



**MEMORANDUM ON THE HUMAN RIGHTS IMPLICATIONS OF
SELECTED OFFENCES UNDER CHAPTER XIV OF THE PENAL CODE ACT
CAP 120**

PRESENTED TO THE UGANDA LAW REFORM COMMISSION

AUGUST 2013

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I. ABOUT HRAPF

Legal Status

Human Rights Awareness and Promotion Forum - Uganda (HRAPF) is an independent, non-partisan, non-governmental organisation. It is incorporated under the laws of Uganda.

Our Vision

A society where the human rights of all persons including marginalised groups are valued and respected

Our Mission

To promote respect and observance of human rights of marginalized groups through legal and legislative advocacy, research and documentation, legal and human rights awareness, capacity building and partnerships.

Contact

Human Rights Awareness and Promotion Forum (HRAPF)

Plot 390 Prof. Apolo Nsibambi Road

P O Box 25603 Kampala

E-mail: info@hrapf.org

Website: <http://www.hrapf.org>

Telephone; +256 414 348 600

II. LIST OF ACRONYMS

1.	CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
2.	CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law
3.	CRPD	Convention on the Rights of Persons with Disabilities
4.	HRAPF	Human Rights Awareness and Promotion Forum
5.	ICCPR	International Covenant on Civil and Political Rights
6.	ICESCR	International Covenant on Economic, Social, and Cultural Rights
7.	LGBTI	Lesbians, Gays, Bisexuals, Transgendered persons, and Intersex persons
8.	MCA	Magistrates Courts Act
9.	PCA	Penal Code Act
10.	TIA	Trial on Indictments Act
11.	ULRC	Uganda Law Reform Commission

III. INTRODUCTION

The Penal Code Act (PCA) Cap 120 Laws of Uganda 2000 is the principal criminal legislation in Uganda that defines crimes and prescribes penalties for a wide variety of offences.

The Penal Code has its origins in the 1930 Penal Code Ordinance,¹ which was modeled on the Griffith Code of Queensland, Australia of 1901, which in turn was inspired by the Indian Penal Code 1960. It has undergone a number of minor amendments since then but in essence it still remains reflective of the pre-colonial attitudes that informed its promulgation.

In light of the new Constitutional order introduced by the 1995 Constitution, and also in light of the changing trends today, it is clear that the Penal Code is in urgent need of amendment if it is to conform to the Constitution and reflect modern day realities. Parliament's efforts to amend the Penal Code to conform to the Constitution by making the offence of defilement cover boys and girls² have been supplemented by the work of civil society activists who have challenged various provisions of the Penal Code and had them declared unconstitutional including Section 154 on adultery,³ and corporal punishments in general,⁴ and the offence of publishing false news.⁵ While all these efforts are laudable, progress has been slow.

Given this background, HRAPF welcomes the initiative undertaken by the Uganda Law Reform Commission (ULRC) to review the Penal Code and other criminal laws in the country. This effort is the only viable avenue that can lead to a comprehensive reform of the Penal Code.

¹ Ordinance No. 7 of 1930 (later Cap 128 of the Laws of Uganda Protectorate, Revised Edition 1935).

² Penal Code Amendment Act 2007

³ Law and Advocacy for Women vs. Attorney General, (13/05 & 05/06 [2007] UGCC 1)

⁴ Uganda vs Kyamanywa

⁵ Charles Onyango Obbo vs. Attorney General [1997] UGCC 7

As a legal aid service provider, HRAPF works with persons who have been arrested or charged under particular provisions of the PCA. As such, it witnesses the human rights violations that such persons face in the process of implementation of these laws. The laws highlighted are those criminalising consensual adult same-sex relations and sex work.

The provisions are analysed for their effects on human rights and other implications that impact persons arrested/and/or charged under these provisions.

HRAPF is very grateful to be given the opportunity to contribute to this noble process and is hoped that these views will be taken into consideration during the review of the penal laws.

IV. EXECUTIVE SUMMARY

These submissions contain the position of Human Rights Awareness and Promotion Forum (HRAPF) on various sections contained in Chapter 14 of the Penal Code Act, entitled "Offences Against Morality." This report has been prepared pursuant to the process of reforming penal laws currently being undertaken by the Uganda Law Reform Commission. While there are many provisions in the Penal Code that are not only out of date but also blatantly in violation of the Constitution, the submissions focus only on those sections which HRAPF encounters daily in its work as a legal aid service provider to marginalised groups. The selected provisions are dealt with chronologically, as they appear in the Penal Code.

Section I discusses the offences of rape and indecent assaults, which while laudable are discriminatory against men and boys, as well as leaving transgender and intersex people without protection. Under both provisions, rape and indecent assaults can only be committed against women and girls, yet in real life men and boys suffer rape and sexual assaults as well. It is recommended that these sections be revised to include protection for men, boys, transgender and intersex persons.

Section II covers defilement of 'idiots and imbeciles' provided for under section 130. We decry the language used, as it is disrespectful and violates the right to dignity of persons with mental and physical disability. It not only violates article 35 of the Constitution but also the text and spirit of the Convention on the Rights of Persons with disabilities. It is recommended that the Commission revise the language and also extend protection to boys, men, transgender and intersex persons with disabilities.

