



## The Enforcement of Criminal Abortion Laws in Uganda and its Impact on the Human Rights of Women and Health Workers

Final Version, December 2016

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# THE ENFORCEMENT OF CRIMINAL ABORTION LAWS IN UGANDA AND ITS IMPACT ON THE HUMAN RIGHTS OF WOMEN AND HEALTH WORKERS

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## ABOUT HUMAN RIGHTS AWARENESS AND PROMOTION FORUM

Human Rights Awareness and Promotion Forum (HRAPF) is an independent, non-partisan, non-governmental human rights advocacy organisation. HRAPF seeks to create awareness of human rights and provide legal support to the most marginalised groups as a means of stemming abuse of their fundamental rights. HRAPF envisions a society where the human rights of all persons, including marginalised groups, are valued and respected. This is achieved through promoting respect and observance of human rights of marginalised groups through legal and legislative advocacy; research and documentation; legal and human rights awareness; and capacity building and partnership.

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## ACRONYMS

<b>CEDAW</b>	Convention on the Elimination of all forms of Discrimination Against Women
<b>CEHURD</b>	Centre for Health, Human Rights and Development
<b>CRR</b>	Center for Reproductive Rights
<b>CSMMUA</b>	Coalition to Stop Maternal Mortality due to Unsafe Abortions
<b>DPP</b>	Directorate of Public Prosecutions
<b>HRAFP</b>	Human Rights Awareness and Promotion Forum
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>RSA</b>	Resident State Attorney
<b>TASO</b>	The Aids Support Organisation
<b>UGX</b>	Uganda Shillings
<b>UN-CAT</b>	United Nations Convention Against Torture
<b>UNCST</b>	Uganda National Council of Science and Technology
<b>UPF</b>	Uganda Police Force
<b>UPS</b>	Uganda Prisons Service
<b>WHO</b>	World Health Organization

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## EXECUTIVE SUMMARY

### i. Introduction and background

Abortion is criminalised under the laws of Uganda, with only one vague and limited exception. Uganda's abortion laws and policies are confusing and their parameters remain contested among health service providers, law enforcement officers, judges, and women and girls. Despite the fact that the uncertainty of the legal position risks misapplication of the law, abortion laws are actively enforced. Women and girls, and health workers are left vulnerable to law enforcement personnel and face arrest, prosecution and imprisonment. Women and girls are also denied legal abortions and resort to unsafe means of terminating unwanted pregnancies. As a result, unsafe abortion contributes to an already high rate of maternal mortality in Uganda.

The study set out to examine the trends of enforcement of Uganda's criminal abortion laws, and the particular impact that this enforcement has on the human rights of the healthcare providers, women and girls who are harassed, intimidated, arrested, convicted or imprisoned and those who are affected by the law. The study also makes recommendations aimed at promoting a progressive change in legal and societal attitudes towards abortion in order to protect the rights of women and health providers.

### ii. Methodology

The study applied a mixed model research design that combines both quantitative and qualitative research methods. It tracked both the experiences of women and health providers who come into contact with the criminal justice system for abortion-related crimes, and the rates of arrests, prosecutions, convictions and incarcerations for abortion related crimes.

This was a nation-wide study but with a specific focus on two districts; Kampala and Kitgum. The two districts were selected as case studies because they provide urban versus rural settings and also have contrasting income levels. The information from these two districts illuminates the general trends of implementation of abortion laws in Uganda.

Uganda's courts and other criminal justice agencies, including prisons and police stations, provided valuable data to quantify and qualify the prevalence of abortion-related criminal cases in Uganda. The project reviewed records from six selected police stations serving Kampala, and six in Kitgum. It also reviewed records from magistrates courts serving Kampala and Kitgum.

Qualitative data was collected through semi-structured interviews, using pre-tested interview guides. The team interviewed women, girls and health workers who had been through the criminal justice system, which includes coming into contact with the police, courts or prison. Six women who had gone through the criminal justice system were interviewed nationally from the districts of Arua, Iganga, Jinja, Luwero and Mityana. Although the study originally aimed at interviewing women and girls in the two study districts, this proved impossible due to the stigma which occasions the enforcement of abortion laws. Without exception, the women and girls who were known to have

undergone abortion in the two study districts were found to have left the area.

In both study districts, midwives and other health workers who were arrested for performing abortions; police officers who had made arrests under the abortion laws; state attorneys; prosecutors; private legal practitioners (advocates); magistrates who had handled abortion cases; and prison officials and members of civil society organisations that deal with abortion rights were interviewed. Key informants from key stakeholder institutions, including: the Directorate of Public Prosecutions (DPP); the Uganda Prisons Service's Policy and Planning Division; and the Coalition to Stop Maternal Mortality Due to Unsafe Abortions (CSMMUA) at the Center for Health, Human Rights and Development (CEHURD), were selected to give their views.

Interviewees described their own stories, addressing their own lived experiences, and how these experiences affected themselves, their families and communities. These first hand case studies illuminate both the quantitative data and the real life experiences of women and girls arrested, prosecuted or imprisoned for abortion.

Quantitative data were collected through review of publicly available reports including police arrest and detention records: the 2011, 2012, 2013, and 2014 national annual crime reports; and court and prison records. Researchers also used quantitative content review methods to review secondary sources including government publications such as the National Demographic and Health Survey released by the Uganda Bureau of Statistics, reports of international organisations, newspapers, journals and magazines, and scholarly works.

