



Gender Transformation & Empowerment



POLICY BRIEF

**ANALYSIS OF THE SEXUAL OFFENCES
BILL, 2019 FOR COMPLIANCE TO
HUMAN RIGHTS STANDARDS**

GAINS AND LOSSES

2022

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1.0 INTRODUCTION

Advocacy for a sexual offences law in Uganda dates back as far as 2000 when Uganda Law Reform Commission conducted a study to inform the process of reform. Although no comprehensive bill or amendments were introduced by the Commission, the study informed the 2007 Penal Code Amendments on related sexual offences.

Seeing no progress towards a consolidated law, the Uganda Women Parliamentary Association (UWOPA), initiated a Private Members Bill of 2015, in the 9th Parliament which lapsed before enactment. It was saved and re-tabled in 2016, in the 10th Parliament, briefly withdrawn and re-tabled in 2019 and sent to the Legal and Parliamentary Affairs Committee for scrutiny as required by the Rules of Procedure of Parliament.

The Bill was consequently tabled on the floor of Parliament for its second reading in November 2019. The Committee report was adopted, and the Bill considered and passed in April 2021. The enacted Act was sent for Presidential assent but never signed into law by the President. It was also not saved when the 11th Parliament began its work. Advocates for the Sexual Offences law have been therefore working forward towards re-tableing a new bill before Parliament for enactment being mindful of the pitfalls and challenges the previous bill faced.

Uganda Women's Network (UWNOET) conducted an analysis of the Sexual offences, Bill 2019. The purpose of the analysis was to assess the key proposals in the 2019 Bill to examine whether they are compliant to national, regional and international women's and human rights standards. The analysis also highlights the gains in the Bill that reinforce gender justice as well as gaps for further revision in the Bill.

This analysis also brings out the mind of Parliament in response to the Bill in the enacted Sexual Offences Act, 2021, which was not signed by

the President in the 10th Parliament. It is hoped that this review can support ongoing efforts to redraft and retable the bill for enactment in the 11th Parliament.

1.1. THE PURPOSE OF THE BILL

The purpose of Sexual Offences Bill, of 2019 is to enact a specific law on sexual offences for the effectual prevention of sexual violence; to enhance punishment of sexual offenders; to provide for the protection of victims during sexual offences trials; to provide for extra territorial application of the law; to repeal some provisions of the Penal Code Act, Cap. 120 and for other related matters. The bill consists of six parts, 46 clauses dealing with interpretation of the words and clauses used in the Bill, the sexual offences created; sexual offences against children, powers of court, Sex Offenders Register and other miscellaneous matters.

The development of this bill by its advocates was prompted by some gaps in the existing laws on sexual offences in the country, which is largely the Penal Code Act, Cap. 120. The Penal Code Act provides for several sexual offences some of whose provisions are outdated and the ingredients constituting the offences are narrow given the fact that they do not reflect the evolving trends in social attitudes, values and sexual practices. There are also new forms of sexual violence and exploitation have emerged such as sex tourism, indecent communication and child marriages, detention with intent to commit sexual act, sex with persons in custody, among other areas, which are currently not provided for in existing laws posing a challenge while dealing with them.

The application of the Penal Code Act, Cap. 120 is also limited in as far as combating sexual violence on Ugandan citizens by Ugandan citizens and residents while outside the country is concerned. There is need to provide for extra territorial application of the law to combat sexual violence on Ugandan citizens by Ugandan citizens and residents while

outside the country. It is therefore necessary that a specific law on sexual offences be enacted to provide for the effectual prevention of sexual violence. This will particularly lead to enhancement of rights of women and girls who are the main victims of these offences.

2.0. ANALYSIS OF PROPOSALS IN THE SEXUAL OFFENCES BILL, 2019

2.1 DEFINITION OF A SEXUAL ACT

The Sexual Offences Bill, 2019 creates a better definition of a 'sexual act' in clause 1, because it is central in the entire penal regime of sexual offences as it determines what constitutes a sexual act or not.

A sexual act is defined in the recent 2007 amendments into the Penal Code Amendment Act, in the offence of Defilement of persons under eighteen years of age under section 129 (7) of the PCA; A 'Sexual act' means-

- a. penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ;
- b. the unlawful use of any object or organ by a person on another person's sexual organ;

Thus, the 2019 Bill proposed the following definition for a 'sexual act' in all sections which sought to modify the definition provided for under section 129 (7) of the PCA; "sexual act" in the 2019 Bill means the;-

- a. penetration of a person's sexual organ and mouth or anus by a person or an animal's sexual organ or object; or
- b. contact or stimulation of a person's sexual organ with another person's or animal's sexual organ or object; or
- c. insertion of a person's or animal's body part or any object into the sexual organ, anus or mouth of another person; but does not include the penetration of person sexual organ, mouth or anus, contact or stimulation of person's sexual organ, or insertion of any object

into the sexual organ anus or mouth of another person done for sound health practices or proper medical procedure;

However, in passing the Sexual Offences Act of 2021, Parliament preferred the definition provided for under 129 (7) (a) of the PCA which referred a “sexual act” as ‘the penetration, however slight, of a person’s sexual organ by another person’s sexual organ. This is a total departure from the original intention of the 2019 Bill, which considered the international standard on definition of sexual acts, including the use of objects, oral sex, and other evolving sexual practices.

The preferred definition of Parliament limits a sexual act to only the traditional penile-vaginal penetrative sex. This definition is unnecessarily limited and is bound to deny protection of the law to survivors of sexual offences where the perpetrators’ actions do not fit penile-vaginal penetration but opt to use other body organs such as mouth, annus or other objects. This will limit protection for all persons as guaranteed in Article 21(1) of the National Constitution as well as under international legal frame works. Laws that are biased and discriminatory are the first bar to access to justice for women.

2.2 RAPE

Clause 2 of the Sexual Offences Bill of 2019 proposes to make changes to the offence of rape as provided for in section 123, 124 and 125 of the Penal Code Act, cap 120.

Section 123 of PCA provides for the definition of rape as follows; ‘Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape’.