Section III covers offences related to sex work under Sections 136, 137 and 139. These outline various offences in respect of sex work including living on the earnings of prostitution, operating brothels, and prostitution, respectively. It is recommended that all of these provisions be removed for lack of a legal basis to criminalise sex work. Sex

work is also recognised by the International Labour Organisation (ILO) as a work and a source of livelihood.

Section IV deals with Section 144, which concerns the age of female victims of sexual offences. It states that in sexual offences knowledge of the age of woman or girl is immaterial. It is recommended that the section be made gender neutral to cover all persons who are the subject of sexual offences.

Section V deals with offences that criminalise consensual same sex relations. These are Sections 145 and 146, which criminalise unnatural offences and attempts thereof have been a subject of much discussion. We re-iterate the position that it is high time these provisions were removed from the country's penal laws. The meaning of 'carnal knowledge against the order of nature' is vague and thus has a potential to include all sorts of acts. The provisions are discriminatory as they are specifically targeted at LGBTI individuals. Not only that, but they also criminalise consensual adult sexual relations, which is a violation of the right to privacy and dignity of the person. In practice, the provisions are used to persecute rather than prosecute suspected LGBTI persons. The provisions also violate various international treaties to which Uganda is a state party including the ICCPR, ICESCR, the African Charter etc. Chapter Five is dedicated to these provisions.

Section VI deals with Section 148, which criminalises indecent practices. This provision should be repealed or amended for being vague, because what it criminalises is not clearly defined. It is also in violation of the rights to privacy and dignity of the person in as far as it criminalises consensual adult sexual conduct in private.

Section VII deals with the Section 168, which creates the offence of being a 'rogue and vagabond.' This section should be repealed because it does not define what constitutes rogues and vagabonds. It is in violation of article 28(12) of the Constitution which requires offences to be specifically defined and punishment provided.

In conclusion, the recommendations made are based on the grounds that: laws should be gender neutral in order to protect men, women, transgender and intersex persons; laws criminalising private adult consensual sexual relations should be repealed because they violate basic human rights; and that laws criminalising sex work should also be repealed for they violate the right to work, and make women vulnerable to abuse as well as worsen the situation of HIV/AIDS in the country.

1.0 SECTIONS 123 & 128: RAPE AND INDECENT ASSAULTS

Overview

Section 123 criminalises rape and Section 128 criminalises indecent assaults. Both provisions are discriminatory because they exclude men and also leave transgender and intersex persons unprotected.

The Provisions

Section 123: Definition of rape

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.

Section 128: Indecent assaults, etc.

- 1) 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.*
- 2) 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.*
- 3) 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 misdemeanour and is liable to imprisonment for one year.

Recommendation

- These sections should be gender neutral.

Justification

Under Section 123, the definition of rape applies only to non-consensual sexual activity between a person and a woman or girl. Section 128, indecent assaults, etc., also applies only to an indecent assault on a woman or girl. Both sections exclude males. They therefore discriminate against male rape and indecent assault victims and are clearly in violation of Article 21, equality and freedom of discrimination, which states “a person shall not be discriminated against on the ground of sex.”

Male rape and indecent assault

It is now clear that violence against men includes sexual violence and men suffer from rape as well as indecent assaults. These acts may be perpetrated by other men or by women. In a documentary by Refugee Law Project of the School of Law, Makerere University entitled “*Gender against Men,*” victims of male sexual rape in northern Uganda and the Democratic Republic of Congo testified about the ordeal they went through when they were raped by soldiers as a tool of war. Their predicament was compounded by the fact that the law does not recognise male rape and society confuses male rape with homosexuality.⁶

Male rape is often overlooked by society yet it indeed exists in society. Often used as a weapon of war, rape against men is rarely spoken about publicly. This is partly because

⁶ The documentary is available at <http://www.youtube.com/watch?v=mJSI99HQYXc>. Accessed on 12th August 2013.

of the patriarchal structure of many communities in Uganda where men are said to be incapable of being vulnerable, let alone raped or indecently assaulted.

This mindset is not helped by the fact that laws, including Ugandan criminal law, do not recognise male rape as rape in the criminal sense. This means that when a man is raped, they cannot find redress and justice in the legal system. They thus suppress their trauma, which causes a lot of psychological torture.

Male rape and indecent assault also occur in prisons and schools. It is usually confused with “homosexuality” leading to assumptions that both parties involved are criminally liable for “carnal knowledge against the order of nature.” This stigma prevents many cases of such rape or indecent assault from being reported to the police.

Violation of the right to equality and non-discrimination

Equality before the law is one of the tenets of the present human rights regime. The Constitution of the Republic of Uganda, 1995 protects the right to equality before the law and non-discrimination under article 21. Sex and gender are some of the grounds upon which discrimination is prohibited. Treating men and women differently where the treatment affects both sexes/genders amounts to unequal treatment before the law and is discriminatory. In *Law and Advocacy for Women in Uganda v. Attorney General*⁷, the Constitutional Court held that several Penal Code provisions that discriminated on the basis of sex were null and void. In particular, the court observed:

Section 154 of the penal code is unconstitutional for punishing married women and men differently for adultery. Additionally, several sections of the Succession Act, which provide different inheritance and succession rights based on sex, are unconstitutional.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides for equality before the law and for non-discrimination. One of the grounds listed is sex

⁷ 13/05 & 05/06 [2007] UGCC 1

and gender. Article 2 of the African Charter on Human and Peoples' Rights also protects the right to equality, and lists gender and sex as one of the grounds protected.