### **iii. Findings**

The study revealed that abortion laws are being implemented at the national level as well as in the two study districts, though the numbers of arrests are very low compared to the estimated number of abortions carried out in Uganda every year. Nationally, at least 182 arrests were made on abortion-related charges during the four year period (2011-2014). At least 4 persons were arrested in Kampala in each of the five study years. In Kitgum, a total of 18 abortion-related arrests took place over the whole of the study period. Data from both of these two districts suggest that there was not much difference in the number of people arrested in each of the five years. National data, on the other hand, indicates a steady increment in the number of arrests over the course of the study period. Further investigation has led the research team to the conclusion that this apparent increment may be attributable to improved record-keeping methods and that it does not reflect a true upsurge in the number of arrests.

The study revealed a much higher rate of reporting and arresting in Kitgum as compared to Kampala, proportional to the populations of each of these two districts. This finding suggests that urbanisation influences the measure of secrecy with which an abortion can be carried out and that someone living in a small, close-knit community is more likely to be outed to the public.

The study revealed that some arrests are taking place merely for the purpose of extortion by family members of the girl or woman who had aborted and the police. Health workers

in particular were found to be the targets of such extortion.

Three categories of arrestees under the abortion offences were identified, namely: women or girls who had undergone abortions; health workers who had procured abortions and third parties (usually the men responsible for the pregnancies) who were involved in procuring an abortion. It was found that in Kampala, more women are arrested while in Kitgum more third parties are arrested. One explanation for this higher rate of third party arrests in Kitgum is the endemic defilement, which is viewed as part of the continuing legacy of the war, which the area experienced. It was found that in both districts healthcare workers are rarely arrested. This can be because most of the women do not necessarily go to qualified health workers for abortion due of the high fees they charge for performing a procedure which is illegal. The study also delved into the socio-economic status of the people who get arrested under the abortion laws and found that almost without exception, the persons arrested were poor.

The study found that although abortions are rampantly taking place, the cases which are reported to the Police are few and far in between. The research team found that while some communities strongly feel that abortion laws are to be enforced and would ensure that their neighbours are reported to the police, other communities show resistance toward the enforcement of these laws and try to protect the women, health workers and even third parties from arrest.

It was found that very few of the cases that are reported to police are actually prosecuted, at the national level as well as in the two study districts. This is due to the inherent difficulty in investigating abortion cases as well trends of complainants losing interest or being paid off before their cases can be submitted to the Resident State Attorney's offices for sanctioning.

Of the few cases reported in Kampala and Kitgum, which do actually reach the DPP, few reach the courts. In Kampala, 20 cases were referred to the DPP for sanctioning of which six made it to court. In Kitgum, only three of the eighteen cases referred to the DPP were eventually heard in courts. A trend was identified according to which under-aged girls are often impregnated by older men who then also convince them to go for an abortion. The prosecution would prefer charges of defilement rather than abortion charges in these cases and often, if the man agrees to marry the girl or to pay her medical bills, the girl's family would drop the charges. It was also found that abortion cases would sometimes be sanctioned, despite the low probability of successful prosecution, due to the pressure which state prosecutors experience from communities once it has come to light that an abortion has taken place.

At a national level, more third parties (which may include health workers) are prosecuted than the women involved. In the two districts, however, most of the people charged are the women who carried out abortions, followed by third parties. Not a single case of a health worker who had procured an abortion reached the courts in either district, which supports the finding that health workers are most often reported and arrested simply for the purpose of extorting them for bribes.

The study has found that there are many more convictions than acquittals or dismissal

for cases that go before the courts at a national level. In Kampala, two of the six cases which were heard in court lead to convictions while there were convictions in all three of the cases in Kitgum. A trend of imposing light sentences on women or girls who have been convicted under the abortion provisions was identified. Third parties involved in the procurement of abortions, however, are not afforded such leniency.

The conclusion reached is that the overall enforcement of abortion laws in the two study districts is undertaken haphazardly and is met with much resistance at every step of the way. Prosecutions of women and girls and health workers under these laws are rarely undertaken or successful and even when they are, the sentences imposed amount to mere warnings.

Despite the fact that abortion-related crimes are rarely prosecuted successfully, the existence and enforcement of these laws nevertheless lead to the violation of the rights of women, girls and health workers. The study found that the criminalisation of abortion forces women to undergo unsafe and clandestine abortions which violates their rights to life and health. The study finds that the rights of women and girls to be informed, upon arrest, of the charges against them and their entitlement to legal representation is violated, constituting an infringement of their right to liberty and security of person. It was found that some communities and police officers prioritise the enforcement of abortion laws above the provision of medical treatment to women and girls that have suffered complications or are in need of care following an abortion, which violates their right to be free from cruel, inhuman and degrading treatment and punishment.

The study found that while abortion laws discriminate against women in general, women of lower socio-economic status, as well as girls under the age of 18, are particularly prone to suffer the effects of its enforcement. Due to the criminalisation of abortion, women and girls in particular tend to lack the courage to approach professional health care providers for advice on the legal position and medical options concerning abortions, which violates their right to information. The study found that the arrest of a woman or girl often leads to the publication of the facts of the abortion, and personal details surrounding the abortion, to the community which infringes upon the right to privacy. Women are also affected by these laws by their very existence. Since they are aware that abortion is criminalised, many women do not even attempt to seek safe abortion services and end up going for unsafe abortions thus violating their right to life and dignity.

The study found that a broad range of rights of health workers are also violated in the process of enforcing abortion laws. Health workers are usually arrested under the abortion laws for the mere purpose of blackmailing them and extorting bribes, which violates their right to liberty, and security of person. The experience of an arrest is humiliating and violates a health worker's right to dignity. The abortion laws furthermore hinder health workers in exercising their profession of choice by rendering them vulnerable to arrest and damage to their professional reputation. The arrest of health workers is also occasioned with severe stigma and they tend to feel the same pressure to move elsewhere in cases where the community has been made aware of the arrest.

