatory to including the Universal Declaration on Human Rights (UDHR), the Beijing Declaration and platform for action and the Maputo protocol.

Action that need to be taken

It is thereby important that the procedural law pertaining to sexual offences especially in the area of victim handling is available. This will allow for the collection of accurate data that will result in successful prosecution of offences. It is therefore important that;

- The survivor/victim of sexual offence has access to crisis care center and the police should work closely with crisis centers in the aftercare of a survivor/victim.
- The category of persons who are capable of handling sexual offence victims should be expanded to include the medical and dental practitioners council.
- Need to modify the trial procedure and evidential requirements to make them victim friendly. It should be simplified, the high evidential standard should be lowered, and trials relating to sexual offences should be held in camera, the publication of the victims' names should be prohibited and that where young children are involved, they should be protected from facing the accused.
- Eliminate the requirement for corroboration in sexual offences. Corroboration is evidence which confirms the accuracy of other evidence in a particular material. In criminal cases, it must confirm or tend to confirm the guilt of the accused. Traditionally, the evidence of victims of sexual offences has been regarded as peculiarly susceptible to fantasy or fabrication, perhaps motivated by frustration, spite or remorse. The corroboration rules were intended to reduce the danger arising from the fact that complaints of sexual offences are easy to make but difficult to refute.
- The compensation of victims to sexual assault and rehabilitation of offenders, lowering the standard of proof to a balance of probability, eliminating the admission of evidence of prior sexual experience for victims.

Conclusion

The legal regime relating to sexual violence is inadequate in a number of ways ranging from the drafting language to procedural loopholes. The absence of a specific amendment to the law occasions a miscarriage of justice to the victims. The government of Uganda is under an obligation to ensure that the legal regime and policy framework on sexual violence is up to date and in conformity with international standards and constitutional guarantees. It is in this regard that the sexual offences Bill is a much needed reform initiative.

It is anticipated that the enactment of these provisions would go a long way in ensuring constitutionality and promoting access to justice especially for victims of sexual assault in Uganda. This would further culminate in improved procedures for victim handling and support, increased reporting of sexual offences and successful prosecution of offences. The enactment of these proposals would also have Uganda's legal regime conform with international standards and human rights best practice.

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Contact;

The Executive Director

Uganda Women's Network (UWONET)

Plot 198 Old Kiira Road Ntinda – Kampala, Uganda

P. O. Box 27991, Kampala

Phone: +256 414 286 539,

E-mail: info@uwonet.or.ug

Website: www.uwonet.or.ug

Blog: <http://uwonetnews.blogspot.com>

Facebook: <http://www.facebook.com/uwonet>

Twitter: @uwonet

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UN JOINT PROGRAMME ON GENDER EQUALITY
Supported by UKaid from the Department for International Development

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