

A CRITICAL APPRAISAL OF UGANDA PENAL CODE IN RESPECT TO  
RAPE AND DEFILEMENT

BY  
ADIKINI PENINA  
LLB/37876/123/DU

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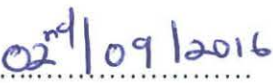
## DECLARATION

I, **Adikini Penina** undersigned declare that this research report entitled “a critical appraisal of Uganda penal code in respect to rape and defilement” is my own original compilation and has never been presented to any organization or institution of higher learning either as a paper or for any academic award.

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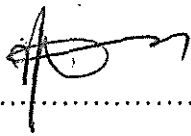
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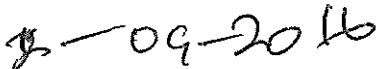
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### APPROVAL

"I confirm that the work reported in this research report was carried out by the candidate under my/our supervision".

Signature:.....

**DR. CHIMA MAGNUS**

Date: .....

## ACKNOWLEDGMENT

This work would not have been produced in the form and level it is, if it were not the contribution of many people from different walks of life.

Thanks go my mother Mrs. Magret Nyagoma for having raised me since my childhood, her protection, provision and all related necessities she did to me. I pray God to bless you surely.

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I cannot forget my teachers since I toddled to school. Each one's contribution is what has made me what I am today.

*May God reward you all*

## DEDICATION

I dedicate this to my mother the Mrs. Magret Nyagoma and my father Mr. Stephen Olebe who dedicated all their recourses to educating me despite her low levels of education and Minimum income.

I also dedicate this book to my beloved husband Mr. Ajala Mathew for his total support and tireless effort he has made during my studies.

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## ABSTRACT

Rape AND defilement violates the right of dignity of a girls and boys. It breaches the trust of wife. Even then, it is not criminalized as rape in Uganda. It raises a question, is a girls and boys being considered an object or the property of the husband. It also raises the question, as to does a girls and boys has right to save her body from the lust of her husband. No doubt the purpose of the being single is to provide right to have sex with one u get married too. This paper points out whether this right can be coupled with force or right to have sex is only coupled with will or consent of wife. The purpose of the marriage in point of view of right to have the law should only be providing satisfaction of concern need without any check or burden of society and law.

This reveals that the failure of victims of rape and defilement (mainly women and girl children) to satisfy the requirements of the purported 'rule' (or practice or *modus operandi*) on corroboration is a significant common reason why so many sexual assailants (mainly men) escape legal punishment.

Tracing the origins and history of the purported 'rule', it distinguishes it from the law which it apparently subverts throughout the entire investigative, prosecution, trial and appeal stages of these crimes.

## CHAPTER ONE

### INTRODUCTIONS AND BACKGROUND

#### 1.0 Introduction

This Paper analyzed a critical appraisal of Uganda penal code in respect to rape and defilement. Hardly a day passes without an African newspaper, radio or TV report focusing on a fresh case of defilement, a sex crime against juveniles that seems to thrive on widespread poverty. In parts of Uganda, it's on the rise.

Ugandan law defines defilement as the act of having sex with a girl under 18, while rape is having sex with a woman without her consent, usually by force. Often defilement involves relatives, married men or professional people in the community. Worse still, some men rape or defile their own daughters. Rape and defilement can lead to infertility, trauma, contraction of HIV/Aids, terminal illness or even death. In fact, defilement is a capital offence in cases where the victim has been infected with HIV/Aids virus or is very young and has been defiled by a relative categorised as aggravated defilement. Those defiling children aged 14-18 get prison sentences if convicted.

Peter Georges of the St Nicholas Uganda Children's Fund, writing about child poverty in Uganda, says defilement of school-age girls is common. "Rape is always a danger as girls travel to and from school through risky neighborhoods at dawn and dusk. Defilement is not always involuntary. Because of extreme poverty, many girls are tempted by the promise of a little money to buy food or clothing. The most at risk are girls in the upper primary classes (P/5-P/7). Some are well into their teens by the time they reach sixth or seventh grade because their academic progress was delayed due to lack of school fees.

Georges argues that the cost of secondary school is prohibitive for most families and these girls see no hope for their future. This then makes them vulnerable to the advances of unscrupulous men. The St Nicholas children Fund is an non-government organisation providing orphans and vulnerable children with education, nutrition and healthcare.

## 1.1 Background of the study

Defilement is defined as having sexual intercourse with a girl who is below the age of eighteen years. Anybody below 18 years<sup>1</sup> is a child under the law and therefore it does not matter whether the girl agreed to have sex or not.

Defilement has been a big problem in Uganda and continues to be one of those incessant forms of child abuse. Because of the prevalence of the problem, and in conformity with more modern methods of child care and protection, the Ugandan Parliament amended the law relating to defilement in 1990<sup>2</sup> that had the effect of: Raising the defilement age from 14 years to 18 years. Raising the maximum punishment to death<sup>3</sup>.

The amendment to the law came against the background of serious concern for the physiological and emotional health of children who were increasingly falling prey to lustful men especially because of the AIDs pandemic that was spreading like a bush fire in the late eighties. Many men have tended to go to young girls for sex in the belief that the younger the girl, the less the danger of catching AIDs.

Women legislators (now Minister of Ethics and Integrity) pressurized parliament to pass the law that has raised nearly equal measures of praise and condemnation. A Media Analysis on child abuse 1986 - 1996 undertaken under the auspices of the Ugandan Chapter of the African Network for Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) revealed that out of 486 cases of child abuse as reported in the three English daily newspapers in Uganda in the period quoted, defilement featured in 214 cases - nearly half of all cases of child abuse<sup>4</sup>.

Rape is having forceful sexual intercourse with a girl or woman above eighteen years of age. According to the Oxford English Dictionary in Uganda Law Reform Commission publication (2000 p21), rape is an act of forcing a person, especially a woman, to have sexual intercourse against her will. This includes the act of bugging a man or boy against his will. In law, the term "rape" refers to a situation where a man has carnal knowledge of a woman by force, against her will and against her consent. The definition, however, excludes the penetration of the mouth or

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<sup>1</sup> The 1995 Uganda Constitution

<sup>2</sup> Statute No. 4 A of 1990

<sup>3</sup> Hovil and Okello (2007).

<sup>4</sup> Eluzai (1997)

anus by other part of the body, or by any object used by the rapist to penetrate the victim's vagina. Where there is no penetration of the penis into the vagina, such an offence is construed as attempted rape. The offence is committed against a woman of eighteen years and above, otherwise it is defilement. Rape is by nature a violent and a degrading act. However, study findings show that it is considered as an act of immorality rather than of violence.

Rape is an immoral act that goes directly against the command of God. Deuteronomy 22:25-28<sup>5</sup>, condemns rapping and this command was meant to protect women and the nation of Israel from committing sinful actions. It also mentioned a punishment the mosaic commanded for a man who raped a woman. The man was to be killed by stoning while the woman was considered innocent. Though the Mosaic Law was for the nation of Israel during the time of Moses, the principle is clear that raping was sinful in the eyes of God and led to the most extreme punishment possible.

Due to the dangers of rape, countries have tried to take initiatives of combating this immoral act in the society by enacting laws which stipulate punishments or fines for those who would fall victim. In Uganda, the penal code act<sup>6</sup>, confines any person who commits the offence of rape liable to suffer death. The offence of attempted rape is defined under section 119 and a penalty of life imprisonment is prescribed. Prior to the 1990 amendment, rape was punishable by life imprisonment with or without corporal punishment. However, the amended penal code statute modified this penalty by introducing death as the maximum penalty. This amendment in effect removed the jurisdiction from the chief magistrate's court to the high court.

Since most of the rape victims remain silent after the act for fear of embarrassment, health providers should be educated beyond the health care provision of these victims by being familiar with the sexual offences law and other appropriate legislation which could play an important role in reducing the sexual assaults. This could encourage victims to report rape through improved emotional care.