#### **iv. Key recommendations**

##### **To Parliament**

- Revise sections 141, 142 and 143 of the Penal Code Act to provide for more grounds upon which abortion can be lawful.
- Fulfil the constitutional obligation in Article 21(2) of the Constitution by adopting legislation, which lays down proper grounds and procedures for the procurement of an abortion.
- Adopt the new Sexual Offences Bill 2015 with abortion provisions that include broader exceptions to abortion based on human rights standards, and include the provision of treatment to persons who are in need of emergency treatment due to abortions.

##### **To the Uganda Law Reform Commission**

- Recommend ways of reviewing sections 141, 142 and 143 of the Penal Code Act in accordance with Uganda's domestic, regional and international human rights obligations and in light of evidence of the link between restrictive abortion laws and maternal mortality.
- Fast track the development of a bill to regulate abortion in Uganda.

##### **To the Ministry of Health**

- Release the Standards and Guidelines on Reducing Maternal Mortality from Unsafe Abortions in Uganda, publication of which had been stayed in 2015.

##### **To the Uganda Police Force**

- Make a professional decision not to arrest healthcare workers for abortion-related offences bearing in mind the effects of a mere arrest on the reputation of a healthcare provider and the conflicted situation in which health workers find themselves due to restrictive abortion laws.
- If there must be an arrest, prioritise emergency health care provision.
- Keep meticulous records of all cases handled.

##### **To the Judiciary**

- Be responsive to any constitutional violations involved in arresting suspects on abortion charges and bringing them before courts.

##### **To the DPP**

- Continue to refrain from sanctioning abortion charges where a prosecution cannot reasonably be sustained.
- Develop a specific prosecutorial policy in terms of how abortion charges against health workers are to be dealt with. The policy should make plain the distinction between abortion crimes and acts of medical negligence. The sanctioning of abortion charges against health workers should furthermore be discouraged.

##### **To mainstream civil society organisations and legal aid service providers**

- Lobby for the revision of sections 141, 142 and 143 of the Penal Code Act.
- Lobby for the adoption of an Act which broadens and clarifies the grounds for legal abortion in Uganda.

- Ensure the availability of legal representation for women, girls and health workers arrested and charged with abortion crimes.
- Ensure the widespread accessibility of information on the legal regime governing abortion, especially to women in rural areas and women belonging to marginalised groups such as sex workers and those living with HIV/AIDS.
- Engage the judiciary, police and government on the issue of the violation of rights of women, girls and health workers through the existence and use of abortion laws.
- Conduct awareness-raising and sensitisation of government officials and law enforcers on the issue of abortion.

### **To the President and Cabinet**

- Approach the incidence of unsafe abortion as a public health emergency rather than a criminal justice issue.

# SECTION I



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## INTRODUCTION

### 1.1 Introduction

In 2012 a young woman suffering from life-threatening injuries after self-inducing an abortion, went to a maternity centre for emergency treatment. The on-duty midwife, experienced in treating such cases, saved her life. The woman's uncle,<sup>1</sup> reported the midwife to the police, claiming she had conducted the abortion. The police arrested the midwife, detained her at a police station and then released her. She was rearrested two days later, then released again, but this was only after she had paid the police officers a bribe of UGX 400,000 (approximately USD 110). This is not how the law is supposed to work. Under Ugandan law, abortion is permitted on mental and physical grounds.<sup>2</sup> No one should go to jail for providing a health service, let alone for providing emergency treatment after an unsafe abortion. Yet this scenario plays out daily in Uganda.

There are more than 300,000 abortions in Uganda every year<sup>3</sup> and the country's maternal mortality is high at around 438 per 100,000 live births.<sup>4</sup> It is estimated that unsafe abortion contributes 26% of maternal deaths in Uganda.<sup>5</sup>

One of the contributing factors to this high number of abortions is that Uganda's abortion laws and policies are confusing and in some cases contradictory.<sup>6</sup> Because of this, most health service providers, law enforcement officers, judges and women and girls, do not know the parameters of the laws and policies. Most think abortion is illegal without any exceptions and some think there is only one exception - when a medical practitioner carries out a surgical operation to save the life of the mother. With little or no access to legal abortion, many women who want to terminate a pregnancy must resort to unsafe abortions.

The criminal laws on abortion are actively enforced, and often incorrectly. Both health workers and women and girls who terminate a pregnancy risk being arrested and prosecuted and even imprisoned. The Uganda Police Force's Annual Crime Reports record criminal cases related to abortion, and the numbers are telling. According to this data, reporting of abortion-related crimes is increasing. In 2013, 555 abortion-related

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<sup>1</sup> Interview with midwife at a Maternity and Health Centre in Kampala, 21 April 2016.

<sup>2</sup> Center for Reproductive Rights, O'Neill Institute, and International Woman's Human Rights Clinic Georgetown *The Stakes Are High: The tragic impact of unsafe abortion and inadequate access to contraception in Uganda* (2013) 8.

<sup>3</sup> E Prada et al 'Incidence of induced abortion in Uganda, 2013: New estimates since 2003' *PLOS One* (2016) 11(11), 9.

<sup>4</sup> Uganda Bureau of Statistics *Uganda Demographic and Health Survey* (2012).

<sup>5</sup> Uganda Ministry of Health *Roadmap for accelerating the reduction of maternal and neonatal mortality and morbidity in Uganda 2007-2015* (2007) 17.

<sup>6</sup> Center for Reproductive Rights *Briefing Paper: A Technical Guide to Understanding the Legal and Policy Framework on Termination of Pregnancy in Uganda* (2012) 6; S Singh et al *Unintended pregnancy and induced abortion in Uganda: Causes and consequences* Guttmacher Institute (2006).

cases were reported.<sup>7</sup> By 2015 these numbers more than tripled, and 1,800 cases were reported.