- This section assumes only females can be raped, yet incidents of rape of the male gender are continually being reported in media. This distinction between genders contravenes article 21(1) of the Constitution which provides equal protection before the law.
- The section was not clear on what consent is and factors that negate it
- Section 123 currently allows a person who has sexual intercourse with a person below the age of 18 years to be charged rape because it still has the word 'girl' in its definition.
- Persons under the age of 18 years cannot legally consent to a sexual act. Consent is a total defense to rape. Courts of Law in Uganda have distinguished rape from defilement (See *Uganda v Kusemererwa* (HCT-01-CR-SC 15 of 2014) [2015] UGHCCRD 12(25 November 2015)).

The Sexual Offences 2019 Bill thus, proposed to create a new section which is re-drafted in the following way;

1. A person who performs a sexual act with another person;
 - a. without that other person's consent; or
 - b. incapable of consenting to the sexual act commits an offence and is liable on conviction, to imprisonment for life.
2. An assertion of having obtained consent of another person shall be negated where the alleged consent was obtained by- threats; duress; undue influence; misrepresentation; or intimidation of any kind.
3. In this section, a person is incapable of consenting to a sexual act if at the time of performance of the sexual act he or she was- asleep; unconscious; in an altered state of consciousness due to the influence of medicine, drug, alcohol or substance that adversely affects his or her judgment; or mentally impaired.

The advantages of this 2019 Bill proposal are;

- Removing ambiguity in the law which assumes that rape could be committed against a person below the age of 18 years, yet this is legally not possible as such a person is still a child thus denying them proper justice.
- The introduction of other factors capable of further negating consent where it is put up as a defence against the offence of rape such as being asleep; unconscious; in an altered state of consciousness due to the influence of medicine, drug, alcohol or substance- is progressive as it further enhances protection for victims from offenders of sexual offences.
- The proposal in the Bill is more gender responsive in principle and language as it provides for an offence which can be done by both genders required in Article 21 of the Constitution on equality before the law.

The 2019 bill however proposed penalty for rape as life imprisonment and an attempt to perform a sexual act called rape; to imprisonment not exceeding eight years. The current provision in the PCA, punishes rape with death and an attempt to rape with life imprisonment. Parliament in considering this bill agreed with this new redraft of the section, however noted the penalties provided in the bill, watered down the severity of the offences of rape.

This provision of redrafting the offence of rape under the 2019 Bill is a gain and needs to be supported however adopting the recommendation of Parliament to maintain higher penalties as they offers better protection for women. The proposal in the Bill removes ambiguity of rape being an offence of children below 18 years, is more gender responsive in principle and language which is the requirement of Article 21 of the Constitution on equality before the law. Higher penalties offers further protection of women in law according to the international human and national standards.

2.3 AGGRAVATED RAPE

The Bill in clause 3 further proposes to create an offence of aggravated rape and seeks to replace section 124 of the PCA. Clause 3 provides that; where rape is committed in the following circumstances, it shall be deemed to be aggravated and the person so convicted is liable to suffer death or imprisonment for 8 years for a person to attempt the offence of aggravated rape. The following are the aggravating factors;

- a. the sexual offender is infected with HIV or suffering from AIDS;
- b. the offender is a serial offender;
- c. the victim suffers disability;
- d. the act was committed by two or more persons;
- e. the act was committed in the presence of another person;
- f. the offender is a person in authority or a person in trust; or
- g. the victim is of advanced age.

The Sexual Offence Bill introduces important dimensions of aggravating factors to rape which are common in society yet not captured in the law. These aggravating factors recognize that not every rape is the same since there may be aggravating circumstances for each case of rape. These include circumstances where the act is committed by two or more persons; or in the presence of another person; or where the offender is a person in authority or a person in trust; or victim is of advanced age. In addition; there is need to introduce mental illness or where the offence is committed by a relative of the victim as other aggravating factors. This is good in law as it enhances protection of the victims of sexual offences who are especially women and girls. and girls.

In view of the international women and human rights standards, the proposal to have HIVAIDs as an aggravating factor is no longer good law because it discriminates against persons with HIV/AIDS which is also against Article 21 of the Constitution of Uganda. HIV/AIDS being an aggravating factor in sexual matters if, enacted as it is would further victimize women and girls living with HIV/AIDS and further expose them to intimate partner violence. The other aggravating factors in law are welcome as they enhance protection of the victims of sexual offences and punishment for the offenders and have not been challenged.

However, human rights activists have challenged the section proposed HIVAIDs as an aggravating factor as being retrogressive in line with the rights of persons living with HIV/AIDS. The advocacy to decriminalize this section is informed by earlier efforts with a similar provision in the HIV/AIDS Control Bill as well as the recent PCA amendments in the Penal Code.

2.4 SEXUAL ASSAULT

The Bill proposes in clause 5 to introduce the offence of sexual assault to replace section 128 of the Penal Code Act; Section 128 of the PCA provides for indecent assaults thus;

- a. Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years, with or without corporal punishment.
- b. It shall be no defence to a charge for an indecent assault on a girl under the age of eighteen years to prove that she consented to the act of indecency,

- c. Any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object intending that such word or sound shall be heard or that such gesture or object shall be seen by such woman or girl or intrudes upon the privacy of such woman or girl, commits a misdemeanor and is liable to imprisonment for one year.

The Mover of the Bill argued that this particular provision of the PCA was redundant in the law, as it rarely was being applied generally in sexual offences and therefore sought to strengthen it for more protection to the women and girls yet sexual assaults were very common in the Uganda society. Thus, the proposal under clause 5 of the bill, provided for sexual assault as;

(I) A person who unlawfully-

- a. touches the anus, breasts, penis, buttocks, thighs or vagina of another person;
- b. exposes or displays his or her sexual organ to another person;
- c. exposes or displays the sexual organ of another person.
- d. utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen another person; or
- e. intrudes upon the privacy of a person, with intent to insult the modesty of that other person, commits an offence and is liable on conviction, to imprisonment for a term of one year or a fine of twenty-four currency points or both.