Sex-related offences have continued to increase in the country despite several interventions by the government and non-government organisations. The 2012 Annual Crime and Traffic Safety

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<sup>5</sup> The Holy Bible

<sup>6</sup> Year 1994 section 118

report shows that defilement, rape, incest and unnatural offences are increasing. At least 8,076 defilement cases were registered the past year compared to 7,690 reported in 2011. Rape cases increased to 530 in 2012 from 520 in 2011, and incest rose by 70 per cent from 20 cases reported in 2011. The Inspector General of Police, Gen Kale Kayihura, said police are challenged by the increase in the cases because parents and guardians have turned the offence into a business.

## **1.2 Statement of the problem**

Statistics about child rape and defilement reveal that rape and defilement is the most common form of abuse in Uganda. While there are a number of sexual offences against children, defilement is the most prominent. Many children are defiled, raped by people in all spheres of life, in the hands of their biological fathers, step fathers, relatives, friends, religious leaders, care givers and strangers.

The annual crime statistics compiled by the Criminal Investigation Department (CID) of the Uganda Police enlists defilement cases as continuing to dominate the crime scene with a 22.3 percent increase in registered cases of 6,395 in 2004. With particular respect to defilement, 15,385 cases were reported to police in 2006 representing an increase of 23 per cent from the 2005 figure of 12,545. In 2007, reported defilement cases were 12,230 compared to 15,385 in 2006. There was thus a decrease by 2 percent.

But, the LCs did not have any records for defilement cases. That means that they do not keep any record. But still even the other organizations visited, some do not keep their records properly. The Uganda's Commissioner General of Prisons, revealed that defilement tops crime list of all detainees in Uganda Prisons; accounting for 32 percent of all prisoners on remand, 13 percent of all convicts and 46.7 percent of the capital offenders<sup>7</sup>. Organization 2003 2004 2005 2006 2007.

Although article 34 of the 1995 Uganda Constitution, grants children rights, it is deficient in fostering outright protection from defilement. It is clear that the Penal Code<sup>8</sup> spells out defilement and its punishment as death and seven years imprisonment. Today it eighteen years and defilement remains a big problem because it tops first on the crimes committed against

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<sup>7</sup> Monitor Newspaper 2006

<sup>8</sup> Cap 120 chapter 14

children. There are no explicit structures to facilitate the protection of children against defilement. This weakness has hindered the Court processes and prosecution of the abuses.

The high rate of defilement cases in Uganda is becoming a great concern. Despite the high rate of reporting by the press, the existence of the penal code, expanding police force, growing judiciary, civil society advocates on child rights, and parents plus local community authorities, all arrayed against child sexual abuses, there many challenges facing this phenomenon which this study seeks to find out There is no evidence available that the presence of all the above measures to reduce girl child defilement as having any effect in reducing the rate of defilement. While a number of studies have been undertaken to determine causes and effect of defilement on girl child, not much research has been undertaken to determine the reasons why, despite of all the measures that have been put in place, the rate of defilement continues to rise. It is against this background that this study, attempts to find out why defilement continue to be a big social problem by assessing the challenges faced in the control of girl child defilement.

### **1.3 Purpose of the Study**

The purpose of the study examined a critical appraisal of Uganda penal code in respect to rape and defilement.

### **1.4 Research objectives**

- i. To find out the legal framework in controlling rape and defilement
- ii. To examine the extent to which social, economic and cultural factors may be a barrier in the control of rape and defilement.
- iii. To establish strategies that can be put in place to improve on the control of rape and defilement.

### **1.5 Research questions**

- i. What are the legal framework in controlling rape and defilement?
- ii. What is the extent to which social, economic and cultural factors may be a barrier in the control of rape and defilement?
- iii. What are strategies that can be put in place to improve on the control of rape and defilement?

## **1.6 Scope of the study**

### **1.6.1 Geographical scope**

The research covered the Uganda penal code in respect to rape and defilement. The research was done in Kampala capital city which lies within the Kingdom of Buganda, in Central Uganda.

### **1.6.2 Content scope**

These are directly involved in work to do with abused children, as well as the local communities that are served by the two non-governmental organizations such as parents, defiled girls, local community, area authorities, and police stations. The research focused on the period between 2003 and 2016.

## **1.7 Significance of the Study**

The study was to contribute to an understanding of the dynamics and complexities on the increasing number of girl-child defilement as the commonest rape and defilement inflicted on the girl child. In essence, an appreciation of this relationship will go a long way into informing future strategies for controlling this kind of crime.

The study will also compliment other studies and fill in certain gaps which are uncovered. It is anticipated to be of use to a wide range of stakeholders who include Government, politicians, youths, policy makers, local authorities, local communities, children, girl-child, women activists, non governmental organizations, and researchers. In addition, to the findings of the study will help local community authorities, police, judiciary and government agencies to appreciate the need to improve on the culture of stopping child sex abuse especially defilement of girl child in vulnerable situations. Finally the findings of the study will also contribute to additional knowledge on the phenomenal complexities of child sexual abuse, and defilement. This will make it easier for policy formulation regarding to girl child defilement in Uganda and elsewhere.

The findings of the study will stimulate a desire for further research into the dynamics that explain the institutional challenges into controlling child defilement.

## 1.8 Definitions of key concepts

**Girl child:** This is a young female who has not yet reached the age of 18 years according to the constitution of Uganda.

**Defilement/Child Sexual Abuse:** It is any form of sexual contact either through sexual touch, kissing, oral, anal and vaginal intercourse where the perpetrator use physical force to the victim in order to achieve sexual gratification and the defiled must be below the age of 18 years according to the 1995 Ugandan Constitution.

**Aggravated defilement:** Is sexual intercourse with a girl below fourteen years and when the man who has defiled her is HIV positive.

**Control:** Is a system that manages or regulate the behavior of others by reducing the incidence in this case defilement.

**Challenge:** This is to claim justification or into questioning the act for example of defilement.

**Victim:** A person who is offended by another person as a result of committing a crime to the victim. In this case, the victim is the defiled girl child.

## 1.9 Methodology

Methodology utilized qualitative in nature as, according to Leedy<sup>9</sup>, this methodology is aimed at description. By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of political activity. Qualitative research is used in several academic disciplines, including political science, sociology, education and psychology. According to Peshkin (200:134) in Patton, it usually serves one or more of a set of four purposes: description, interpretation and evaluation of a hypothesis or problem.

According to QSR (a, 2011:115), qualitative research “is used to gain insight into people’s attitudes, behaviors, value systems, concerns, motivations, aspirations, culture or lifestyles.”

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<sup>9</sup> Established on 2001:148



QSR continues to explain qualitative research as a method of making informed decisions in both business and politics.

This study utilized a descriptive approach as it was necessary to observe and describe the penal code on sensitizing the rape and defilement in Uganda. Thus the researcher utilized a descriptive approach so as to be able to assess the law concerning rape and defilement. The descriptive approach may be considered as inductive, according to Rhodes (1995:44) as conclusions are drawn from repeated observations that is letting facts speak for themselves. Statements are made about Causes and consequences of the phenomenon being observed

### **1.9.1 Reliability of the instrument**

Reliability is the measure of the degree to a research instrument yields consistent results after repeated trials. According to Christensen (1988), reliability of the questionnaire, the researcher employed the methods of expert judgment and pretest in order to test and improve the reliability of the questionnaire.

### **1.9.2 Data gathering procedures**

According to Krishnaswami (2002:197) data are facts, figure and other relevant materials. past and present that serve as bases for the study and analysis. He further states that data may be classified into primary and secondary sources. The researcher was obtained an introductory letter from the School of law of Kampala International University Kampala, Uganda, which he will present to the heads of legal institutions, heads of government ministries and authorities and leaders of Non Governmental Organizations which will involve in the study. The researcher therefore will develop rapport, sought for consent and appointments with respective respondents to obtain the information.