Watering down protection of transgender and intersex persons

By making the offences gender/sex specific, the law presumes that all persons are either male or female and therefore does not consider the fact that some people are intersex and/or transgender. So, when such a person is raped or indecently assaulted, they must be proven to be a woman/girl before the offender can be charged/convicted of the offence. Since the conventional ways of determining gender/sex may not be appropriate in such cases, there is a great possibility that someone may be acquitted on the technicality of the gender/sex of the victim. A gender neutral provision would do away with such absurdities.

Summary of reasons for the recommendation

- The provisions exclude men and therefore send a wrong impression that men cannot be raped or indecently assaulted, which increases their vulnerability.
- The provisions violate the right to equality before the law protected under the Constitution and international human rights instruments.
- The laws do not protect transgender and intersex persons.

2.0 SECTION 130: DEFILEMENT OF “IDIOTS” OR “IMBECILES”

Overview

Section 130 criminalises defilement of a group of persons referred to as “idiots or imbeciles.” HRAPF objects to the language used and also the fact that the provision is not gender neutral.

The provision

Section 130: Defilement of idiots or imbeciles

Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, commits a felony and is liable to imprisonment for fourteen years.

Recommendations

- The provision should be reformulated using language that conveys respect for persons with physical and mental disabilities.
- The section should be made gender neutral.

Justification

Derogatory language and lack of respect

Although protection of persons with disabilities by the Penal Code is a positive step, it should be done in a manner that is respectful to the dignity of the persons.

The use of the words “idiots” and ‘imbeciles’ is derogatory and violates the Constitution and international law. The words “idiots” and “imbeciles” are generally understood to be pejorative toward persons with disabilities and convey a lack of respect for the dignity of those with a severe mental or intellectual handicap.

Specifically, the language offends Article 35 of the Constitution, which states that “...persons with disabilities have a right to respect and human dignity...”

Uganda has an obligation under the Convention on the Rights of Persons with Disabilities (CRPD), article 8(1)(a), which requires the state to foster respect for the rights and dignity of persons with disabilities.

Discrimination against males

Section 130 applies only to girls and women. In doing so, it discriminates against males and is therefore clearly in violation of Article 21 of the Constitution.

Summary of reasons for revising the section

- The section discriminates against male persons of unsound mind and physical incapacity who suffer sexual violations
- The section is vague
- The language used is derogatory and disrespects and discriminates persons with mental and physical incapacities

3.0 SECTIONS 136, 137 AND 139: OFFENCES RELATING TO SEX WORK

Overview

The Penal Code Act of Uganda criminalises sex work and activities around sex work. Sections 136, 137, and 139 criminalise living on the earnings of prostitution, keeping a brothel, and prostitution, respectively. Section 138 defines the offence of prostitution. HRAPF is of the view that sex work and activities around it should be decriminalised for the reasons of protecting the rights of women and controlling the spread of HIV/AIDS.

The provisions

136. Person living on earnings of prostitution.

(1) Every person who knowingly lives wholly or in part on the earnings of prostitution and every person who in any place solicits or importunes for immoral purposes commits an offence and is liable to imprisonment for seven years.

(2) Where a person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he or she is aiding, abetting or compelling his or her prostitution with any other person, or generally, that person shall, unless he or she shall satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution.

137. Brothels

Any person who keeps a house, room, set of rooms or place of any kind for purposes of prostitution commits an offence and is liable to imprisonment for seven years.

138. Definition of prostitute and prostitution

In this Code, "prostitute" means a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain, and "prostitution" shall be construed accordingly.

139. Prohibition of prostitution

Any person who practises or engages in prostitution commits an offence and is liable to imprisonment for seven years.

The term prostitution is defined in section 138, which provides thus:

“Prostitute means a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain, and “prostitution” shall be construed accordingly.”

Recommendation

Sections 136, 137, 138 and 139 should be repealed.

Justification

Violation of the right to work

The International Labor Organization, to which Uganda is a state party, accepted adult sex work as work in a 1998 report and called for its global recognition as a legitimate form of work.⁸ Sex work is a form of livelihood or commerce rather than coercion. It's also an exercise of the right to self-determination. Thus, continued criminalization of prostitution amounts to violation of the right to work guaranteed under article 40(2) of the Constitution and protected in the International Covenant on Social, Economic and Cultural Rights (ICESCR).

Moral offence

Until the 1960s, attitudes towards prostitution were based on Judeo-Christian views of immorality⁹. Lately, it is accepted that criminalization of the activities associated with sex work, or sex work itself, is neither contemporary nor modern, nor is it based on any

⁸ *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*; Edited by Lin Lean Lim, International Labour Office, Geneva, 1998

⁹ www.csun.edu/~psy453/prosti_y.htm accessed on 25th June 2013 at 5:30pm

reliable evidence or legal backing. Its criminalization is merely based on moral and ideological grounds.

Researchers have recently attempted to separate moral issues from the reality of prostitution. They have found that the rationale for its continued illegal status rests upon the following three assumptions:¹⁰

- Prostitution is linked to organized crime
- Prostitution is responsible for much ancillary crime
- Prostitution is a cause of an increase in venereal disease.