While considering the Bill at the last attempt in enactment, Parliament recommended that this section be divided into three distinct offences, namely the offence of indecent assault, sexual assault, and indecent exposure. Parliament noted that whereas an indecent assault deals with the spoken words, a sexual assault is an assault accompanied by a sexual act. For instance, whereas paragraphs (a), (b) and (c) are

sexual assaults, paragraphs (c) and (d) are indecent assaults and should ordinarily be placed in different offences.

Parliament has further recommended to make additional proposals in line with two issues;

- a. To make it immaterial to a charge of indecent sexual on a child to prove that the child consented to the act constituting a sexual assault
- b. Further punishing any person who commits sexual assault, indecent assault and indecent exposure in the presence of a person's spouse, family member or child.

The offences of sexual assault, indecent assault and indecent exposure were created in the Sexual Offences Act, 2021 in section 5, 6 and 7 as enacted.

The provision by the 2019 Bill is good and a gain in law and the proposal by Parliament to create three offences out of one is also welcome because it will enhance protection of the victims and their immediate family members from sexual offences and enhance punishment for the offenders. This section of the law if passed will enable Uganda to domesticate international and regional frameworks that support elimination of violence against women in society by strengthening protection for women and girls against sexual violence.

2.5 INDECENT COMMUNICATION

The Bill in clause 6 creates the offence of indecent communication and proposes that it is committed when a person who by whatever means transmits, transfers, sends, forwards, directs material of a sexual nature to another person without the consent of that other person. The proposed offence imposes a penalty of a fine not exceeding three hundred currency points or to imprisonment for seven years or both.

In reviewing this offence, Parliament was agreeable to the creation of the offence of offensive communication but recommended that the proposal in clause 6 be aligned to the provisions of the Anti-Pornography Act in so far as prescribing a higher penalty for the offence. Parliament also recommended that requiring the consent of a person who receives the offensive communication, should be deleted because this same conduct is expressly prohibited under the Anti-Pornography Act. Parliament thus recommended the deletion of consent in the provision and recommended increasing years of punishment from 8 to 10.

This section of the law if enacted is particularly important, since it will go a long way in enhancing protection of women and girls from cyber sexual harassment, an offence which is not yet sufficiently enforced in Uganda. The evolution of internet has come with benefits but also negatives for women and the girls as they are increasingly vulnerable to all forms of cyber harassment including leaking of private photos or videos from jilted lovers. This is a gain in law as it is very much in line with the principles set out in international and regional frameworks on eliminating all forms of violence against women.

2.6 SEXUAL HARRASSMENT

Sexual harassment is currently not a criminal offence under the laws of Uganda but would so become if this law is enacted.

The provision on sexual harassment, which is lifted from section 7 of the Employment Act, 2006 and the Employment (Sexual Harassment) Regulations of 2012.

Clause 7 of the Bill proposes that a person commits the offence of sexual harassment where he or she-

- a. makes direct or indirect sexual advances or requests whether verbal or written to;
- b. displays sexually suggestive pictures, objects, written materials or sexually suggestive gestures to;
- c. engages in unwelcome touching, patting, pinching or any other unsolicited physical contact with; or
- d. makes sexually oriented comments, jokes, obscene expressions or offensive flirtations with; an employee, student, patient or other person under his or her authority knowing or having reason to believe that such conduct is not welcome or offensive, as a pre-condition for preferential treatment in employment, promotion, recommendation, academic progress/ healing or other favor and that by its nature has a detrimental effect on that other person commits an offence and is liable on conviction, to a fine not exceeding two thousand currency points or to imprisonment not exceeding ten years or both.

The proposed criminalization of sexual harassment in Uganda is based on the increasing numbers of such cases yet the punishment is not deterrent enough. The current provisions on sexual harassment under the Employment Act consider sexual harassment a civil matter which

is handled by the labour officer rather than a criminal offence carrying criminal sanctions. Under Regulation 19 of the employment (sexual harassment) regulations, punishment is a fine not exceeding six currency points or imprisonment not exceeding three months or both.

Parliament agreed with the Mover of the Bill, in essence to say, there is need to criminalize sexual harassment given the high incidence and making the punishment deterrent. Parliament thus went ahead in the enacted Sexual Offences Act, 2011 to propose new sections to the bill, requiring that it becomes immaterial to a charge of sexual harassment that-

- a. the victim consented to sexual harassment;
- b. the victim of the sexual harassment welcomed the sexual harassment; or
- c. such conduct did not have detrimental effect on the victim of the offence.

And where-

- a. the victim of the offence is a child, the convicted person shall instead of the punishment prescribed in subsection (1), be liable to imprisonment for eighteen years; or
- b. the perpetrator of the offence is a public officer, such a public officer shall in addition to the penalty in subsection (1), be removed from office.

This proposal in the bill and the additional proposals by Parliament are very progressive as they will enhance protection for women and girls from sexual harassment which has become very rampant in Uganda, yet law is limited and non-deterrent in punishment. This will align the laws of Uganda to the desirable standards of women's right against violence as stipulated in international and regional frameworks.

2.7 DETENTION WITH SEXUAL INTENT

Clause 8 of the Bill creates a new offence seeking to penalize any actions of detaining a person with intent to commit a sexual act. Clause 8 provides that; ‘A person who unlawfully detains another person with the intention of performing a sexual act with that other person commits an offence and is liable on conviction, to imprisonment not exceeding seven years’

This offence can be committed by any person who prevents a person from leaving any place he or she is. This occurs when a person is restricted in their personal movement within any area without justification or consent. While reviewing this bill, Parliament made proposals for defining what would amount to detention in this section to differentiate this type of detention from legal detention resulting from an act of the law to make it clearer. On the other hand, Parliament also excepted consent of a person being detained for a sexual act from being a defence to a charge of detention with sexual intent.

This proposal is good in law and should be supported as it will lead to enhanced protection of women against sexual violence and related acts which are prevalent in society today.