But these numbers do not tell the full story.

This study examines the trends of enforcement of Uganda's criminal abortion laws, and the impact of this enforcement on the human rights of the healthcare providers, women and girls who are harassed, intimidated, arrested, convicted or imprisoned. This study is national in scope and covers the years 2011-2015. It takes a detailed look at the enforcement of criminal abortion laws in the Kampala and Kitgum districts. The two districts are very different in terms of income levels and availability of social and health services. The results from these two areas can be generalised to the whole country.

This report provides a basis for legislative advocacy. A progressive change in legal and societal attitudes towards abortion is necessary not only to protect the health and rights of women, but also to safeguard the country's strained health system. By understanding the magnitude and experience of women and health providers going through the criminal justice system, key stakeholders will have the necessary data and tools to advocate for law reform for safe and legal abortion.

The definition of 'abortion' adopted in this report is 'the deliberate termination of an unintended pregnancy before the foetus is capable of survival outside of the womb.' Abortion' should be understood to mean an 'induced abortion' which has deliberately been procured through medical or surgical means as opposed to a 'spontaneous abortion' or miscarriage.<sup>8</sup> A medical abortion is defined by the World Health Organization as 'the use of pharmacological drugs to terminate pregnancy'<sup>9</sup> while a surgical abortion refers to the physical removal of the foetus and placenta from the woman's womb.<sup>10</sup>

## 1.2 Background to the study

Interpreting Uganda's abortion law is not simple. Most countries with abortion restrictions regulate the parameters of the procedure under the Penal Codes and standards and guidelines. In Uganda, there are multiple legal frameworks for interpreting the law. According to the Center for Reproductive Rights, to understand Uganda's legal and policy frameworks on abortion one must include applicable human rights law, Uganda's Constitution, Penal Code, national policies and case law. Based on the existing frameworks, legal scholars have determined that in Uganda abortion is permitted to preserve the life, and mental and physical health, of a pregnant woman. The health exception is understood

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<sup>7</sup> Uganda Police *Annual Crime and Traffic/Road Safety Report 2013* (2014) 27.

<sup>8</sup> 'Spontaneous abortion' or 'miscarriage' refers to the natural or accidental loss of a foetus. It is defined by the WHO as 'the premature loss of a foetus up to 23 weeks of pregnancy and weighing up to 500g (1)'. WHO Reproductive Health Library 'Follow-up for improving psychological well-being for women after a miscarriage' available at [http://apps.who.int/rhl/pregnancy\\_childbirth/antenatal\\_care/general/cd008679\\_mehtam\\_com/en/](http://apps.who.int/rhl/pregnancy_childbirth/antenatal_care/general/cd008679_mehtam_com/en/) (accessed 25 November 2016).

<sup>9</sup> WHO *Safe abortion: Technical and policy guidance for health systems* Second edition (2012) iv.

<sup>10</sup> US National Library of Medicine, Medline Plus 'Abortion – surgical' available at <https://medlineplus.gov/ency/article/002912.htm> (accessed 15 November 2016).

by some to also include cases of sexual violence.<sup>11</sup>

Uganda is party to various international human rights treaties that bind it to promote women's right to health, including access to safe abortion services. Key among these instruments is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),<sup>12</sup> which Uganda ratified. Other treaties signed by Uganda, which protect the right to health, include the Convention on the Rights of the Child,<sup>13</sup> the Convention on the Elimination of all forms of Discrimination Against Women,<sup>14</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>15</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>16</sup> The various Committees, which are charged with providing an authoritative interpretation of the above treaties, have decried the criminalisation of reproductive health services such as abortion.<sup>17</sup>

Under the above instruments the state is obligated to protect the right to life, health, privacy, non-discrimination, self-determination, human dignity, bodily integrity, and women's rights. The promotion of women's health and reproductive rights, including provision of legal and safe abortion services, is critical to the enjoyment of these rights.<sup>18</sup>

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<sup>11</sup> Center for Reproductive Rights *Briefing Paper: A Technical Guide to Understanding the Legal and Policy Framework on Termination of Pregnancy in Uganda* (2012) 24-25, 35-36.

<sup>12</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf) Adopted 11 July 2003; entered into force 25 November 2005. Uganda placed a reservation on Article 14(2)(c) of the Protocol which authorises abortions in certain circumstances.

<sup>13</sup> (1989) 1577 UNTS 3.

<sup>14</sup> (1979) 1249 UNTS 13.

<sup>15</sup> (1966) 999 UNTS 3.

<sup>16</sup> (1966) 993 UNTS 3.

<sup>17</sup> For example, the Committee on Economic, Social and Cultural Rights (CESCR) in *General Comment No. 22 on the Right to Sexual and Reproductive Health*, 2016 paras 34, 40, 41 and 49 (a)) and The Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) in *General Recommendation 24, Article 12 of the Convention, 'Women and Health'* par 11, A 54/38/Rev.1, Chap 1 95 February 1989.

<sup>18</sup> Office of the High Commissioner for Human Rights (OHCHR) 'Abortion' *Information Series on sexual and reproductive Health and rights*, [http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_Abortion\\_WEB.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf) (Accessed 19 October 2016).

While some African states have taken significant positive steps to enact more progressive abortion laws,<sup>19</sup> Uganda still has legislation that significantly limits access to abortion.<sup>20</sup>

In June 2015, the Ministry of Health attempted to clarify Uganda's ambiguous abortion law and developed the *Reducing maternal morbidity and mortality from unsafe abortion: Standards and Guidelines*.<sup>21</sup> For the first time, Uganda had clear guidelines for the provision of safe termination of pregnancy and post-abortion care.<sup>22</sup> Three months later in December 2015, the government stayed dissemination. As of this publication, the standards and guidelines have still not been reinstated and the question of legal access to abortion remains undefined.<sup>23</sup>

Without clear guidelines, women, girls and health providers are vulnerable to law enforcement personnel, who are unaware of the legal parameters for abortion. It increases the risk of misapplication of the law. Women are being denied legal abortions, and both women and health providers are targets of law enforcement. We need reliable data on how abortion law is being enforced in order to understand the social and human rights ramifications this has on Uganda's women, girls and health providers. This report provides such data.