All these assumptions have been proved to be baseless and the reality of prostitution in different countries has proven to be the contrary. For example, according to the Swedish National Police Board,¹¹ in 2010, ten years after Sweden criminalised purchase of sex, serious organized crime, including prostitution and trafficking, had increased instead.

Criminalization is counterproductive to the prevention of HIV/AIDS and other venereal diseases

As a Canadian court has held,¹² “*the harms related to sex work are caused by criminalization-not by sex work in and of itself. Sex work is not inherently harmful-criminalization is.*”

With regard to health, criminalization of prostitution has escalated the spread of HIV/AIDS. This occurs because sex workers avoid visible locations and operate further from police and other services that protect their safety and health, such as peer support networks, which leaves them more isolated and vulnerable¹³. Criminalization of prostitution also makes it difficult to practice safe sex, since sex workers find their power on the job curtailed and so they cannot bargain with their clients for safe sex.

¹⁰ *ibid*

¹¹ Press release in Riskspolisstyrelsen 2010, available at www.scot-pep.org.uk

¹² *Bedford v Canada*, 2012 ONCA 186, available at www.abolitionprostitution.ca/downloads/ontario-court-of-appeal-decision-2.pdf accessed on 25th June 2013 at 5:46pm

¹³ *UN Report calls for decriminalization of prostitution*; Washington Times, available at www.washingtontimes.com/news/2012 accessed on 25th June 2013 at 5:40

In Uganda's case, the UN Committee on the Elimination of Discrimination against Women (CEDAW) has expressed concern about the prevalence of HIV/AIDS and other sexually transmitted diseases among prostitutes arising out of criminalizing prostitution. The Committee recommended the development of programs of action relating to prostitution and the introduction of legislation to ensure the prosecution of and stronger penalties for exploitation of female prostitutes.¹⁴

Furthermore, areas that have decriminalized sex work like New Zealand and Australia's New South Wales province are models of how decriminalization of prostitution increased condom use and slowed the spread of HIV, resulting in extremely low or non-existent transmission of sexual diseases among prostitutes¹⁵.

¹⁴ http://www.idppcenter.com/CEDAW_Comm_Pressures_Nations_on_Prostitution.pdf

¹⁵ *ibid*

4.0 SECTION 144: KNOWLEDGE OF AGE OF FEMALE IMMATERIAL FOR AGE SPECIFIC OFFENCES

Overview

Under Section 144, for age specific cases, it is immaterial that the offender did not know that the girl was underage. HRAPF is of the view that the provision should be gender neutral.

The provision

Section 144

“It is immaterial in the case of any of the offences committed with respect to a woman or girl under a specified age that the accused person did not know that the woman or girl was under that age, or believed that she was not under that age.”

Recommendations

- The provision should be revised to be gender neutral

Justification

The provision should be gender neutral

The provision follows the trend of all the sexual offences discussed above by affording protection only to women and girls. As already noted this is in violation of the equality provisions under the Constitution and under international law.

Making the provision gender neutral will protect both women and men as well as transgender and intersex persons.

Summary of reasons for our recommendations

- The law should be non-discriminatory on the basis of gender/sex
- The law should be able to protect transgender and intersex persons

5.0 SECTIONS 145-146: PROVISIONS CRIMINALISING CONSENSUAL SAME SEX RELATIONS

Overview

Sections 145, 146 and 148 of the Penal Code criminalise adult consensual same-sex relations. This is contrary to the Constitution of Uganda and the current trends in international human rights law.

Section 145 and 146 will be addressed jointly because they cover the same subject matter, while Section 148 will be dealt with separately.

The provisions

Section 145

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: attempt to commit unnatural offences

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.

Recommendation

- Both sections should be repealed.

Justification

Vague and wide sweeping

The criminalised acts are described as “carnal knowledge against the order of nature.” These acts are not defined in the law. In the case of *Kasha Jacqueline, Pepe Julian Onziema and David Kato v Rollingsstone Ltd and Giles Muhame*,¹⁶ Musoke-Kibuuka J stated that one must commit an act prohibited in order to be regarded as a criminal. However, he did not define which acts are covered in the provision, which has a high potential for including all forms of sex that may be regarded by a judge/magistrate as ‘unnatural.’ This fear is well justified in India where section 377 (which was recently struck down by the Delhi High Court for being unconstitutional) was interpreted to prohibit penetration of a sexual organ into any orifice that is not connected to procreation.¹⁷ This was wide enough to include all forms of sex that would not lead to procreation. This contravenes article 28 (12) of the Constitution, which states that, “*Except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.*” In striking down the offence of sedition, the Constitutional Court in *Charles Onyango Obbo vs. Attorney General*¹⁸ stated that “*the section does not define what sedition is. It is so wide and catches everybody to the extent that it incriminates a person in the enjoyment of one’s right of expression of thought.*”

Despite the dicta in *Kasha Jacqueline*, the law is used to criminalise sexual orientation and gender identity generally. A study by the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) and HRAPF revealed that there are a number of arrests that take place under these two provisions, and in none of these cases was there

¹⁶ High Court Miscellaneous Application No. 163 of 2010.

¹⁷ *Khanu v Emperor* AIR 1925 Sind 286.