### **1.9.3 Ethical considerations**

To ensure that ethics is practiced in the course of the study as well as utmost confidentiality for the respondent and the data provided by them, the following will be done, (1) Coding of questionnaire (2) The respondent will be requested to sign the informed consent ;(3) Authors

mentions in the study will acknowledge within the text;(4) finding was presented in a generalized manner.

### **1.10 Limitations of the study**

The researcher expected some challenges during the study. Poor attitude of some respondents was one of such. For example the officers in respective departments were skeptical about responding to some questions. Some information was regarded confidential and therefore bringing difficulty in accessing it. However, the researcher built rapport and explained fully the purpose of the study, which convinced the respondents to give the confidential information.

The researcher also met some financial challenges. The process of data collection took a period of 3-4 weeks, which means that the researcher was incurring transport and other support costs. However, the researcher intended to operate on minimal expenditure. The researcher did not get the respondents in time as planned. Some of the respondents did not respect time and appointments. Also the research faced the challenge of poor roads which were brought about the heavy floods that were evident in the region. This affected the transport system the researcher was using at that time.

### **1.11 Literature review**

#### **1.11.1 Rape as concept**

According to Susan Estrich (1987)<sup>10</sup>: A man commits rape when he engages in intercourse or carnal knowledge with a woman not his wife by force or threat of force against her will and without her consent. That is according to the old statute and is a traditional and common law definition of rape and it remains the essence even in the most radical reform statutes.

Many young women believe that sexual pressure, including physical pressure, is simply not illegal behaviour if it takes place in a dating situation. Most of the girl victims of rape do not perceive their experience of victimization as legitimate (Estrich, 1987). This means that they do not involve strangers or substantial violence.

In Uganda, the law states that any person can be an offender of rape so long all the elements of rape are present. It does not matter whether the perpetrator is a stranger or not. Those who do not

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<sup>10</sup> Susan Estrich (1987) *Real Rape*, Harvard University Press, Cambridge Massachusetts and London England 8.

report the offence do not do so because of cultural and social pressures within the society. The law is very clear on the definition of rape. According to the Penal Code<sup>11</sup>, 'rape' is dealt with 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 impersonating her husband, is guilty of the felony termed "rape".'

Due to the myths that women are untrustworthy, they are subjected to a taxing and languishing interrogation about whether the offence took place at all. Such evidence is called evidence of corroboration.

#### **1.11.1.1 Statutory rape**

Statutory rape refers to sexual intercourse with a minor (someone below the "age of consent"). People below the age of consent cannot legally consent to having sex. This means that sex with them, by definition of the strict liability statute, violates the law.

Statutory rape laws vary by state, with states setting the age of consent differently, as well as using different names to refer to this crime. Many states punish statutory rape under laws addressing sexual assault, rape, unlawful sexual intercourse or carnal knowledge of a child. In many states, statutory rape is a felony only if one of the participants (usually a male) is at least three years older than the other; otherwise, it is a misdemeanor. There are very few federal laws dealing with statutory rape.

#### **1.11.1.2 Free Legal Case Review**

A rape conviction can come down to the issue of consent, which is not always clear cut. Your case will be decided by facts that can be established by the government. However, you're also entitled to establish facts in your defense. In fact, that's one of the jobs of your legal team. A seasoned criminal defense attorney understands the process and how to lay out a strong defense. You can speak with an attorney in your area today and obtain a free review of the facts of your case to help you going forward.

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<sup>11</sup> Chapter II (2) of Penal Code Act

### **1.11.1.3 Defilement**

According to the Penal Code Act<sup>12</sup> any person who unlawfully has sexual intercourse with a girl under the age of eighteen years commits an offence and is liable to imprisonment for eighteen years, with or without corporal punishment.

### **1.11.2 Causes of rape and defilement**

The causes of defilement range from socio-cultural, economic and political. Absolute poverty looms in the majority of households in Uganda<sup>13</sup>, this can also step up the factors leading to increased defilement. This is because parents and the girl children are looking for material gains in order to survive.

The UNICEF, ANPPCAN et al (2001) report observed that, broken marriages leave children stranded and without proper support. Children are often mistreated by step parents and run away from homes ending up as prostitutes or child laborers. Orphans who lack care and support are at risk of being exploited and street children are also more vulnerable to sexual exploitation. Drug abuse is both a direct cause and consequence of survival sex and child prostitution. In some countries, parents make their children available for sexual exploitation as a way of earning money or in exchange for the invalidation of family debts.

### **1.11.3 Social, economic and cultural factors may be a barrier in the control of rape and defilement**

In many societies girl child defilement occurs though most of the cases are not reported to concerned authorities, girls are exposed to more of the cultural, social and economic constraints than boys. Cultural norms against reporting defilement abuses make it even more difficult to assess accurately the abuses<sup>14</sup>.

In most of the African societies, children are a source of wealth and girls are means of obtaining money, cows and many other things. And so since the highest proportion of bride price goes to girl's parents, then these girl children are married off by their parents when they are still young to old men who defile them, due to their parents' need for material gains. In traditional Africa, defilement existed, but like in Buganda virginity of the girl was of great value. So if a man

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<sup>12</sup> Section 129 (1)

<sup>13</sup> Luswata (1990)

<sup>14</sup> Delano, 1998

defiled a girl before she got married, then he would be fined a goat, one cow and two backcloths which he would give to the father of the girl.

However, if a man defiled a girl being prepared to marry the 'Kabaka' meaning king then the defiler would be killed. In the African tradition, every elder person was regarded as a parent to any child. Sexual issues were forbidden to be discussed in public. And traditionally the position of women in society, family and politic was subordinate. Virginity of a girl was safe guarded, but today parents leave their children with house-girls/ boys, relatives, neighbors and school authorities<sup>15</sup>.

In Uganda and Africa at large, matters concerning sex were treated with sensitivity and not to be discussed in public. The responsibility of giving and passing of sex education to the girl child was to be done by female relatives of the family<sup>16</sup>. This would happen when the girl was being prepared for marriage.

Cultural practices condone rape and defilement of children; it has not been easy to effect positive change in most communities where cultural practices condone the sexual exploitation of children. In some communities the definition of a child does not necessarily agree with the legal provisions. Due to the fact that sex is taboo, many cases of rape and defilement of children go unreported for fear of stigmatization<sup>17</sup>.

In the East and Southern Africa Region, early marriage is closely associated with a society's concept of children and the situation of any given child. In Uganda and Kenya, for example, cultural practices such as initiation ceremonies and the view that the onset of puberty is the cutoff point between childhood and woman hood, means that adolescents are not defined as children in many cultural practices. This is also the basis for early marriage<sup>18</sup>.

In Kenya some parents are known to marry off their young girls to older men in order to obtain money to meet educational fees for their male siblings and for other purposes. In pastoral communities, early marriages are common where parents marry off their young girls in exchange

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<sup>15</sup> (Batunzi and Kadoma 1997)

<sup>16</sup> (Nkozi 1992)

<sup>17</sup> (UNICEF 2001)

<sup>18</sup> Kalembera and Sameji 1998

for livestock. These exchanges, of cattle for girls and women, form an integral part of the local economy<sup>19</sup>.

Godwin (1998) observed that child rape and defilement is seen to be present through out the history of human interactions, and in some cultures is ingrained in the historical and sociological development of society; thus, like folks, tales, that emphasizes the relationship between kin that are in actual practice are incest taboos. He puts emphasis on the point that should be taken seriously is the fact that people should be aware of and conscious of the historical concepts as well as the cross-cultural differences that exist in different societies across the world when thinking of adult-child sexual contacts that may in society not be seen as evil and deviant behavior.