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<sup>19</sup> In Ethiopia, the criminal Code of the Federal Democratic Republic of Ethiopia 414/2014 Art 551 permits termination of pregnancy in instances of rape, incest, where the continuance of the pregnancy or birth of the child is dangerous to the life and health of the mother; where the child has an incurable and serious deformity, and where owing to the woman's physical or mental deficiency, they are unfit to bring up the child. South Africa has the Choice on Termination of Pregnancy Act 1891 of 1996 which allows abortion even without stated reasons. Other states have taken significant positive steps to enact more progressive abortion laws, and others such as Kenya (The Constitution of Kenya 2010 Art 26(4) allows for termination of pregnancy to preserve both the life and health of the woman), Rwanda (Penal Code of Rwanda 2012 Art 165 permits termination of pregnancy in instances of rape, forced marriage, incest in the second degree, and where continued pregnancy endangers the life of the baby or the woman), Swaziland, (The Constitution of the Kingdom of Swaziland Act 2005 Art 15(5) permits termination of pregnancy on medical grounds regarding the life, physical and mental health of the woman, in cases of rape, incest, and unlawful sexual intercourse with a retarded female) and Tunisia (Penal Code Act Tunisia 1973 Art 214 authorises the performance of abortions on request during the first three months of pregnancy. After this period, an abortion may be performed when there is a risk that the health or mental balance of the mother will be compromised by the continuation of the pregnancy or a risk that the unborn child will suffer from a serious disease or infirmity). In Zambia the Termination of Pregnancy Act Cap 304 provide more grounds for abortion in addition to saving a woman's life.

<sup>20</sup> Sec 224 of the Penal Code Act.

<sup>21</sup> Ministry of Health *Reducing Maternal Morbidity and Mortality From Unsafe Abortion: Standards and Guidelines*, 2015.

<sup>22</sup> This includes in cases of rape, defilement, incest and other forms sexual and gender based violence. The Guidelines also addressed such critical issues as prevention of unsafe abortion through family planning and contraceptive service delivery.

<sup>23</sup> Interview with Joy Asasira, coordinator of the Coalition to Stop Maternal Mortality as a result of Unsafe Abortion (CSMMUA), 21 September 2016. Ms. Asasira expressed that the development of these guidelines are part of the Ministry's ongoing efforts to address the contribution of unsafe abortion to preventable maternal mortality.

### 1.3 Problem statement

The criminal laws on abortion largely criminalise access to abortion services, with only one exception. This leaves women and girls, and health workers vulnerable to law enforcement personnel, who are also often unaware of the legal parameters for abortion. The uncertainty of the legal position also risks misapplication of the law. Women are being denied legal abortions, and both women and health providers are at risk of arrest, prosecution and imprisonment.

Given this situation, it is necessary to study how abortion law is being enforced in order to understand the social and human rights ramifications of this enforcement on women, girls and health providers.

### 1.4 Study objectives

1. To analyse the legal and policy framework governing abortion in Uganda;
2. To understand how laws and policies criminalising abortion are being enforced in Uganda with a focus on Kampala and Kitgum districts;
3. To analyse the impact that the enforcement of abortion laws has on the human rights of women, girls and health workers affected; and
4. To make recommendations to stakeholders in the enforcement of abortion laws

### 1.5 Literature review

Apart from a few newspaper reports and data from annual police reports, scholarly and other literature on the enforcement of abortion criminal laws is scanty.

As regards numbers of people arrested on abortion related charges, police annual crime reports provide general information on the number of cases of abortion investigated per year. These reports are: The 2011 Annual Crime Report,<sup>24</sup> the 2012 Annual Crime Report,<sup>25</sup> the 2013 Annual Police Report,<sup>26</sup> and the 2014 Annual Police Report.<sup>27</sup> These reports show how many abortion related cases were inquired into, how many were taken to court and how many resulted into convictions, acquittals or dismissals. The reports however do not disclose the number of women and girls or health workers who are arrested, and those who are eventually prosecuted. There is thus still need to discover how many women and health workers get arrested and/or imprisoned under these laws.

While criminalisation of abortion continues to receive critical attention in studies on abortion, little of the existing research addresses directly questions surrounding the enforcement of these laws and policies. In Uganda, the Centre for Health, Human Rights and Development

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<sup>24</sup> 54 cases. Uganda Police Force *Annual Crime and Traffic/Road Safety Report 2011* appendix ii.

<sup>25</sup> 48 cases. Uganda Police Force *Annual Crime and Traffic/Road Safety Report 2012* appendix i.

<sup>26</sup> 1003 cases. Uganda Police Force *Annual Crime and Traffic/Road Safety Report 2013* appendix i.

<sup>27</sup> 1689 cases. Uganda Police *Annual Crime Report 2014* appendix ii.

(CEHURD)<sup>28</sup> conducted a study on criminalisation of abortion and access to safe abortion services focusing on Manafwa district. They found that abortions were widely carried out, but there was limited understanding of the law on abortion and how this was undermining access to safe abortion and post abortion care services in the district.

Ipas did a study in Rwanda on the enforcement of the criminal abortion laws and found that although the country had revised its Criminal Code to permit abortion in certain circumstances, legal, cultural and religious barriers make it almost impossible for women to access a safe, legal abortion.<sup>29</sup> This is largely because of the procedural requirement that a woman seeking an abortion for health reasons should get approval of two doctors, which is a barrier to access safe and legal abortion.