2.8 SEXUAL ACT WITH PERSON IN CUSTODY

Clause 9 of the Bill seeks to provide protection for persons in custody. It provides that; A person who being an officer or an employee of a detention facility-

- a. performs a sexual act, with a person in custody of the detention facility; or
- b. procures, authorizes, facilitates, compels, or induces another person to perform a sexual act, with a person in custody of a detention facility commits an offence and is liable on conviction, to imprisonment not exceeding ten years.

The justification for this proposal was based on several reports from inmates/detainees in many detention facilities claiming sexual violence from officials in charge. In considering this Bill, Parliament concurred with the Mover of the Bill to observe that sometimes detainees are subjected to humiliating searches as officers try to use their genitals to ascertain their actual sex or gender and are subjected to tests such as the anal exams. They are also subjected to sexual harassment by their fellow suspects/prisoners, which is in most cases constructively sanctioned by the officials in charge. These searches are inhuman and degrading and are a form of torture to the person detained and are not adequately prohibited or punished under the law, making these provisions necessary.

Parliament has made recommendation for definition of a detention facility and a provision to have consent of the person in custody to the sexual act not to be a defence to this charge considering that the consent of a person in such circumstances might not be voluntary, independent, or informed due to the fact that such a person is held in custody.

This proposal is good in law, as it enhances protection of the rights of persons in custody and detention in line with Articles 21 and 28 of the Constitution and international frameworks on human rights.

2.9 SEXUAL EXPLOITATION

Clause 10 of the Bill proposes to create the offence of sexual exploitation, thus;

1. A person who-
 - b. causes, encourages, induces, entices, incites another person to be sexually exploited; or
 - c. controls any of the activities of another person to the effect that that person is sexually exploited; within or outside Uganda for gain for himself or herself or another person commits an offence and is liable on conviction, to imprisonment for a term of fifteen years.
2. A victim of sexual exploitation shall not be penalized for practicing or engaging in acts constituting the sexual exploitation.

The offence of sexual exploitation is lifted from Penal Code and the Prevention of Trafficking in Persons Act, 2009, improved to become an independent offence. Under the Penal Code, it is taken to be an offence associated with living on the earnings of prostitution, contrary to section 136 (2) of the Penal Code Act. In the Trafficking of Persons Act, it is not an independent offence but depending on the offence of trafficking in persons.

In reviewing this provision, Parliament agreed to it and recommended introduction of a higher penalty where the survivors of the offence is a child and to making it immaterial if the survivors of the offence of sexual exploitation consents of the act.

Creating an independent offence which is more punitive is necessary and will provide sufficient protection for women and girls from this increasing vice of sexual exploitation in Uganda. The cases of Ugandan migrant workers in the Middle East and other parts of the diaspora are reported almost daily in Ugandan media. Many Ugandan migrant workers in the Middle East report being sexually exploited in form of forced sexual intercourse, forced prostitution, forced pornography production and sex slavery. The same vice has been reported amongst some sections of Ugandan society where persons are lured to urban areas with promises of employment and end up being sexually abused.

2.10 CRIMINALISATION OF PROSTITUTION

The Bill proposes in clause 45 to, among others, decriminalize prostitution by deleting sections 136, 137, 138 and 139 of the Penal Code Act, Cap 120. These sections deal with living off the earnings of prostitution, the keeping of brothels, who a prostitute is and the prohibition of prostitution as well as punishment of imprisonment which is up to seven years.

In criminalized environments, law enforcement agencies harass sex workers, extort bribes, and physically and verbally abuse sex workers, or even rape or coerce sex from them.

This renders sex workers more vulnerable to violence, including rape, assault, and murder, by attackers who see sex workers

as easy targets because they are stigmatized and unlikely to receive help from the police and seek justice.

Human rights advocates have argued that there is no need to criminalise prostitution, since it is a voluntary and consensual relationship between adults, in their privacy which is not the business of Government. They have further argued that criminalization of prostitution exposes Commercial Sex Workers CSW to abuse and exploitation by law enforcement officials. Criminalization consistently undermines sex workers' ability to seek justice for crimes against them, forcing sex workers to work in unsafe locations to avoid law enforcement agencies.

This notwithstanding, Parliament while considering this bill, deferred from decriminalization and proposed prohibition of keeping brothels, prostitution and engaging in sex with a prostitute in an attempt to penalize both women and men for the act of prostitution. Parliament argues that legalizing prostitution will hurt society, the young children and the family unit resulting to break down in families and the institution of marriage.

The decriminalization is thus a good proposal which needs to be supported as the whole argument of prohibiting prostitution in law sounds redundant in current times as seen from the rising global movement towards the discrimination of prostitution.

Although Parliament attempted to deal with the earlier discriminatory nature of the offence of prostitution against women, the whole argument of prohibiting prostitution in law sounds redundant in current times as seen from the rising global movement towards the discrimination of prostitution.

2.11 UNNATURAL OFFENCES

Clause 11 of the Bill, provided for unnatural offences, lifted from section 145 and 146 of the PCA to consolidate all sexual offences in one law. Section 145 of the PCA, provides that;

Any person who—

- a. has carnal knowledge of any person against the order of nature;
- b. has carnal knowledge of an animal; or
- c. permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.

Section 146 of the PCA provides that; Any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years.

Clause 11 of the Bill, sought to reduce the punishment for unnatural offences but maintaining the offence with gender neutral language thus; A person who-

- a. performs a sexual act with another person contrary to the order of nature; or
- b. engages in a sexual act with an animal; commits an offence and is liable on conviction, to imprisonment for ten years.

Parliament while considering this clause noted that it is ultra vires with Article 28 (12) which provides that no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law. The major ingredients of this offence are not clear which might result being challenged before courts of law since is not clear as to which conduct is prohibited.