Kariisa (1993) highlights that new technology in form of televisions, videos, cinemas, novels, music and some magazines with pornography have brought problems and peer pressure to children. Alcohol, stereotyping, sexual immorality and drug abuse all need to be addressed. UNICEF, ANPPCAN et al (2001) report, showed that since children in this region exist within a cultural context, work with children, families and communities needs to take into account the social and cultural settings and experiences. Interventions must therefore be culturally sensitive and appropriate to policy makers and all concerned policy makers.

#### **1.11.4 The legal framework in controlling rape and defilement**

##### **The International law (Child Rights)**

The United Nations, on the convention of the rights of the child (UNCRC) which Uganda ratified in 1989. This purpose of the convention is for protection of the rights of a child and to be articulated on girl defilement are provided by UNCR. These include; the right to life, the protection of a child without family, freedom from abuse and neglect freedom of identity: freedom from sexual abuse, freedom from sale, trafficking and abduction. These are contained in article 6, 7, 8, 19, 34, 35 and 36.

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<sup>19</sup> UNICEF, ANPPCAN, et al 2001

## **The African Charter**

The African charter, on the rights and welfare of child article 27 says that, state parties shall undertake to protect the child from all forms of rape and defilement and exploitation shall in particular undertake measures to prevent the inducement, coercion or encouragement of a child to engage in any sexual activity. Uganda is one of the countries that ratified this convention.

Events that happen within families are usually not subject to international law. International law respects family autonomy as articulated in the International Covenant of Economic Social and Cultural Rights (ICESCR). However, child rape and defilement facilitated in the family under the guise of culture is now prohibited under international law by the Convention Rights of the Child (CRC) and the African Charter on Rights and Welfare of the Child (ACRWC).

Under article 19 of the CRC, the child is protected from abuse whilst in the care of parents, guardians or others who care for the child.

The state is required to take all appropriate legal, administrative, social and educational measures to protect the child. Sexual exploitation of children is also prohibited. At the regional level, ACRWC expressly prohibits child rape and defilement and exploitation. It compels states to amongst the same grounds articulated in the CRC to protect children against rape and defilement by school authorities.

ACRWC is applicable to all children under the age of 18 years regardless of national ages of majority. It seeks to eliminate the possibility of rape and defilement of children within marriages by establishing 18 years as the minimum age of marriage. To reinforce this, states are obliged to make registration of all marriages compulsory in an official register. Child marriages are to be prohibited by enacting the necessary legal measures that sets a minimum age of marriage at 18 years.

## **The Constitution for the Republic of Uganda**

While a whole chapter four of the Constitution of Uganda 1995 provides for the observance of human rights of all individuals, only a single article 34 specifically provides for children's rights. Among the rights mentioned, there are no specific provisions for protection rights of the girl child against situations that lead to girl defilement as spelt out in the UNCRC.

It is apparent that the 1995 constitution of the republic of Uganda provides no specific provision to protect the girl child in times of armed conflict as it has been seen in northern Uganda. However, article 34 provides for a legal framework under which children's human rights.

Policies and law have been enacted in support of realizing and protecting rights of children in general or specific situations, such laws formulated have included; the children Act chapter 59 and the laws under the penal code cap 120.

### **The Children Act Chapter 59**

The children Act of Uganda Chapter, provides the principles which guide in the design of protection of rights strategies of children in situations of domestic dispute and where legal action is required. And these are based on three core values of the UNCRC 1989 and these are "the best interest of the child", "survival and development of the child" and participation of children". On the basis of these, any decision that is made that affects the child's life while dealing with other persons, state, a court, a local authority are to be decided with the following consideration (a) the wishes and feelings of the child concerned in light of his or her age and understanding (b) the child's physical, emotional and educational needs and (c) the likely effects of any changes in the child's circumstances.

Those considerations are a good pointer that Uganda recognizes and appreciates children's right to protection against defilement or protection physically and emotionally. When the Act out-law harmful customary practices that are detrimental to the child's health, it becomes useful to the cause of the study but in conflict situation the customary practices continued become worse and relegate the girl child to sexual encounters of early marriages. As it stands however, it is incomplete because it does not give the scope of the social customary practices.

### **The Penal code cap 120**

The Penal Code Act cap 120 is an offence creating Act in Uganda and has a long history that is traced in the colonial era in the early 50's. When one examines the offences therein it will be appreciated that any violation of the following protection rights is offensive and the offences are punishable. They include, the right to life, freedom from illicit transfer, abuse and neglect, child labor, sexual exploitation, freedom from slave, trafficking and abduction freedom from other



forms of exploitation and to abuse, rape and defilement against children irrespective of what environment they are committed under. All are clear provision for enforcing and protecting the rights of all children irrespective of situation. However, the area that has hindered the protection of the girl child from defilement and what needs to be urgently addressed is the lack of up to date data on the practice.

#### **1.11.5 Strategies that can be put in place to improve on the control of rape and defilement**

The response of the international community to rape and defilement of children does not have a long history and it is only recently that it has been recognized as a significant social problem. The hesitancy of international law to address child rape and defilement has been attributed to the dichotomy of the private and public spheres. International law is primarily concerned with the public sphere whilst domestic law deals with the private sphere (Levesque 1999).

Thomason (1995) observes that, the ideal response to child sexual abuse would be primary prevention strategies aimed at eliminating, or at least reducing, the sexual abuse of children. He says that focus on issues related to the deleterious outcomes linked to child sexual abuse rather than on the characteristics of abusers and the contexts in which abuse is more likely to occur, which are relevant to primary prevention, and since, most information presents levels of sexual abuses the implications are for secondary and tertiary preventive strategies aimed at ameliorating the damage inflicted by abuse, and reducing the subsequent reverberations of that damage.

According to Lucy (2001) offenders accountability or community protection mechanisms that are for instance used in the United States are good strategies because, about 60 percent of cases confirmed during investigation are referred for prosecution. The rates are higher for cases investigated and referred by police than cases referred from child protection authorities. On average, more than half of those cases result in prosecution. Cases involving older children, more serious abuse, extra family offenders, more and better evidence, children with fewer problems and the presence of maternal support for the child are more likely to be prosecuted. A large majority cases where charges are filed result in conviction mostly by plea. In only about 15 percent of cases do children testify in court, of the convicted offenders about half are incarcerated.

State reporting is one of the strategies that have been introduced by the international community to ensure compliance with international norms. There are reporting procedures in the CRC and ACRW to oversee compliance; state reporting is not a form of enforcement mechanism as such. Reporting procedures have not been effective in ensuring that child sexual abuse and exploitation of the child is curtailed. There has been a general lack of political will to implement the comments of the relevant committees.

Sex-related offences have continued to increase countrywide despite several interventions. According to the 2012 Annual Crime and Traffic Safety report, defilement, rape, incest and unnatural offences are on the increase.

At least 8,076 defilement cases were registered the past year compared to 7,690 reported in 2011.

The Uganda Demographic Health Survey 2011 also indicates that 56 per cent of women between 15-49 years experience physical violence while 28 per cent experience sexual violence every year.

Defilement remains the leading sex related crime reported in the country with a total of 7,690 cases according to the Police Crime Report 2011 compared to 7,564 cases in 2010 despite the amendment of the Penal Code Act and the coming into force of the Domestic Violence Act 2010.

In Uganda, sexual offences take different forms. There are offences against children which include – defilement, aggravated defilement, failure to disclose offence of defilement for economic gain, child-to-child sex, householder permitting defilement, defilement or rape before a child, supply of sexual content and material to a child, incest, incest of a child, child prostitution and child pornography.

There are also sexual offences against adults which include but not limited to - rape, aggravated rape, attempt to commit rape, administering substance for purpose of committing a sexual act, sexual assault, sexual harassment, sexual offences relating to position of authority and persons in position of trust, sexual act with a person incapable of giving consent, detention with sexual intent, person living on earnings of prostitution, prohibition of prostitution, exploitation of

prostitution, unnatural offences, attempt to commit unnatural offences and indecent practices and acts.