Ipas also studied the enforcement of laws criminalising abortion in Bolivia, Brazil and Argentina, and found that hundreds of women and health workers had been arrested, charged, detained and/or imprisoned for violating abortion related laws and that their human rights were infringed in the process.<sup>30</sup>

The Center for Reproductive Rights (CRR) studied the impact of Kenya's restrictive abortion law.<sup>31</sup> The study found that procuring an abortion in Kenya, whether safe or unsafe, carries social and legal risks for women, such as stigma and social condemnation as well as arrest and prosecution. It also found that it leads to the violation of human rights including the right to life; the right to health; the right to liberty and security of person; the right to be free from torture and cruel, inhuman, or degrading treatment; the rights to equality and non-discrimination; the right to dignity; the right to information; the right to privacy and family; and the right to redress and legal assistance. No such study has been done in Uganda, and this is the gap that this study seeks to fill.

Therefore, although much has been written about abortion laws and their effects, very few studies have tackled the trends of enforcement of these laws, and the impact that this has had on the human rights of the women, girls and health workers that are directly affected.

## 1.6 Methodology

The study applied a mixed model research design that combines both quantitative and qualitative research methods. It tracked the experiences of women and health providers who come into contact with the criminal justice system for abortion-related crimes, and the rates of arrests, prosecutions, convictions and incarcerations for abortion related crimes. Uganda's courts and other criminal justice agencies, including prisons and police stations, provided valuable data to quantify and qualify the prevalence of abortion-related criminal cases in Uganda.

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<sup>28</sup> CEHURD 'Criminalization of Abortion and Access to Post Abortion Care in Uganda: Community Experiences and Perspectives in Manafwa District' (2014) *Discussion Paper No. 4 of 2014*.

<sup>29</sup> Ipas & Great Lakes Initiative for Human Rights and Development *When Abortion is a Crime in Rwanda* (2015).

<sup>30</sup> G Kane et al *When Abortion is a Crime: The Threat of Vulnerable Women in Latin America* (2013).

<sup>31</sup> Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (2010).

The districts of Kampala<sup>32</sup> and Kitgum,<sup>33</sup> which differ in terms of income levels and population,<sup>34</sup> and provide urban versus rural settings, were selected as case studies. The information from these two districts illuminates the general trends of implementation of abortion laws in Uganda.

The research team reviewed records from six selected police stations serving Kampala, and six in Kitgum<sup>35</sup> It also reviewed records from magistrates courts serving Kampala and Kitgum.<sup>36</sup>

The purposive sampling technique was used to select the key respondents. This technique focuses on a small number of important cases that are likely to have the greatest impact on the development of knowledge.<sup>37</sup> Snowball sampling, where one respondent links the researcher to another, was also employed especially for the health workers. This method is appropriate for respondents who may be able to identify each other and who may not be easily discernible by a person who is not part of the group.<sup>38</sup> This was key because trust is an important component of the study due to its sensitivity.

In total, sixty respondents were interviewed for the study.

In Kampala, twenty eight respondents were interviewed: four midwives (three of whom were arrested for performing abortions); four police officers, two of whom had made arrests under the abortion laws; six state attorneys; one prosecutor; two private legal practitioners (advocates); seven magistrates, one of whom had handled abortion cases; the CID Commander of Kampala Metropolitan Police Headquarters; the records officer at Kampala Metropolitan Police Headquarters, a senior police official in charge of records; and the superintendent of Luzira Women's Prison;

In Kitgum, nineteen respondents were interviewed: six health workers which included three medical doctors, one clinical officer, one midwife and one nursing assistant (three of these

<sup>32</sup> Kampala has the second largest population in the country after Wakiso district. Kampala has relatively better health facilities than Kitgum and access to post abortion services is easier in Kampala than in Kitgum. It also has the highest levels of incomes in the country.

<sup>33</sup> Kitgum is in Northern Uganda, has a small population and is among the poorest districts in the country with a low per capita income. Kitgum is also one of the districts in Northern Uganda that suffered the adverse impact of the Lords' Resistance Army (LRA) insurgency for close to 20 years.

<sup>34</sup> Kampala had a population of 1,507,080 persons as per the 2014 census. See Uganda Bureau of Statistics *The National Population and Housing Census 2014 – Main Report* (2016) 9.

<sup>35</sup> These six police stations are Old Kampala Police Station; Jinja Road Police Station; Kira Police Division; Kabalagala Police Division; Katwe Police Division and Kawempe Police Division. For Kitgum, the study team visited all the major police stations and police posts which are: Central Police Station; Akwang Police Station; Amida Police Post; Lagoro Police Post; Layomo Police Post and Matidi Police Post.

<sup>36</sup> Makindye Chief Magistrates Court was selected for Makindye Division; Mengo Chief Magistrates Court for Rubaga Division; Nabweru Chief Magistrates Court for Kawempe Division; Kira Chief Magistrates Court for Nakawa Division and Buganda Road Chief Magistrates Court for the Central Division. Data was obtained from the only court that serves Kitgum district - the Kitgum Chief Magistrates Court.

<sup>37</sup> MQ Patton *Qualitative research and evaluation theory and practice* (2014).

<sup>38</sup> As above.

health workers were arrested for providing abortions or providing post abortion care services or were closely involved with such incidences); six police officers, four of whom had conducted arrests in abortion cases; one officer in charge of the Kitgum Prison; one state attorney who prosecuted abortion cases; three magistrates, one of whom has tried abortion cases; one man who had reported the mother of his unborn child for having an abortion, and a staff member of an NGO that works on issues concerning HIV screening, family planning, peace building and under-aged alcohol consumption programmes.