¹⁸ [1997] UGCC 7

any indication that “carnal knowledge against the order of nature” was being committed. What spurred the arrests was simply a suspicion that the accused is an LGBTI person. The study documented instances where people have been arrested for sending text messages from their phones, dressing up in a way that the police interprets as cross dressing, and basing on rumors and “anonymous tipoffs” that an individual is LGBTI.¹⁹ This has led to many people being arrested and taken through the horrors of arrest using sections 145 and 146 as a basis.

The vagueness of the law has made it the ultimate tool for extortion by police officers and blackmail by the public.²⁰ One typical case of extortion is highlighted below:

This guy asked me whether I was married. I said no, I love men, I don't love women. He was interested, we exchanged numbers. We met the next day and he took me on his boda (motorcycle). Then he said he had run out of fuel, so I got off. There were policemen waiting. One slapped me. The one from my tribe said I was shaming them. He said he would call the media and put my picture in the newspaper. I got very scared. They took me to the police station. I had to write that I wanted to sodomise the guy. I refused. They were humiliating me, pushing me with their guns. They told me the guy wanted 1.5 million shillings. I had 15,000 in my wallet. They took it. I said I could raise only 300,000. It was money to pay my brother's school fees. I hired a taxi and went to my place with two policemen. The driver and one policeman stood outside. I went inside with the other policeman and gave him the money. I was released at 3:00 am.’²¹

Violation of Constitutional Rights

¹⁹ Above

²⁰ Above

²¹ Open Society Foundations, Moving Walls, Being Gay in Uganda, <http://www.opensocietyfoundations.org/moving-walls/18/being-gay-uganda>. Quoted in Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) & Human Rights Awareness and Promotion Forum (HRAPF) Above 35-36

Sections 145 and 146 violate a number of constitutional rights guaranteed by the Ugandan Constitution. These include the right to equality and non-discrimination, the right to liberty, freedom from inhuman and degrading treatment, and the right to privacy.

Equality and Non Discrimination: Article 21(1) of the Constitution provides that “All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.” Article 21(2) then lists the grounds upon which a person cannot be discriminated against and these include ‘sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability’. The UN Human Rights Committee in the case of *Toonen Vs Australia*²² stated that ‘sex’ as used in article 26 of the International Covenant on Civil and Political Rights (ICCPR), which lists grounds for non discrimination, “is to be taken as including sexual orientation....”.²³ Since Uganda is a state party to the ICCPR, which also prohibits discrimination, it is clear that the reference to sex in the Ugandan Constitution should also include sexual orientation and gender identity.

The history of the ‘unnatural offences’ provision that first made its appearance in the Indian Penal Code 1860 shows that the intention of the drafters was to criminalise same-sex conduct. This intention was never clearly articulated, however, given the language used was vague and broad, as seen above. The framing left the provision open to inclusion of acts committed by heterosexual persons, but nevertheless, in practice the law is solely used to target LGBTI persons. This makes the law discriminatory.

The right to liberty: Article 23 protects the right to liberty. No one is to be deprived of the right to liberty except in the exceptional cases listed under that provision. Among these exceptional cases is deprivation of liberty for the purposes of bring one before a

²² UN Human Rights Committee; Communication No. 488/1992: Australia CCPR/C/5/D488/1992, 4, April 1992)

²³ Above, Para 8.7

court of law 'in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda.' This exception allows arrests only in case of 'reasonable suspicion.' Arresting someone for having 'carnal knowledge against the order of nature' on the basis of their appearance cannot be said to be reasonable under any circumstances. So is arresting someone for purposes of extortion.

Of recent, the arrested persons have been denied the right to be taken to court within 48 hours contrary to Article 23(4) of the Constitution. One case that stands out is the case of where our client was detained for 7 days without being brought before a court of law.²⁴

In the Kasha Jacqueline case, the court made it clear that Section 145 covers *acts* and not one's sexual orientation or gender identity. Therefore, this implies that if one is arrested simply for being LGBTI, then such an arrest is in violation of the right to liberty.

Since it is difficult to find persons having 'carnal knowledge against the order of nature,' the law is exclusively used to arrest people basing on their suspected sexual orientation or gender identity. This explains why no conviction under this law has been registered. As such, the law does not serve any purpose except facilitating the violation of the right to liberty.

The right to dignity and freedom from inhuman and degrading treatment: Article 24 of the Constitution protects individuals from inhuman and degrading treatment. This is based on dignity of the person. In the case of *Victor Mukasa v Attorney General*, the High Court ruled that the right to dignity applies to all human beings including lesbians and homosexuals. In that case, the police and local council officials had illegally entered the house of the first applicant and then denied the second applicant the use of toilet facilities as well as fondling her. The Court held that this constituted inhuman and degrading treatment. This was case was cited with approval in the subsequent case of

²⁴ The parties have been withheld for security reasons

Kasha Jacqueline where the High Court ruled that publishing pictures, and addresses of persons suspected of being LGBTI and calling upon them to be hanged was a violation of the right to dignity of the person. This was regardless of the sexual orientation or gender identity of the persons.

Since the offence requires persons to be found having sexual intercourse, attempts to enforce this provision would certainly require invasion of peoples' homes and watching them having sex. This is indeed an extreme case of degrading treatment.