Efforts such as Sexual Offences (Miscellaneous Amendments) Bill 2000, the draft Private Members Bill, 2012 on sexual related offences have been pursued to amend the provisions of various enactments on sexual offences, procedural and evidential requirements during trial of sexual offences and for other related matters.

The two pieces of legislation seek to consolidate laws relating to sexual offences, combating sexual violence, providing for punishment of perpetrators of sexual offenses, providing for procedural and evidential requirements during trial of sexual offences and other related matters.

However, both processes of amendments and presentation of the Private Members Bill have been delayed due to various social and political barriers though the two institutions have been seen working tirelessly to ensure that sexual offences are reduced and the victims are compensated and justice is sought through existing legislation such as the Domestic Violence Act 2010, Defilement Act 2007, which are apparently not sufficient enough to suffice for the rampant forms of defilement and rape predispositions.

It is commendable to witness collaborations of different stakeholders in particular; the Ministry of Justice and Constitutional Affairs, Ministry of Gender, Labour and Social Development and Civil Society Organisations who continue to work tirelessly to hasten the process of amendments relating to sexual offences since the present legal framework is not responsive to the current criminal trends of sexual offenses.

However, this coalition should lobby through different wings of power to ensure that the Penal Code Act Amendment Bill, 2012 (that also covers the Sexual Offences Bill amendments as annexes), is prioritised before the Cabinet since the government amendments not only cover offence specifically but also seek to amend sections on evidence under the Magistrates Court and the High Court which has deflated proceedings in courts while dealing with sexual related offences. This may finally bring a ray of hope to perpetually deal with sexual-related crimes in Uganda, though institutions like police, LCs, should also be strengthened to ably deal with sexual related crimes.

At the national level, there are a number of strategies that have been put in a place to prevent girl child defilement ranging from the legal, political to cultural means among others. They occur at 20 national and community level. For example, section 123(1) of the Penal Code of Uganda, spells out clearly that, the maximum penalty for defilement is death. And the punishment for attempted defilement is life imprisonment. As the law stands today, defilement is a capital offence punishable by death in Uganda.

## CHAPTER TWO

### RELATED LAW ON RAPE AND DEFILEMENT

#### 2.1 Introduction

When policies does not achieve the goal they were set to, usually it is the management who gets the blame. The ones who made the decision are questioned and studies and evaluations are done concerning the actual decision and the decision-makers. But you also need to look at the implementation of the decision, the whole policy processes. You can tell a lot from studying the implementation.

According to Carol Baker Health policy studies are not very popular and research within health is often focused on the management. But she claims that when studying policy process you have to be aware of that the policy exist in a very complex reality, and even if the management can be a part of a problem you have to look around to get the whole picture (Barker 1996:5f).

Policies can be slippery to study because they are dealt with on many different levels at the same time, and a decision is often made in relation to what has happened before and what is believed to happen next. Decisions are also often interrelated in a big network and together they form a strategy of how to handle practical issues (ibid). So when studying the implementation process of the Penal Code Act and the specific law about defilement and how it is implemented you therefore have to see to all levels of implementation, and also combine that with history and future.

There is an importance in investigating how defilement cases are handled, since too few studies have been done on sexual coercion correlated to health (Population Council 2004:1).

In Uganda this is an alarming situation and since the death penalty for defilement never have been executed even though defilement is very common, maybe there can be some problems within the process of implementing the law (Agardh 2004).

## **2.2 Court system**

In Uganda you find two types of courts: the local courts and Courts of Judicature. The local courts are subordinate to the Courts of Judicature. They handle civil cases, minor criminal cases and cases of customary nature. Appeals lie from the LCI to LCII to LCIII to the Chief Magistrate Court. The order: the Supreme Court, the Court of Appeal, the High Court and the Magistrate Courts. The Magistrate Courts usually handle cases of sexual offences and the High Courts handles cases capital offences and defilement (ULRC 2000:2).

## **2.3 The Penal Code Act**

The Penal Code Act was commencement in 1950 and since then it has gone through some smaller revolutions. It is more or less the British law, which Uganda inherited by the colonials. Initially Uganda had a different way of settling matters, but when the Englishmen came they brought the Penal Code Act with them and made it in to an African version. The Indian Penal Code Act also played a big role in Uganda, since the Indians seemed more related than the Englishmen. The Ugandan Penal Code Act therefore is a joined Penal Code Act with British, Indian and African influences (Herbert 2004).

When Uganda became independent in 1962 the Penal Code Act did not change very much, because the political and legal system in Uganda was already running independently by the time of independence (Herbert 2004). A big change was in 1995 when the Constitution gave special protection to vulnerable groups like woman and children and are at the same time allowing customs which is against the dignity of the woman, as long it is written (ULRC 2000:16).

The Penal Code Act is divided into several parts depending on what sort of crime was committed; 'Offences against the state', 'Offences against other states', 'Offences against the republic', 'Offences against the person', 'Offences against morality' etc. (Tamale 2004).

## **2.4 The law about defilement**

Before 1990 defilement could only be committed by a man against a girl of fourteen years and below and the maximum penalty was fourteen years imprisonment. Today law

number 129 in The Penal Code Act is now called 'Defilement of girl under the age of eighteen' and is located under the section 'Offences against morality' (ULRC 2000:32).

## **2.5 Defilement of persons under eighteen years of age**

129. (1) Any 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.

(2) Any person who attempts to perform a sexual act with another person who is below the age of eighteen years commits an offence and is on conviction, liable to imprisonment not exceeding eighteen years.

(3) Any person who attempts to perform a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

(4) The circumstances referred to in subsection (3) are as follows

(a) where the person against whom the offence is committed is below the age of fourteen years;

(b) where the offender to his or her knowledge, is infected with Human Immunodeficiency Virus (HIV), Acquired Immune Deficiency Syndrome(AIDS);

(c) where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed; or

(d) where the offender is a serial offender.

(5) Any person who attempts to perform a sexual act with another person below the age of eighteen years in any of the circumstances specified in subsection (4), commits an offence and is liable on conviction, to imprisonment for life.

(6) In this section unless the context otherwise requires

“serial offender” means a person who has a previous conviction for the offence of defilement or aggravated defilement;

“sexual act” means penetration of the vagina, mouth, or anus, however slight, of any person by a sexual organ or the use of any object or organ by a person on another person’s sexual organ

### **Low rate of rape prosecution cases**

Inability of victims to report cases to the police: This can be seen from the shame or neglect shown towards rape victims in Uganda by family and friends. It ranges from openly mocking the victims to being neglected by close family members and friends. In some cultures, some are even seen as having brought shame and dishonor to the family.

There is a general lack of support from care agencies of government who should not ordinarily encourage these victims but also re-engineer a systemic re-integration of victims into the society.

Considering the statistics of decided cases on rape at the Court of Appeal and Supreme Court, a cursory look shows that most reported instances of rape are from underage children who do not usually understand the very nature of the offence. Most adults rather choose to suffer in pain and anguish due to the social stigma attached to it.

Lack of proper investigation: There is a general apathy on the part of the Police institution. A typical example will be that of a victim approaching a police station and the police officers insist on laying the complaint over the counter without trying to conceal her identity or guaranteeing her privacy or possibly requesting information that is not central to the genuine complaints.

There is a lack of specialized training for police officers in handling these cases or in providing support for the victims. Furthermore, forensic identification of suspects cannot be effectively carried out, the use of biological evidence such as blood, semen, saliva, vagina epithelial cells etc is totally lacking. There is serious doubt as to the existence of a functional forensic crime laboratory in Uganda.