Six women who had gone through the criminal justice system were interviewed nationally and these were from the districts of Arua, Iganga, Jinja, Luwero and Mityana.

Seven key informants from key stakeholder institutions were purposively selected to give their views. These were: the Assistant Public Relations Officer at the Directorate of Public Prosecutions; the head of Research of the Uganda Prisons Service's Policy and Planning Division; the former President of the Obstetrics and Gynaecologists Association of Uganda; the coordinator of the Coalition Stop Maternal Mortality Due to Unsafe Abortions (CSMMUA) at the Center for Health, Human Rights and Development (CEHURD), a lawyer working with Human Rights Awareness and Promotion Forum (HRAPF) who provides legal aid services to women involved with the criminal justice system for abortion-related crimes, and two lawyers who have handled abortion cases.

Quantitative data was collected through review of publicly available reports including police arrest and detention records; 2011, 2012, 2013 and 2014 national annual police reports; and court and prison records. Researchers also used quantitative content review methods to review secondary sources including government publications such as the national demographic and health survey released by the Uganda Bureau of Statistics, reports of international organisations, newspapers, journals and magazines, and scholarly works. This method factored into consideration that secondary data has already been availed, collected and analysed and as such may not be neutral. Thus, such data was subjected to serious scrutiny to minimise any biases.

Qualitative data was collected through semi-structured interviews, using pre-tested interview guides. The team interviewed women, girls and health workers who had been through the criminal justice system, which includes coming into contact with police, court or prison. Also interviewed were key informants from the criminal justice system, including police officers, state attorneys, magistrates and prisons officials. Interviewees described their own stories, addressing their own lived experiences, and how these experiences affected themselves, their families and communities. These first hand case studies illuminate both the quantitative data and the real life experiences of women and girls arrested, prosecuted or imprisoned for abortion.

The research team used a local language translator in Kitgum district for those respondents who do not speak English. In Kampala, interviews were conducted in English and Luganda and no translators were needed as both the researcher and respondents could express themselves very well in either language.

The analysis of the qualitative data was guided by the themes of the study.<sup>39</sup> Using

<sup>39</sup> These themes included knowledge of abortion laws and policies; the stigmatisation surrounding abortion and community responses to abortion laws.



thematic analysis, the team noted the recurrent themes and used information from the semi-structured interviews to illustrate these themes. The process of analysing the data was continuously done throughout the fieldwork. Field notes were taken at the field site and following each interview session. Data cleaning was done through reviewing the notes for consistency and errors. A thorough analysis of ideas, experiences and viewpoints was carried out. A more comprehensive analysis of the interview scripts and field notes was completed following both inductions and deductions of the themes within the data.

## 1.7 Ethical Considerations

The study was approved by The AIDS Support Organisation (TASO)'s Institutional Review Committee as well as the Uganda National Council of Science and Technology (UNCST).

Before interviewing the respondents and key informants, the research team explained the purpose and likely benefits and/or risks of the project. All participants were required to give both verbal and written informed consent. Given societal attitudes to abortion, all personal information is confidential. The research team ensured confidentiality by collecting data and documenting only demographic information, which did not include participants' names. Pseudonyms were used for women and health workers who were in conflict with the law on abortion. Given the sensitive nature of abortion, the interview guide was pretested to ensure effectiveness, reliability and validity. In addition to gauging the strengths and weaknesses of the study at an early stage, pretesting helps in determining the suitability and appropriateness of the interview questions.<sup>40</sup>

## 1.8 Limitations of this study

The sensitivity of the issue of abortion was an immense barrier to finding willing respondents to participate in this study. Data collected from health centres, police stations and courts show that women and girls are being arrested. However, following their interface with the health or criminal justice systems, they are near impossible to trace. The research team travelled to the different parishes where women and girls were living at the time they were arrested for abortion related crimes. The team could not access any of the women or girls because they were no longer living in these areas. Almost without exception, a woman or girl who has had an abortion and gone through the criminal justice system because of that will feel pressure to move out of her community due to the discrimination and stigma. Many respondents, even those who did not go through the criminal justice system themselves, were reluctant to give an interview.

Access to official records was also a challenge. Data in many police stations was incomplete, while in several courts, cases were neither classified nor digitised and needed to be accessed manually. Where cases were found, key details were often missing.

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<sup>40</sup> The pretesting involved identifying a small sample population, with demographics similar to the population selected for the research, and asking them questions using the interview guide. This assisted in evaluating the validity of the questions; to find out whether they were understood and whether the questions were relevant to the research objectives. Pretesting also informed revision of research tools in order to identify and eliminate unsuitable questions before the actual research was carried out.

# **SECTION II**

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# THE LEGAL AND POLICY FRAMEWORK GOVERNING ABORTION IN UGANDA

## 2.1 Introduction

The law governing abortion in Uganda is primarily found in the Constitution and the Penal Code Act. There are however other policies that have been passed by government with a bearing on abortion. This chapter sets down the legal and policy frameworks as they are at the moment, and also discusses the standing of the law in light of international human rights standards.