Parliament thus recommended that for completeness, the ingredients of the offence as now defined under the Sexual Offences Act, 2021. For the purposes of this section (on unnatural offences)—

- a. a person shall be taken to have performed a sexual act with another person contrary to the order of nature, if the person—
 - ii. penetrates another person’s anus with his or her sexual organ;
 - iii. allows another person to penetrate his or her anus with that other person’s sexual organ;
 - iv. penetrates or allows another person to penetrate his or her, or that other person’s sexual organ or anus with an object; or
 - v. performs a sexual act with a person of the same gender or does any of the acts prohibited in sub paragraphs (i), (ii) or (iii) with a person of the same gender.
- b. a person shall be taken to have engaged in a sexual act with an animal if that person penetrates an animal’s sexual organ or anus with his or her sexual organ.
- c. A person who attempts to commit the offence of unnatural offence commits a felony and is liable, on conviction, to imprisonment for five years.

This offence, even in its original drafting provided for in the Penal Code, which was lifted by bill, has been the contention of human rights activists in and outside the Country. That being the case, the provision is popular with the Parliament of Uganda and Ugandans at large.

The human rights movement against this section of the bill especially the sexual minority groups argue that it is discriminatory and does not assure them all the rights provided for by chapter four of Uganda’s Constitutions. They claim the rights typically violated in the process include the right to liberty, right to equality and non-discrimination, the right to freedom from inhuman and degrading treatment or punishment, the right to life, right to privacy, right to privacy and the right to dignity.

Their claim is that sexual acts between consenting adults should not be criminalized, as this further contravenes established international and regional human rights standards. In particular, the principle of equality is espoused in Article 1 of the UDHR, Article 26 of the ICCPR, Article 2(2) ICESCR; Article 2 of CEDAW and Article 2 of ACHPR.

In view of this, efforts of advocacy for a sexual offences law have to be alive to the concerns against legislation on unnatural offences from these sections of society in Uganda.

Clause 12 of the 2019 bill further seeks to prohibit incest which is rampant in society and is a source of the many defilement cases reported in Uganda being that many children are defiled by the people they know, trust, have authority over them and usually are their relatives. Clause 12 of the Bill, provides that, a person who performs a sexual act with another person who, to his or her knowledge, is related to him or her in the manner defined in the bill commits an offence and is liable on conviction, to imprisonment for life.

In terms of enhancing protection against all forms of sexual violence against women, children, and girls, this is a welcome provision and domesticates international frameworks on the rights of children, women and girls.

2.13 DEFILEMENT AND AGGRAVATED DEFILEMENT

The Bill in clause 13 and 14, create the offence of defilement and aggravated defilement. The Bill proposes that a person commits the offence of defilement if that person performs a sexual act with a child and the offence to carry a penalty of eighteen years for the offence of simple defilement and an attempt at defilement to carry fifteen years penalty. Under clause 14, the Bill also proposes to create the offence of aggravated defilement whose penalty is imprisonment for life and attempted defilement with aggravating factors for 18 years penalty.

The aggravating factors include the following; that the child is below the age of fourteen years; child is a person with a disability; offender is infected with the Human Immunodeficiency Virus (HIV) or acquired immunodeficiency syndrome (AIDS); offender is a person in authority over the child; offender is a serial offender; and that offender is a relative.

The Penal Code on the other hand under section 129 and 130 requires that a person who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment with an attempt being liable for 18 years. A person who commits an act of aggravated defilement is liable to suffer death and an attempt being liable to life imprisonment. These penalties under the Penal Code were maintained by Parliament, in the enacted Sexual Offences Act, 2021.

Parliament in the Sexual Offences Act, 2021 introduced foster parents, in addition to what the Penal Code Amendments of 2007 introduced namely; parents, guardians and persons in authority over the persons on whom the offence is committed. The 2007 amendments of the PCA, introduced 'persons in authority' but did not provide a definition for it. The 2019 Bill introduced 'person in position of trust' but falters with the definition. There is need to align the definition of person in authority and person in trust in line with the PCA amendments so that these unclaritys in the sections does not bring about miscarriage of justice.

The justification for reduction of the sentence by the Sexual Offences Bill, 2019 was based on Police Annual Crime reports which indicated that the highest reported cases in Uganda are sexual offences, yet levels of prosecution was very small or leaving so many offenders on remand for many years. That being the case, the proposal to reduce punishment would reduce protection for women and girls against this grave offence, would amount to a loss if enacted in that proposed state. Thus, the

punishment provided for in the Penal Code is sufficient and needs to be maintained.

2.14 PROCURING DEFILEMENT

Clause 15 of the Bill provides that a 'A person, who procures a child to perform a sexual act, with any other person within or outside Uganda, commits an offence and is liable on conviction, to imprisonment for ten years.

This provision seeks to replace section 132 of the PCA which was gender biased and obsolete in law, since it still assumed that a woman not being a girl could be defiled. This has been settled at law to provide that defilement only applies to children below 18 years. Not only did it presume, that only the girl child can be procured for defilement, but also went ahead to require that, 'No person shall be convicted of an offence under this section upon the evidence of one witness only, unless that witness is corroborated in some material particular by evidence implicating the accused'. This legal language is clearly a bar at law towards access to justice for women and more so the girl child because one single witness, was not sufficient to prove this sexual offence. Moreover, Supreme court in the matter of *Ntambala v Uganda*, UGSC 1 2018, *Tibatemwa-Ekirikubinza* ruled that, the evidence of one single witness is sufficient to secure a conviction.

2.15 HOUSEHOLDER PERMITTING DEFILEMENT

This amendment is in line with what defilement is at law and deals away with gender bias and discrimination in law as required in the constitution of Uganda and international women and human rights standards.

This provision seeks to penalize any person who being an owner, occupier or manager of a property allows a child to be defiled upon their premise thus further enhancing protection for children from sexual offences. This provision aligns this local legislation to article 21, 34 of the Constitution of Uganda, rights of children in the Children's Act, cap 59 as amended; principles on equality and non-discrimination in international and regional frameworks for women, and children.

Clause 17 seeks to prohibit persons from permitting defilement upon their premises. It seeks to replace section 133 of the PCA whose language gender is biased and protects only girls. Thus, the drafting of the Sexual Offences Bill is against discrimination at law. It provides; 'A person who, being the owner or occupier of premises or having or acting or assisting in the management or control of the premises, induces or knowingly makes a child to resort to or be on such premises for the purpose of a sexual act being performed upon him or her, commits an offence and is liable on conviction, to imprisonment for five years.