Weak legal sanctions and enforcement: To protect infants and minors from the cruelty of rape and other abuses. The current Senate President, David Mark, retorted that “we must ensure that maximum sanctions are meted out to culprits of rape and sexual abuses”



Even though the offence of rape is in itself punishable with life imprisonment, other related offences such as indecent assault, sodomy etc carries lesser punishment.

It is not just expedient to ensure maximum punishment, it is also imperative to enforce this punishment in a very firm and decisive manner. The police authorities should courageously investigate and recommend for prosecution the alleged offenders. The judiciary should not shy away from handing out maximum punishment, when the occasion demands, to sex offenders. This will serve as a deterrent to other members of the public.

Legal requirement: In Uganda, for the offence of rape to be properly established, there must be corroborative evidence which usually comes from eyewitnesses account or medical evidence. As regards eyewitnesses' corroboration, the law requires that such witnesses must have witnessed the actual penetration of the victim's vagina. How this is possible, practically speaking, at all times, defeats my wildest imagination. Most often than not, sex offenders will not undertake the abominable act in a place easily accessible to members of the public and there is always the possibility that before any eyewitness finally reaches a rape crime scene, the offender would have disengaged from the victim which ultimately means that rape as a criminal offence cannot be established but a lesser offence of attempted rape.

## CHAPTER THREE

### THE 'RULE' ON CORROBORATION IN RAPE AND DEFILEMENT OFFENCES

#### 3.1 The needs to be corroborated

'The rule' on corroboration in Uganda applies to all the elements of rape and defilement. The elements of the offence of rape are: penetration, lack of consent and identity of the accused. The elements of defilement are: penetration and identity of the accused. In the case of *Wesle vs. Republic*[1995] 1 MLR it was stated that;

Corroboration can be provided by circumstantial evidence. For rape the corroborative evidence must establish in some material respect that sexual intercourse has taken place, without the woman consenting and that the defendant is one who committed it.

What constitutes corroboration of these three ingredients differ from one case to another and the court decides each case according to its own facts. To show that there was no consent, the court usually looks at evidence showing a physical struggle between the complainant and the assailant such as scratches, torn clothes among others;

The evidence of the complainant corroborated by that of her friend who was in her company at the time of the event, her distressed condition, and the condition of her clothes leads to no other conclusion than that the sexual intercourse was without consent. Further more there were marks of violence which police found at the scene providing more corroborative evidence. (*Republic vs. Patrick Sambani* CC No. 392 of 1994)

Penetration can be shown and corroborated by medical evidence, the presence of semen, hairs in the victims' vagina and in the case of a child a broken hymen confirms penetration. Medical evidence has been said to be the best evidence to prove sexual intercourse but of course it is not the only evidence that can confirm penetration;

Part of corroboration of the sexual assault was the presence of semen on the girls clothing; that semen and spermatozoa found in the vagina are very powerful corroboration of completed as

opposed to attempted rape though proof of emission of semen into the vagina is not essential to prove a charge of rape. (Mariette vs. Republic 1966-68) ALR (MAL) 119)

The identity of an accused person also needs to be corroborated (Mariette vs. Republic). This can be done through third parties who actually saw the assailant, or through the admission of the assailant himself.

### **3.2 Human Rights and the 'rule' on corroboration**

The rule on corroboration has been tested against the law of human rights. Various articles from various constitutions and international human rights conventions have been invoked to assess whether the rule is in compliance with the articles. Uganda has a Constitution which contains a Bill of Rights and is also a signatory to a number of human rights Conventions. Below are some of the human rights articles that informed the study.

### **3.3 The 'rule' and the right to equality before the law**

Section 20 of the Uganda Constitution provides for the right to equality before the law as follows;

Discrimination of persons in any form is prohibited and all persons are under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status Uganda is also a party to various international Conventions which protect the right to equality before the law. Some of these instruments are as follows:

The Convention on the Elimination of all Forms of Discrimination Against Women

(1979) defines discrimination against women as follows;

Discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and

women of human rights and fundamental freedoms in the political, economic, cultural, civil or any other field.

Article 7 of the Universal Declaration on Human Rights stipulates that;

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 26 of The International Covenant on Civil and Political Rights stipulates that;

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to equality before the law is a fundamental right under the Uganda Constitution which can not be limited under Section 44(g) of the Constitution. A number of foreign cases and articles have held that the rule on corroboration is in contravention of this right and therefore discriminatory against women. For example in Uganda the rule was considered in the case of *Uganda vs Peter Matovu* (Criminal Session Case No. 146/2001, where the judge held that the rule was in contravention of the right to equality before the law under the Ugandan Constitution as well as other international human rights instruments which Uganda is a party to. The court declined to apply the rule on the basis that it was discriminatory against women and declared the rule unconstitutional.

The 'rule' and the right to dignity and personal integrity Section 19 (1) of the Uganda Constitution provides that; The dignity of all persons shall be inviolable.

The right to dignity entails a state of being dignified in mind, character or bearing whilst integrity is a state of wholeness; probity; honesty; uprightness. (Tanzanian Law Commission. 1991.) 'The rule' infringes on this right as it suggests that women are liars in all sexual matters.

The law requires that there must be penetration of the vagina, no matter how slight, this is in itself a laudable idea but modern realities has shown us that it is only the vagina that can be penetrated or defiled. This issue will be addressed in due course in this essay.

The other way through which corroboration can be established is through medical evidence which has been discussed above. The lack of human and material resources to medically investigate and reach conclusive findings in a rape case leaves a sour taste in the mouth.

## **CHAPTER FOUR**

### **ANALYSIS OF THE LAW**

#### **4.1 Introduction**

Rape is having forceful sexual intercourse with a girl or woman above eighteen years of age. According to the Oxford English Dictionary in Uganda Law Reform Commission publication (2000 p21), rape is an act of forcing a person, especially a woman, to have sexual intercourse against her will. This includes the act of bugging a man or boy against his will. In law, the term "rape" refers to a situation where a man has carnal knowledge of a woman by force, against her will and against her consent. The definition, however, excludes the penetration of the mouth or anus by other part of the body, or by any object used by the rapist to penetrate the victim's vagina. Where there is no penetration of the penis into the vagina, such an offence is construed as attempted rape. The offence is committed against a woman of eighteen years and above. otherwise it is defilement. Rape is by nature a violent and a degrading act. However, study findings show that it is considered as an act of immorality rather than of violence.

Rape is an immoral act that goes directly against the command of God. Deuteronomy 22:25-28, condemns rapping and this command was meant to protect women and the nation of Israel from committing sinful actions. It also mentioned a punishment the mosaic commanded for a man who raped a woman. The man was to be killed by stoning while the woman was considered innocent. Though the Mosaic Law was for the nation of Israel during the time of Moses, the principle is clear that raping was sinful in the eyes of God and led to the most extreme punishment possible.

#### **4.2 The Uganda Penal Code**

The penal code Act (1950) also treats it as a mere act of immorality. It defines rape as unlawful carnal knowledge of a woman or a 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.

Contrary to the penal code (1950) and the Uganda Law Reform Commission publication (2000), according to Opiyo (2005), in some areas rapping is closely related to cultural practices. In Karamoja, it is permissible for a boy to abduct a girl and rape her as it is a means of testing his manhood. This is also true with the Bagisu who rape after their circumcision. For example, it was cited in the Monitor of 24th to 27th 1995 under the heading “ man rapes 65 years old man” that Mabafe of Mugomba Mpata parish, Ntenjeru sub county in Mukono district on Saturday February ambushed and raped 65 years old woman. The villagers said that the man raped the old woman because being Mugisu who had just recovered from circumcision, he could not immediately sleep with his wife. He had to do from outside according to the Bagisu custom called “Okumala akambe”. These people have a tendency to ignore the law when it clashes with their customs. Their elders also recognize the practice as accepted aspect of everyday life and often no assistance in trying to prevent it. However, this kind of customs is exhibited in a few cultures that it cannot prevent the law from being enacted against this act.