The rights to privacy: Article 27 protects individuals from having their homes or property or selves intruded upon through unlawful searches or entries on their homes or premises. This is regardless of one's sexual orientation as the case of *Victor Mukasa* showed. The forced entry by the police and Local Council officials into the first applicant's home was found to be a violation of the right to privacy.

In the subsequent *Kasha Jacqueline case* Hon. Justice V. F. Musoke Kibuka ruled that:

".....With regard to the right of privacy under Article 27 of the constitution, court has no doubt again using the objective test that the exposure of the identities of the persons and homes of the applicants for the purpose of fighting gayism [sic] and the activities of gays as can easily be seen from the general outlook of the expunged publication, threatens the rights of the applicants to privacy of the person_and their homes. They are entitled to that right"

Successful prosecution of the offences would certainly require finding people having sexual intercourse. As discussed above, this would violate the right to privacy of the person and/or their homes.

Indeed in the *Toonen case*, the UN Human Rights Committee found a violation of article 17 of the ICCPR, which protects the right to privacy. It observed that "*.....It is undisputed that adult consensual sexual activity in private is covered by the concept of privacy...*"²⁵

²⁵ supra

Not justified in a free and democratic society

Article 43 of the Constitution provides a general limitation to human rights. It states that:

In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

Public interest under this article shall not permit –

- (a) Political persecution;*
- (b) Detention without trial;*
- (c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.*

Thus apart from the right to dignity, which is non-derogable under Article 44, all the other rights can be limited. Mulenga JSC in the case of *Charles Onyango Obbo and Anor v. Attorney General*²⁶ stated that

Limiting their [rights] enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. ...There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight.

The laws criminalising consensual same sex conduct are said to be justified on the basis of culture and morality. However, culture and morality are both not immutable and it is difficult to point to what exactly constitutes culture or morality in Uganda. Again these laws did not develop out of the culture or morality of Uganda. Instead they are products of a colonial society and were imported from England via India and

²⁶ Constitutional Appeal No.2 of 2002 (SC), unreported.

Australia.²⁷ As such, limiting rights based on this justification may not pass the test under Article 43.

Therefore, having stated that the continued criminalisation of consensual same sex relations violates the right to equality, liberty, dignity of the person, and privacy, and cannot be justified as necessary limitation under Article 43, it follows that they are inconsistent with the Constitution. Article 2 of the Constitution declares that the Constitution is the supreme law of Uganda and that any law that is inconsistent with it is null and void to the extent of its inconsistency. Therefore, the Penal Code should not include provisions that are unconstitutional.

Violation of Uganda's international obligations

Uganda is a state party to a number of international human rights instruments that outline standards for the protection of human rights and place obligations on states. The relevant instruments that Uganda is a state party are the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples rights (African Charter).

The International Covenant on Civil and Political Rights (ICCPR)

Article 2(1) of the ICCPR imposes a duty on state parties to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 7 protects the freedom from inhuman and degrading treatment. As such, since the criminal law is used as an excuse to violate the rights of LGBTI persons, as evidenced by the *Victor Mukasa* and the *Kasha Jacqueline* cases, such laws would facilitate the violation of this Article.

²⁷"This Alien Legacy: the Origins of 'Sodomy' Laws in British Colonialism," Human Rights Watch. 2008. Pg. 25.

Article 9 protects against arbitrary arrest and detention. Arresting someone without any reasonable suspicion of commission of an offence except the person's real or perceived sexual orientation or gender identity would constitute arbitrary arrest.

Article 17 protects the right to privacy of the individual. In the *Toonen case*, the UN Human Rights Committee found a violation of the right privacy under Article 17 in a case where laws criminalising same-sex conduct were in existence.²⁸

Article 26 of the ICCPR protects the right to equality before the law for all persons. It imposes an obligation on states to prohibit any discrimination on any ground. It lists the examples of the grounds as "*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"

In determining whether sexual orientation was covered under Article 26, the UN Human Rights Committee stated that sexual orientation is a valid ground of discrimination in Articles 2(1) and 26, for it can be included under 'sex' or under 'other status.'²⁹

The UN Human Rights Committee in its concluding recommendations to states has since *Toonen* always recommended the decriminalisation of consensual same-sex relations. This recommendation has been made on the basis that such criminalisation violates Article 17 of the ICCPR as well as Article 26. This was for example done for Cameroon,³⁰ Chile,³¹ and the United States of America.³²

²⁸ Above, Para 8.2

²⁹ *Toonen v Australia*, Above.

³⁰ Concluding observations of the Human Rights Committee on Chile (CCPR/C/79/Add.104), at Para. 20.

³¹ Concluding observations of the Human Rights Committee on Cameroon (CCPR/C/CMR/CO/4), Para. 12.

³² Concluding observations of the Human Rights Committee on the United States of America (A/50/40), Para. 287.

The African Charter on Human and Peoples' Rights (African Charter)

Article 2 of the African Charter prohibits discrimination in the enjoyment of any rights and freedoms set out in the Charter on any grounds. The examples of grounds listed are: race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Although the African Commission has not yet interpreted whether sexual orientation is covered by Article 2, the use of "sex" and "other status" makes a compelling case that just like in the ICCPR, discrimination against sexual orientation is also prohibited by the African Charter.