2.16 SUPPLY OF SEXUAL CONTENT AND MATERIAL TO A CHILD

Clause 18 of the Bill prohibits supply of sexual content to a child. The clause provides that;

1. A person who unlawfully gives, displays, distributes or supplies to a child material-
 - a. of a sexual nature;

- b. demonstrating, depicting or illustrating a sexual act;
 - c. whose common usage is for the performance of a sexual act;
 - d. mimicking a sexual organ; commits an offence and is liable on conviction, to imprisonment for a term of years.
2. For avoidance of doubt, subsection (1) shall not apply to material given, displayed, distributed, or supplied to a child as part of sex education or reproductive health as part of the curriculum of an approved institution of learning.

This provision domesticates and enhances child protection against sexual abuse as required in article 34 of the Constitution of Uganda, Children's Act, cap 59 as amended; and article 1 of the Convention on the Rights of Children.

2.17 CHILD PROSTITUTION

Clause 19 of the bill prohibits involving children in prostitution in and outside the country. It is a new provision that attempts to prohibit, using and involving of children in prostitution. Clause 19 provides that; A person who-

- a. knowingly permits a child to remain in any premises, for the purposes of prostitution
- b. procures or attempts to procure a child to become a prostitute, within or outside Uganda;
- c. procures or attempts to procure a child to leave Uganda, with intent that he or she may become an inmate of or frequent a brothel elsewhere;
- d. procures or attempts to procure any child to leave his or her usual place of abode in Uganda with intent that he or she may, for the purposes of prostitution, become an inmate of a frequent a brothel;

- e. induces a person to be a client of a child for sexual acts or for any form of sexual abuse or indecent exhibition or show;
 - f. takes advantage of his or her influence over, or relationship to a child, to encourage, entice or cause a child to engage in prostitution;
 - g. threatens, intimidates, or forces a child into prostitution; or
 - h. owns, leases, rents, manages, occupies, or has control of any movable or immovable property for purposes of prostitution involving children;
- commits an offence and is liable on conviction, to imprisonment not exceeding ten years. This proposal is well aligned with the principles in the children's Act, the Constitution and international human and women's rights for the protection and best interest of the children.

This proposal is good and if enacted, should be able to enhance child protection from sexual abuse where they are forced into prostitution or used as proxies for earning. This is not in the best interest of a child and thus supports principle of best interest of child as required in article 34 of the Constitution of Uganda, Section 5 of the Children's Act, cap 59 as amended; and articles 4, 16 of the Convention on the Rights of Children.

2.18 CHILD SEX TOURISM

Clause 20 of the Bill, further provides that; A person who--

- a. makes or organizes travel arrangements for himself or herself or on behalf of another person resident within or outside Uganda, with the intention of facilitating any sexual activity with a child; or
 - b. prints or publishes, in any manner, information that is intended to promote or facilitate arrangements for sexual acts with a child;
- commits an offence and is liable on conviction, to a fine of two thousand currency points or imprisonment not exceeding ten years or both.

This offences like other preceding offences created by the bill seek to enhance protection of children from sexual abuse and needs to be supported. Sex tourism is reported as a growing vice in Uganda especially with perverted individuals seeking to have children's naked pictures, or videos for sell to their audiences or directly involve children in sex. needs to be supported. This is in line with article 27 of the African Charter on Rights and Welfare of the Child which prohibits child prostitution and the convention on the rights of children.

2.19 SEXUAL ACT IN THE PRESCENCE OF CHILD

Clause 21 further seeks to penalize sexual acts before the presence of children. This a new proposal in law and will go a long way in protecting children from toxic environments imposed upon them, by adult parents, guardians and other family members who may involve in sexual activity knowingly, thus defiling their innocence.

Thus clause 21, provides that; A person who intentionally-

- a. performs a sexual act; or
- b. causes another to engage in a sexual act; in the presence of a child or in a place from where he or she can be observed by a child, commits an offence and is liable on conviction, to imprisonment for ten years.

2.20 MARRIAGE INVOLVING CHILD

This will encourage parents and other persons whom children are entrusted to be more responsible and strive to have safe environments for growing children. This provision is in line with the principles of protection in the Children's Act, article 20 of the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Children.

The bill further in clause 22, seeks to prohibit marriages involving children which is a rampant problem in Uganda without sufficient legal protection for the children. Clause 22 provides that;

1. A person who-
 - b. conducts, directs, participates, or abets a marriage of a child including participation in formal or informal marital rites and initiation practices with a child; or
 - c. purports to marry a child in a formal or informal ceremony of marriage or any other arrangement with or without the consent of a parent or guardian of the child; commits an offence and is liable on conviction, to imprisonment for ten years.
2. In this section, marriage involving a child means the union whether formal or informal between a child and another person for the purpose of living as husband or wife.

Marriages involving children are a rampant problem in Uganda without sufficient legal protection for the children. This provision will go a long way in dealing with the challenge of early and child marriages that have been rampant in Uganda by particularly domesticating article 21 (2) of the African Charter on the Rights and Welfare of the Child that clearly prohibits child marriage.

This provision will go a long way in dealing with the challenge of early and child marriages that have been rampant in Uganda.

2.21 PAYMENT OF COMPENSATION.

Clause 23 of the Bill proposes to allow court to order payment of compensation to a victim of a sexual offence. This is lifted from Section 129B of the Penal Code Act (Amendment) which requires the payment of compensation to victims of defilement.

Under Clause 23 of the Bill, the bill seeks to modify the payment of compensation not only to children who are defiled but for all victims of sexual violence. Clause 23 provides that; Where a person is convicted of an offence under this Act, court may in addition to any sentence imposed under the Act, order that the person convicted compensates the victim for any physical or psychological harm caused.