Dr. Bagonza, a consultant obstetrician and gynecologist of Makerere Medical School, the medical complications of rape are numerous. One of them is getting injuries in the genital urinal system like bruises, tears and lacerations of the genital system. It has been estimated that over 50% of victims have some form of injury of the genital system. Bleeding often varies from stains to life threatening haemorrhage. Getting unwanted pregnancies is also another complication and about 1 to 5% of rape cases result into unwanted pregnancies which affect the physical, mental, and psychological conditions of the victims. Acquiring Sexual Transmitted Diseases and Human Immune Virus is also a common problem associated with rapping and many victims have been found to develop a variety of STDs such as gonorrhea, syphilis Chlamydia and trichomoniasis. However, HIV infection takes long to manifest. The psychological complications make the victims to suffer from depression as a result of shame, hopelessness and lowered esteem. The “rape trauma syndrome” includes fear and the denial of psychosomatic complaints such as muscle ache, headache and chronic gastro-intestinal distress. In the long term, the victim suffers sleep disturbances, phobias, suicidal tendencies and sexual dysfunction such as failure of orgasms and altered sexual and emotional responses. Still not avoidable is the infertility and ectopic pregnancies if the infection is not detected early or not properly treated. This is so especially in those individuals who do not reveal that they have been raped.

Raping is an escalating immoral act in the society and the most prevalent one is the marital rape which occurs between a husband and the wife without the latter's consent or the consent is obtained by force or by means of threats or intimidations of any kind or by fear of bodily harm. The main reason why marital rape is escalating is because there is no specific enactment of the law on marital rape. Consent is presumed for the fact of marriage. Mugerwa, a resident of Masaka says, "my wife must satisfy my sexual need. I do not even want the law in my house." According to the Uganda Law Reform Commission publication (2000 pp26), the law in Uganda is silent on the question of marital rape although the study findings indicate that it occurs in all districts.

Another form of rape is the police rape which occurs between a policeman and a woman whose consent he has not obtained or rather the consent is got by means of threats or intimidation. Police rape is mostly caused by uncontrollable urge of sex by some men. Since police are coercive by nature, they take this as an advantage. Nakazibwe Mary of Mpererwe, said that another cause of police rape is the uncontrollable urge which is exhibited among police personnel especially at night. She goes ahead to say that this same problem can trigger stranger rape if someone is not careful. Stranger rape is the kind of rape whereby a man unknown to the woman victim, grabs her without her consent and forces her into having sexual intercourse with him.

Gang rape is also another form of sex which occurs between two or more men with an unwilling female. Most men are known to be jealous. They cannot stand the fact of sharing a woman. This is why he may be free to tell the wife about all the girls he has ever accepted into his life but a woman is not given freedom to talk about the men who happened to be her friends. The most cause of gang rape is the use of alcohol and drugs make men loose "breaks".

Other forms of rape are office rape, genocide rape, ancestral rape which are also caused by indecent dressing, use of pornographic material, revenge exercising superiority powers over subordinates, body language like shaking bums and others.

However, what baffles the society is the ignorance about male rape yet is also exists. It is the kind of rape where a male is the victim. This male sexual victimization includes both rape and sexual



violence in general. It has been reported in UK that over 3% of adult males experience non-consensual sexual activities and it mostly take place in refugee camps.

To sustain a conviction of rape, there should be a physical act and lack of consent as developed under the common law and the case law. The prosecution has to prove beyond reasonable doubt that there was penetration of the vagina by the penis without the consent of the woman and the man knew or was reckless as to whether the woman was not consenting.

Rape as a sexual abuse has continued to represent one of the rapidly growing reported violent crimes all over the world. South Africa is rated the highest with rape cases. According to Schneider (1997) and Reuters (1997) in Eluzai (1997), in Uganda hardly a day passes without a report of rape in the media. Kabuye (1996) in Eluzai (1997) also noted that between 20,000 and 30,000 people living in Kampala today have been subjected to some kind of sexual abuse.

Although the number seems to be high, according to Rape, Abuse and Incest National Network, 60% of sexual assault are not reported to the police. 97% of the rapists do not spend a day in jail and approximately 2/3 of assaults are committed by someone known to the victim. Males have an added burden of facing a society that doesn't believe rape can happen to them at all. Unless there are serious physical injuries, it is difficult for a male victim to report a sexual assault that was experienced by him especially in a society with strong masculine custom. Also the male victims may be very vague in explaining their injuries when they're seeking medical or mental health services.

Due to the dangers of rape, countries have tried to take initiatives of combating this immoral act in the society by enacting laws which stipulate punishments or fines for those who would fall victim. In Uganda, the penal code act, 1994 section 118, confines any person who commits the offence of rape liable to suffer death. The offence of attempted rape is defined under section 119 and a penalty of life imprisonment is prescribed. Prior to the 1990 amendment, rape was punishable by life imprisonment with or without corporal punishment. However, the amended penal code statute modified this penalty by introducing death as the maximum penalty. This amendment in effect removed the jurisdiction from the chief magistrate's court to the high court.

Since most of the rape victims remain silent after the act for fear of embarrassment, health providers should be educated beyond the health care provision of these victims by being familiar with the sexual offences law and other appropriate legislation which could play an important role in reducing the sexual assaults. This could encourage victims to report rape through improved emotional care.

### **4.3 Penal Offences**

#### **4.3.1 Felony and Misdemeanour**

The Penal Code in section 4 defines a felony as an offence declared by law to be a felony, or, if not declared to be a misdemeanour is punishable with death or imprisonment for three years or more. The punishment however differs for example unlawful oaths c/s 46 provides for life imprisonment while other unlawful oaths c/s 47 and unlawful drilling c/s 49 provides for seven years imprisonment and yet fraudulent marriage ceremony carries a sentence of five years.

The punishment for a misdemeanour where no punishment is provided for is governed by section 24 of the Penal Code, which provides for imprisonment not exceeding two years. These misdemeanours are for example: forcible detainment c/s 73, challenge to fight a duel c/s 75, false assumption of authority c/s 86, threat of injury to persons employed in public service c/s 88, perjury and subordination of perjury c/s 89, false swearing c/s 94, deceiving witnesses c/s 95, compounding felonies c/s 98, compounding penal actions c/s 99, advertisements for stolen properties c/s 100, offences relating to judicial proceedings c/s 101, frauds and breaches of trust by person employed in the public service c/s 107, false information c/s 109, insult to religion c/s 112, disturbing religious assemblies c/s 113, trespassing on burial places c/s 114, hindering burial of dead body c/s 115, desertion of children c/s 152, neglecting to provide food etc for children c/s 153 and master not providing for servants or apprentices c/s 154. However other misdemeanours to wit: writing or uttering words with intent to wound religious feelings c/s 116, affray c/s 74, provide for imprisonment of up to one year.

According to “ **Black’s Law Dictionary**”, sixth edition, felony is defined to mean a crime of a graver or more serious nature than those designated as misdemeanours; e.g. aggravated assault (felony) as contrasted with simple assault (misdemeanour). In the United States, the federal land

many state criminal codes define felony status crimes, and in turn also have various classes of felonies (e.g.; class A, B, C, etc) or degrees (e.g.; first, second, third) with varying sentences for each class. On the other hand, the term “Misdemeanour” is defined to mean offences lower than felonies and generally those punishable by fine, penalty forfeiture or imprisonment otherwise than in penitentiary. Under federal law, and most state laws, any offence other than a felony is classified as a misdemeanour. Certain states also have various classes of misdemeanours for example Class A, B, C etc.

#### **4.4 Defilement**

(a) Defilement is defined in section 123 as:

*Any person who unlawfully has sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to suffer death.*

*Any person who attempts to have unlawful sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to imprisonment for eighteen years with or without corporal punishment.*

As teenagers approach adulthood, their parents’ responsibility for them is reduced.