Article 3 protects the rights of all persons to equal treatment before the law and states that all persons are entitled to equal treatment by the law. In *Legal Resources Foundation v. Zambia*³³, the African Commission on Human and Peoples' Rights noted that "citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all citizens."³⁴

The Charter also protects the rights to dignity and liberty in articles 5, 6.

Impossibility of successful prosecution

Because acts that may be regarded as constituting unnatural offences are committed in the confines of peoples' bedrooms or other such private spaces, and due to the fact that both parties to the acts are consenting adults, it is very hard for the state to prosecute them to the satisfaction of the criminal law standard of beyond reasonable doubt. Indeed, frequently section 145 is used to arrest, detain and harass suspects upon which they are released without prosecution, which is a violation of their right to liberty guaranteed under Article 23. CSCHRCL and HRAPF found that in a period of five years (2007-2011) there was no conviction or acquittal in respect of unnatural offences in

³³ African Commission on Human and Peoples' Rights. 14 November 2000. No. 211/98 (2001)

³⁴Legal Resources Foundation v. Zambia, African Commission on Human and Peoples' Rights. 14 November 2000. No. 211/98 (2001)

Kampala district³⁵. This was notwithstanding the fact that the Uganda Police reported 86 cases of unnatural offences in 2010³⁶ and 55 cases in 2011³⁷.

Unnatural offences are basically “unprosecutable” with the result that the continued stay of section 145 on Uganda’s criminal law books and its abuse by the criminal authorities is a black spot on the country’s human rights record and a sore on the face of our criminal justice system.

Summary of reasons for the recommendation

- The meaning of ‘carnal knowledge against the order of nature’ is vague and thus has a potential to include all sorts of acts.
- The provisions are discriminatory as they are specifically targeted at LGBTI individuals.
- The provisions criminalise consensual adult sexual relations, which is a violation of the rights to privacy and to dignity of the person.
- The provisions conflate bestiality with consensual adult sexual relations.
- The provisions are in practice used to persecute rather than prosecute suspected LGBTI persons.
- The provisions violate various international treaties to which Uganda is a state party including ICCPR, ICESCR, the African Charter, *etc.*

³⁵ Protecting morals by dehumanizing LGBTI persons; a critique of the laws criminalizing same-sex conduct in Uganda page 43.

³⁶ Uganda Police Annual Crime report 2010

³⁷ Uganda Police Force annual crime and traffic road safety Report 2011

6.0 SECTION 148: CRIMINALISATION OF INDECENT PRACTICES

Overview

Section 148 criminalises “indecent practices”. What constitutes indecent practices is unclear and that is why we urge the Commission to revise the provision to make it more definite.

The provision

Section 148: Indecent practices

Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself with another person, whether in public or private, commits an offence and is liable to imprisonment for seven years.

Recommendations

- The section should be amended to define clearly ‘acts of gross indecency.’
- Parts of the provision that criminalise consensual sexual relations among adults in private should be deleted.

Justification

Vagueness

Section 148 does not define which acts amount to “gross indecency” and therefore there

is a well founded fear that it could be used to criminalise endless forms of human conduct.

The intentions of the provision are indeed noble in as far as it seeks to protect public morality. Nevertheless, a law that is not clearly defined contravenes article 28(12) of the Constitution, which provides that: “Except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.”

Violation of Constitutional Rights

The parts of the provision that criminalise private consensual adult relations violate various provisions of the Constitution. These include the right to dignity of the person and the right to privacy under Article 24 and 27, respectively.

Sexual relations are an integral part of human life. Where consenting adults are involved, within the confines of their private spaces, criminalisation of their sexual acts constitute invasion of their privacy and by extension of their dignity as rational human beings.

Violation of international instruments

Consensual adult sexual relations in private are protected by both the ICCPR and the African Charter. Under the ICCPR, Articles 7 and 17 protect the right to freedom from inhuman and degrading treatment and privacy respectively. Article 5 of the African Charter protects the right to dignity of the human being

Summary of reasons for the recommendations

- The provision does not define what constitutes acts of gross indecency
- The parts of the provision that criminalise private consensual sexual acts among adults are unconstitutional and also violate international human rights law.

7.0 SECTION 168: CRIMINALISATION OF ROGUES AND VAGABONDS

Overview

The section provides for a generalized criminalization of people who are referred to as “rogues” and “vagabonds.” With no clear definition of a rogue or a vagabond, this section has been a subject of much abuse by authorities leading to mass violations of human rights of individuals and groups.

The provision

Section 168: Rogues and Vagabonds

(1) *Every-*

- (a) *Person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person;*
- (b) *Person going about as a gatherer or collector of alms, or endeavoring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence.*
- (c) *Suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself; and*
- (d) *Person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed to be a rogue and vagabond, and commits a*

misdemeanor and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year.

(2) *Subsection (1) (b) shall not apply to collections made in any recognized building or place of religious worship.*

Recommendation

- The section should be repealed.

Justification

Void for vagueness

The provision is inherently void for being vague. It is hard to know what exactly is criminalized by the section and the essential elements of the offence are not discernible.