However, in considering this bill, Parliament advised to limit the provision to the award of damages only and not compensation since damages are only granted to atone the actual wrong suffered to the wrong suffered instead of providing for compensation which entitles many other matters such restitution, which may not be applicable in the circumstances of this case i.e., there may nothing to restore after the sexual offence except to pay for damages caused. The Sexual Offences Act, 2021 provides for the following drafting;

- a. Where a person is convicted of an offence under this Act, court may, in addition to any sentence imposed under this Act, order the convicted person to pay damages to the victim.
- b. The damages ordered by the court under this section shall be a civil debt.
- c. The victim under this Act shall have priority over any person or authority in recovering any debt arising from an order of court made against a person convicted of an offence under this Act.

The justification for this provision cannot be over emphasized as it was premised on the fact that sexual offences should not only carry penal sanctions but also provide for damages occasioned upon the victims. The principle of compensating victims of sexual offences is very important in enhancing the rights of women, girls and all victims of sexual violence and needs to be sufficiently embedded in the Uganda's jurisprudence. This will make access to justice more meaningful to women, girls, and other vulnerable persons in society.

2.22 PROCEEDINGS HELD IN CAMERA.

Clause 24 of the Sexual Offences Bill seeks to guide on holding proceedings in camera. The Clause provides that;

1. In proceedings under this Act, court may, upon application or on its own volition
 - b. all or any part of the proceedings in camera; or
 - c. remove or direct the removal from court or court premises a person or group of persons whose presence is not necessary at such proceedings, unless the complainant and the accused otherwise request.
2. Where the victim is a child, the court shall take into consideration and act in the best interest of the child.

Procedures of court have for long been discouragement to victims of sexual offences who have to confirm their evidence in open court during cross examinations. Due to the sensitivity of sexual offences, some witnesses may shy away from such court process or give half-truths which in the end cost them justice.

Securing processes in camera is a very important provision of the law necessary for enhancing protection, privacy, and safety of victims of sexual violence, which in turn will enhance their access to justice.

2.23 PROHIBITION OF PUBLICATION

Clause 25 of the bill seeks to prohibit the publication of information regarding the victims, witnesses or complainants involved in the sexual offence or the during the process of hearing or prosecution. The clause prohibits the disclosure of any information such as name, address, or photograph, that may lead to the identification of the victim/survivor, a complainant or witness.

This is also a very important development in sexual offences law aimed at protecting the identity of the victims of sexual violence, which in the past has been a discouragement for reporting of sexual offences. This section of the law, when enacted will enhance access to justice for women and girls as it will enhance their confidence and safety during court processes.

2.24 EVIDENCE OF CHARACTER AND PREVIOUS SEXUAL HISTORY

Clause 26 of the Bill seeks to provide that nobody should be cross-examined on evidence of character and previous sexual history or experience except with leave of court. This has been one of the biggest stumbling blocks in terms of accessing justice for victims of sexual violence because of the crude methods of cross examination employed in court aimed at casting doubt on character and testimonies of victims/survivors of sexual violence. Once this provision is enacted, it will provide guidance to court on how to deal with evidence of previous character and sexual history which has been abused during cross examination for evading justice.

This development is good in law, as it will enhance protection for victims of sexual violence and lead to access to justice especially for women and girls on such related sexual offences.

2.25 UNCORROBORATED EVIDENCE OF A VICTIM

Clause 27 of the Bill seeks to provide that prosecution of sexual offences can successfully be done based solely on the evidence of one witness. As a general rule, section 133 of the Evidence Act Cap 6 requires that no particular number of witnesses shall in any case be required for the proof of any fact.

Whereas the Evidence Act provided the general law on number of witnesses in all matters before court, the requirement in sexual offences, was that evidence from one single witness was not sufficient to sustain a conviction which discriminated victims of sexual offences. Courts have progressively reversed this position which the Sexual Offences Bill, 2021 seeks to legislate. In *Ntambala Vs. Uganda*, UGSC 1 2018, where *Tibatemwa-Ekirikubinza* at supreme court ruled that, the evidence of one witness is sufficient evidence to secure a conviction if court finds the witness truthful.

2.26 SEX OFFENDERS REGISTER

This is especially important in sexual offences where getting witnesses willing to testify is not easy for the victims who most of the time give up on this right to justice because of the need to corroborate evidence. It removes encumbrances in pursuing justice especially for the most vulnerable especially women and girls which is in tandem with international and regional instruments on access to justice for women.

Clause 28 to 33 of the Bill propose to introduce a sex offender's register onto which the particulars of a person convicted of a sexual offence will be included. Offences of defilement, sexual assault, rape, incest, and child abuse among others are serious offences.

Having a sex offender's register is one of the ways through which the public is informed of the existence of sex offenders in their neighborhoods. It serves as a reference point for employers in ensuring that persons who have a history of sexual offences do not get employed in sectors which serve children and other vulnerable groups because of the risk they pose to the public. This is important in enhancing protection of society from potential offenders, especially women and girls who are typically more at risk to sexual violence than males.

2.27 FALSE ALLEGATIONS

Clause 34 of the Bill proposes to criminalize the making of false allegations against a person and proposes that a person who makes false or misleading allegations against another person to the effect that the person has committed an offence; commits an offence. There is need to safeguard the right of a victim to report a sexual offence while at the same time protecting the false reporting of sexual offences as a means of using the sexual offence as a tool for coercion, intimidation, defamation, and character assassination. The harm that arises from making false allegations, especially of sexual offences, is immense and can lead to loss of liberty, association, welfare and may result in hatred, contempt, or ridicule of the person against whom it is made.

The proviso made by Parliament requiring that an acquittal for an offence under this section does not amount to a false allegation would perfect this offence going forward with advocacy for the law. This would reduce the probable counter accusations that would arise after acquittal which sometimes result from lack of evidence rather than innocence of the offender.

2.28 ATTEMPTS TO COMMIT A SEXUAL OFFENCE

Clause 35 of the Sexual Offences Bill, 2019 provides for general attempts to commit sexual offence generally where they may not have been captured in some provisions of the bill. It states; 'A person who attempts to commit an offence under this Act unless otherwise stated, commits an offence and is liable on conviction, to imprisonment for seven years. This is welcome as it enhances the protection available for women and girls in areas this has not be catered for by the law.