Young people should begin to take more responsibility for the consequences of their own decisions and actions. They are at an intermediate stage between childhood and adulthood. The arrangements for dealing with people of this age – 16 and 17 years old (near adults) should reflect this. The current definition of the offence of defilement by raising the age of the victim from 14 – 18 years does not reflect this thinking. As a result, it has watered down the seriousness of defilement where the essence of the offence is having unlawful sexual intercourse with a female under the age of consent by equating it to rape where the essence of the offence is having unlawful carnal knowledge with a woman or girl without her consent.

#### **4.5 Adultery**

Black's Law Dictionary defines adultery as voluntary sexual intercourse of a married person with a person other than the offender's husband or wife, or by a person with a person who is married to another.

In that regard we would recommend that the definition of adultery should be gender sensitive. It should not provide two sets of definitions for the same offence and besides, it should not provide different sentences for the same offence as that may be interpreted to offend Article 21 of the Constitution. A different definition for the same offence also promotes disparity in sentencing.

#### **4.6 In summary**

The thirty-seven cases on defilement highlight a number of issues focusing on procedural and evidentiary flaws. Procedural problems included holding the defendant more than 24 hours, incorrect plea style, incorrect verification of language, using laws that didn't exist, and defective charge sheets. The evidentiary issues included the testimony of child victims, the use and introduction of P3 forms, the sufficiency of evidence including medical evidence, and the age of both offender and victim.

## **CHAPTER FIVE**

### **RECOMMENDATION AND CONCLUSION**

#### **1.0 Introduction**

This chapter covers the recommendations and conclusions for the analysis of the penal code in relation to the rape and defilement. This has given insight about how the government should enhance the law and amend if necessary finally put it into practice in Uganda.

#### **1.1 Recommendations**

It is therefore recommended that in order to strengthen the need to protect young girls particularly those falling in the age bracket of near adults 16-17 year olds, and at the same time allowing them freedom to prepare for founding their own families in terms of Article 31(1) of the Constitution, the age of consent in terms of Section 123 of the Penal Code should be reduced to 16 years while maintaining the punishment.

After the age of 16 years, offences committed to the near adults' 17-18 year olds would be catered for by the offence of rape which in its current state caters for both women and girls and besides it attracts the same penalty as defilement.

Under chapter fifteen that deals with offences against morality, it is only the offence of elopement contrary to Section 121A where courts are empowered to make an order for the convict to pay the aggrieved party compensation in addition to any other punishment. In that regard, our recommendations are: (i) That courts should be empowered to require an offender to pay compensation to the victim for any injury, loss or damage resulting from the offence of which he was convicted and any other offence taken into consideration.

Accordingly, Sections 118, 119, 120, 122, 123, 124, 126 and 129 should be amended to reflect a compensation order in addition to any other sentence that the court may impose. By enabling courts to order the payment of compensation either instead of, or in addition to/or dealing with the offender in any other way, a compensation order could therefore be a disposal in its own

right. Furthermore, where the court does not order compensation, the court will be required to give reasons for not doing so.

It is hoped that such a provision will encourage courts to use compensation orders more readily. By so doing, they would place the responsibility where it belongs by requiring offenders to pay for the injury, loss or damage they have caused. In addition, such an approach will be in line with the spirit and aspirations of the people as expressed in Article 126(2) (c) of the Constitution that empowers courts in adjudicating cases of both a civil and criminal nature to award adequate compensations to victims of wrongs.

It is recognised that there is a high rate of HIV infection in Uganda. Many times the offenders for the offences of Rape and Defilement may be HIV positive. It is suggested that where somebody knowing that he is HIV positive does rape or commit the offence of defilement or where anybody is convicted of any of the above offences and is proved HIV positive then that should be an aggravating factor in the sentencing process.

Education and awareness campaign are still needed. The health and sociological hazards of allowing young girls to have sex, get married, produce children should be made clear to everybody. The efforts of NGOs like ACFODE, UMWA, ANPPCAN, ISIS-WICCE, etc. should be upheld and facilitated to spread.

The legal system should be strengthened and culprits should know that one defiles at one's own risk. The police should be re-evaluated (hopefully the ongoing commission of inquiry into the conduct of the police force - particularly the Criminal Investigation Department, helps in this matter), equipped, sensitized and re-trained to be able to help the anti-defilement movement. In addition the law of evidence should be reformed to cater for young and vulnerable children that have to testify against their older, cunning and wilful defilers.

Intervention programmes like UPE are already doing a good job keeping young girls in school. The anti-defilement movement should work in partnership with government to streamline the UPE Programme so that it can be popular, produce results and become sustainable.

Confidence building is important for young people Young girls who are in school need guidance to avoid early sex, pregnancies and marriage so they can focus on school and training to develop careers for economic self-determination in the future. Activities outside the school to keep young people engaged in useful programmes need emphasis.

Perhaps our parenting methods need re-examination too Parents need to be more mindful about the movement and activities of their children at all times. The hazards in the way of children as they grow are simply too many to be ignored.

There is also need to do research and build an information data bank on defilement that could help in the fight against it.

It will also be crucial to work with the media to expose defilers and inform the public about measures to address the problem with a view to sensitizing communities to take defilement seriously.

Campaigns are necessary for legal reform that should make the law consistent with realities. For example the death penalty is seen as excessive in many areas which propels certain communities to try to settle out of court by asking for ridiculous fines like, beer, meat, etc. The law should put punitive measures in place that do not trivialise the issue of defilement

Cultures that are anti-women should be fought. This can be done through community and school visits. Doctors could be called upon to help educate about the dangers of early sex.

The call to parents to take the education of their daughters seriously should be made louder and sustained Parents should also stop looking at their daughters as, primarily, sources of wealth through bridewealth.

Lastly, Police and LCs should be educated more about the dangers of defilement. They should also be advised to handle such cases very seriously as the law provides and stop trying to settle defilement cases reported to them because they are out of both organs' jurisdiction.

**Accordingly our first recommendation is that:**

The distinction between felonies and misdemeanours in the penal code appears meaningless. Both felonies and misdemeanours are not sufficiently defined and classified, as is the case in the United States. Such offences should be classified and graded according to the seriousness of the offence. Failure to classify them, they should be discarded so that those offences are punished according to their seriousness.

## **1.2 Conclusion**

This article has reviewed the concept of rape, evolutionary history of rape, rape and the law, effects of rape on victims and society, with a view to raising societal awareness and providing informational templates for an effective management of rape and violence related issues in Uganda. This is benchmarked against a succinct but critical review of some communication theories as they relate to certain communication media strategies. It is hoped that the observations made in this study will help to stimulate researchers, NGOs, CBOs and GOs concerned with rape and related issues in Uganda to communicate more effectively in their drive to reduce the incidences of rape.

Defilement is a very serious social problem. It traumatises the victim and may ruin her future. It also affects society in many ways as it arrests the development of its most productive human resource for the future the youth. Despite some societal and cultural attitudes that have not yet grasped the problem of defilement, it is possible that the problem can be fought and eliminated.

However, from the interviews with various people carried in this edition, it is clear that attitudes against defilement are still deeply steeped in culture. It is unfortunate that the elite hold the kind of views as presented especially when they hold positions of responsibility. A lot of sensitisation still needs to be done; in fact the battle has just began.

Education coupled with good law enforcement can do a good job. Intervention programmes like UPE are already a step in the right direction.



All that is needed therefore, is the cooperation of everybody; government, NGOs, civil society, parents, teachers, opinion leaders, even the children themselves.

As we enter the 21st century, let us commit ourselves to enhancing the development one of our most important resources - the youth. And we can do that by ensuring that the spirit, ambition and determination of the girl child-will not be crushed by the evil hand of the defiler.

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