This section violates Article 28 (12), which states that, *“Except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.”*

In *Salvatori Abuki and Another v. Attorney General*,³⁸ the Constitutional Court while declaring the Witchcraft Act void for being vague and ambiguous in that it did not meet the requirements of Article 28 (12), noted:

The reasons for these requirements are not hard to find. Firstly, it is to notify the citizens clearly of what conduct the statute prohibits. This assists a citizen to distinguish the prohibited conduct from the permissible conduct and therefore be

³⁸ Constitutional Court case 2 of 1997

able to guard against violations. Secondly, in the event of a charge being labeled against him under the statute, a citizen shall be able to prepare his defense since the ingredients of the offense are known.

Citing the Canadian case, *R. vs. Nova Scotia Pharmaceutical Society*,³⁹ the court stated:

The requirement of Legal precision is founded on two rationales:

- a) the need to provide fair notice to citizens of prohibited conduct*
- b) the need to prescribe enforcement discretion*

Similarly, in *Uganda v. Sekabira & 10 others*,⁴⁰ the High Court emphasized;

a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . and a statute which either forbids or requires the doing of an act in terms [so] vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

The same view was taken by the Supreme Court in *Charles Onyango Obbo and Another v. Attorney General*,⁴¹ where the court declared that seditious offences (section 40) were void and in violation of article 28(12).

Criminalization of poverty, homelessness, etc.

Rogue and vagabond offences have their roots in England's Vagrancy Act of 1824. The offence is inherited from colonial times and is outdated and does not conform to Constitutional principles and international law.

³⁹ (1992) 2 SCR 606 at page 643

⁴⁰ Others (H.C. Cr. Case No. 0085 of 2010)

⁴¹ [1997] UGCC 7

Additionally, offences such as these give license to police to arrest someone who is homeless or poor or is assumed to be a thief who has not caused harm to anyone. Additionally many persons who try to work extra hours in the night fall victim of such outdated laws. The offence may be abused by police and in Uganda, the police have surely abused this offence on allegations that the culprits fail to give a proper account of themselves. Such persons have been arrested on unjustifiable grounds only for them to be charged with being rogue and vagabond.⁴² Interestingly, even when such cases are sanctioned and forwarded to courts of law, many times the prosecution fails to bring witnesses to give evidence in court resulting in the cases being dismissed for want of prosecution.⁴³ These arrests and prosecutions have serious implications, as most of the victims cannot afford bail fees and so are they are usually on remand pending the dismissal of the case. This violates the right not to be detained arbitrarily provided for under Article 23 of the Constitution. It is also a strain on government resources as the accused persons require food and transportation and these cases increase the backlog of cases, yet very few go through the whole trial process.

The fact that very many people in Uganda, particularly in Kampala, are unemployed makes them prone to arrests and makes the detention centers crowded and overwhelmed by the large numbers of arrested people. The Plan of Action dating from 2003 recommended decriminalization of some offences such as rogues and vagabonds as a strategy to reduce the prison population.⁴⁴

This offence is ripe for repeal because it amounts to nothing more than criminalization of poverty, homelessness, unemployment, and/or previously having committed an offence. In a country like Uganda where a lot of people are unemployed and homeless, keeping such a law on the statute books places a significant portion of the population of Ugandans at a risk of being found to be criminals.

⁴² In the period January to June 2013, HRAPF handled four such cases involving 10 individuals (HRAPF records).

⁴³ For example the charges in all the cases received by HRAPF above were dismissed.

⁴⁴ [Ppja.org/news/campaign-for-repeal-outdated-offences-launched](http://ppja.org/news/campaign-for-repeal-outdated-offences-launched), accessed on 11th July 2013 at 5.18 pm

The provision is routinely used to round up street children and homeless persons as one of them testified:

“it is common that whenever high profile diplomats visit Kampala, orders from officials are passed to the police to rid the streets of this social menace - dirty and notorious children that could bring shame to the state guests. A policeman described it this week as an ‘ordinary cleanup’⁴⁵”

Oppression, extortion and abuse of individual liberties

The provisions of section 168 have become a gold mine for unscrupulous officers of the Uganda Police Force. The “catch all” drafting of the law has been exploited by these officers who mount night patrols dubbed “*ekikweketo*” arresting all and sundry and holding the arrested persons at various police stations to be released only on payment of non-refundable “bond” fees ranging from Uganda Shillings 50,000 – 500,000.

In an interview with a HRAPF lawyer in February 2012, one police officer in Entebbe who prefers to remain anonymous joked, “*whenever we are broke, we launch ekikweketo in the nearby areas and the following day we are rich...*”⁴⁶ Thus, there is normally no real intention of prosecuting the arrested persons.

Summary reasons for the recommendation

- The provision is vague and consequently void.
- Unfair criminalisation of homelessness and poverty

⁴⁵ <http://www.retrak.org/newsDetail.aspx?uid=193>

⁴⁶ HRAPF interview with a police officer, February 2012.

8.0 CONCLUSION

The foregoing discussion focusses on selected sections of the Penal Code particularly those falling under Chapter 14, entitled "Offences against Morality." The sections that are selected and the recommendations provided thereunder reflect areas where HRAPF has witnessed, in its work, the day-to-day challenges caused by these laws. The recommendations made are based on the grounds that: laws should be gender neutral in order to protect men, women, transgender and intersex persons; laws criminalising private adult consensual sexual relations should be repealed for they violate basic human rights; and that laws criminalising sex work should also be repealed for they violate the right to work, and make women vulnerable to abuse as well as worsen the situation of HIV/AIDS in the country. [Include also rogues and vagabonds here]