2.29 WITHDRAWAL OF CONSENT DURING SEXUAL ACT

Clause 36 of the Bill proposes to allow a person who had consented to a sexual act to withdraw that consent at any time before or during the performance of the sexual act. Withdrawal of consent is perfectly possible for a person who consented to a sexual act, but the act turns out to be not what they expected. This is in consonance to the right to bodily integrity that women are demanding for and the right to be able to make decisions concerning their bodies.

Consent is the basis of a sexual act; adults must give their consent to any sexual act and have the liberty to withdraw it at any point. Efforts by the women in Uganda to have this right to decision-making concerning their bodies has been on for many years met with a lot of resistance. Women must be trusted with this ability to make decisions over their bodies. because the reasons for withdrawing consent to a sexual act are varied and are largely for health purposes.

Although Parliament offered to delete this proposal arguing it was a reincarnation of marital rape and that it is not necessary; it is a great loss to women's right to bodily integrity and security.

2.30 HARRASSMENT ORDERS

Clause 39 of the Bill gives an opportunity to anyone who needs to be protected from another to apply for Harassment orders. Court may on application make a harassment order where there exists a well-founded fear that the victim may be subjected to harassment, intimidation, fear, distress, alarm or unwanted contact by the accused, agents of the accused or any person acting on behalf of the accused on such terms and conditions as the court may prescribe. This is always the case where persons of authority are the offenders. The victims usually have to live in fear of their lives or more harassment by the offender.

This provision is necessary in sexual offences in order to enhance protection of women and girls and afford them ore access to justice.

2.31 EXTRA TERRITORIAL APPLICATION

Clause 40 for the Bill deals with extra territorial application of the law, in order to apply to offences committed outside Uganda by persons who while being a citizen of, or permanently residing in Uganda, commits a sexual offence on a Ugandan living outside or the offence was committed partly inside and partly outside Uganda or that a substantial proportion of commission of the offence has taken place within Uganda.

This provision is necessary for dealing with sexual offences which are committed cross borders, which is a common characteristic of sexual offences especially with the evolution of the internet. This will further enhance protection of women and girls from violence against them as required by international human right frameworks.

2.32 DISCONTINUATION OF INVESTIGATIONS

Clause 41 of the 2019 bill provides that investigation into a sexual allegation or complaint shall not be discontinued except with the written consent of the Director of Public Prosecutions. This provision aims at prohibiting the discontinuation of sexual offences cases which is a common occurrence at lower magistrates courts across the country due to interference of the offenders or their family members or relatives or some other reasons.

The involvement of the Director of Public Prosecutions at this point in sanctioning discontinuance is critical to ensure justice is served to the victims and not denied.

2.33 AMICABLE SETTLEMENT OF SEXUAL OFFENCE

Clause 42 of the Bill provides that a person who enters into settlement or compromises with a person suspected to have committed a sexual offence or his or her relative commits an offence and is liable on conviction, to imprisonment for ten years.

Amicable/out of court settlements are a common feature of the justice system in Uganda and a major stumbling factor to investigations and criminal proceedings in sex-related. This however, should not be the case for criminal matters as serious as sexual offences. This proposal is aimed at tightening loopholes that may enable suspects/perpetrators go scottfree. It is also a measure to deter conspirators from offering escape routes to perpetrators.

Parliament during the failed attempt at enactment of the Sexual Offence Act, 2021, introduced this as an offence called 'Conspiracy to defeat justice and interference with witnesses' under Section 42. It provides that, a person who does any act to obstruct, prevent, pervert, or defeat the course of justice commits an offence.

This provision is very necessary given the fact that many of the sexual offences do not see the light of day because the victims get coerced, intimidated, and threatened not to report such cases usually by family members, relatives, friends or community members in protection of the offenders. This provision will therefore enhance access to justice for women and girls in Uganda.

2.34 FAILURE TO REPORT SEXUAL OFFENCE

Clause 43 of the Bill provides that a person being a parent, guardian, relative or person in authority or trust, who fails to report, threatens, intimidates, coerces, or forces a victim of a sexual offence not to report any offence under this Act commits an offence and is liable on conviction, to imprisonment for three years. This is a necessary provision of the law which will enhance reporting of sexual offences thus in turn contribute to prevention of this offence as everyone in community will be compelled to report matters of sexual offence. This will enhance the seriousness of the matter and contribute to its further enforcement and thus reduction of the vice in society.

3.0 CONCLUSION

Uganda's law on sexual offences are spread across several legislations, which need to be consolidated, strengthened and new forms of sexual violence catered for in the law. The justification of having a consolidated law on sexual offences is based on the need to provide the public with a single piece of legislation on the subject matter, ensuring clarity and easy access to the public. Furthermore, it will help the legislation respond to the evolving and current trends in sexual offences, curb the high incidences of sexual violence and adopt international best practices in the prevention of sexual violence.

The Sexual Offences Bill, 2019 has gone through so many processes in its advocacy resulting into the Sexual Offences Act, 2021. Although, the Sexual Offence Act, 2021 was not signed into law by the President, advocacy efforts needs to be directed towards redrafting and re-tabling it taking into account the voices from all stakeholders.

REFERENCES

National Laws

1. The Constitution of the Republic of Uganda, 1995
2. Penal Code Cap, 120
3. Anti-Pornography Act, 2014
4. Prevention of Trafficking in Persons Act, 2009,
5. Domestic Violence Act, 2010,
6. Children Act Cap, 59

Regional instruments

7. African Charter on the Rights and Welfare of the Child, 1999
8. African Charter on Human and Peoples Rights (ACPHR), 1986
9. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003

International Instruments

10. Convention on the Elimination of Discrimination Against Women (CEDAW), 1979
11. Convention on the Rights of the Child (CRC), 1989
12. Declaration on Elimination of Violence Against Women (DEVAW), 1993
13. International Convention on Civil and Political Rights (ICCPR), 1966
14. International Convention on Social Economic and Cultural Rights (ICSECR), 1966
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