## 2.2 Brief History of Abortion Law in Uganda

The Ugandan state can be traced to 1894 when Uganda was declared a British protectorate.<sup>1</sup> Before Uganda was colonised, pre-colonial societies were governed by customary law. By the 1902 Order in Council, the British introduced common law and allowed its application alongside customary law, provided the latter was not repugnant to natural justice and morality.<sup>2</sup> Uganda's abortion laws were inherited from Britain's legal system especially the Offences against the Person Act, 1861 and its accompanying common law as developed by English Courts, especially in *R v Bourne*.<sup>3</sup> In this case, Mr Alex Bourne, a surgeon, carried out an abortion on a 14 year-old girl who had become pregnant as a result of rape. The abortion took place in one of the London hospitals and the operation was performed without a fee. The surgeon was charged under the Offences Against the Person Act, with unlawfully performing an abortion. The court observed that the word 'unlawfully' in the Offences against the Person Act, which is largely similar to the abortion sections 141-143 of the Ugandan Penal Code, meant 'intentional'. The judge noted that there are circumstances under which abortion could be 'lawfully' procured especially for the preservation of a woman's life, physical and mental health. The Ugandan Penal Code attempted to codify common law jurisprudence on abortion especially *R v Bourne* above by enacting section 224, which provides a therapeutic defence for a health worker who in good faith and with reasonable care and skill performs a surgical abortion to preserve the life of a pregnant woman.<sup>4</sup> Unfortunately, after independence, there were no attempts to develop guidelines on how to apply this therapeutic exception.

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<sup>1</sup> JM Gaughan 'East Africa' in S Mitchell (ed) *Victorian Britain: An Encyclopedia* (2012) 232.

<sup>2</sup> The Africa Order in Council, 1889, Art 13.

<sup>3</sup> (1938) 1 KB 687. The *Bourne* case was applied in the East African case of *Mehar Singh Bansel v R* (1959) EA 813 where the appellant appealed against a sentence of 30 months' imprisonment for manslaughter. The charge of manslaughter arose out of the death in his surgery of a young woman following an operation performed on her by the appellant for the termination of pregnancy. The court held that a lawful abortion is one that is performed for a good medical reason, which in the eyes of the law 'is the genuine belief that the operation is necessary for the purpose of saving the patient's life or preventing severe prejudice to her health'.

<sup>4</sup> Center for Reproductive Rights, *Briefing paper: A technical guide to understanding the legal and policy framework on termination of pregnancy in Uganda* (2012) 18.

## 2.3 The Constitution

The Constitution of the Republic of Uganda, 1995 is the supreme law of Uganda and any other law or custom that is inconsistent with it is invalid to the level of inconsistency.<sup>5</sup> The primary provision on abortion in Uganda is espoused in Article 22 of the Constitution, which is about the right to life. It provides as follows:

- (1) *No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.*
- (2) *No person has the right to terminate the life of an unborn child except as may be authorised by law.*

From the foregoing, it is clear that abortion in Uganda is not prohibited but rather restricted. Generally speaking, termination of a pregnancy is not permitted under the laws in Uganda. The Constitution however gives latitude for exceptions to this general rule, if such exceptions are authorised by the law. It may be argued that the phrase, 'authorised by law' gives Parliament a responsibility to enact a law on termination of pregnancies. It therefore remains for the Parliament of Uganda, and other stakeholders such as the Judiciary, to operationalise this provision.

In addition to other rights which are enjoyed by women and men,<sup>6</sup> Article 33 specifically provides for the rights of women. Article 33(1) provides that '[w]omen shall be accorded full and equal dignity of the person with men.'<sup>7</sup> Article 33(2) provides that 'the state shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement'. Article 33(3) enjoins the State to 'protect women and their rights, taking into account their unique status and natural maternal functions in society.' Thus, Article 33 clearly points towards allowing women their rights to equality, privacy, dignity, bodily integrity and self-determination, including their right of access to abortion services when they are needed.<sup>8</sup>

In terms of Article 21 of the Constitution, all people are equal before the law and shall enjoy equal protection of the law. The section prohibits discrimination on the basis of a number of grounds, including sex. The law is discriminatory in that it criminalises health services – access to abortion – that only women need. In any case, criminalisation of abortion targets only the pregnant woman as if the man is not responsible for the pregnancy.

Article 24 of the Constitution is also relevant to the issue of abortion since it requires respect for human dignity and prohibits inhuman or degrading treatment. Forcing women to carry an unwanted pregnancy for a full term and giving birth to an unwanted child

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<sup>5</sup> Constitution of the Republic of Uganda, 1995, Art 2(2).

<sup>6</sup> Such as the right to life (Art 22); liberty (Art 23) and privacy (Art 27).

<sup>7</sup> Art 33(1).

<sup>8</sup> Center for Reproductive Rights, *Briefing paper: A technical guide to understanding the legal and policy framework on termination of pregnancy in Uganda* (2012) 14-15.

violates the right to human dignity and amounts to degrading treatment. It should be noted that freedom from cruel, inhuman and degrading treatment is an absolute right,<sup>9</sup> which is not subject to the limitation clause under the Constitution.<sup>10</sup>

Article 29(1)(b) of the Constitution, which provides for the right to freedom of thought, conscience and belief, is relevant to abortion in that it protects the decision to terminate a pregnancy as well as the rights of health workers who may wish not to provide abortion services due to their personal beliefs. This right has to be balanced with the right to health of those in need of abortion services and the availability of alternative health workers to perform the required services.

As such, the criminalisation of abortion is inconsistent with provisions of the Constitution and is thus unconstitutional.

## 2.4 Statutory framework on abortion

While the Constitution envisages the enactment of a law to deal with termination of pregnancies and permitting circumstances thereof, the only statute in Uganda that has provisions on termination of pregnancies is the Penal Code.<sup>11</sup> The Code creates a system that criminalises both the woman terminating the pregnancy and any person that aids such termination. The relevant provisions are espoused in sections 141, 142, 143 and 212 of the Act.

Section 141 criminalises attempts to procure an abortion. The section provides:

*'Any person who, with intent to procure the miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means, commits a felony and is liable to imprisonment for fourteen years.'*

The offence created in this section criminalises actions of another person, other than the woman intending to terminate the pregnancy. If any person does anything with the intention of causing the miscarriage of another, they commit an offence under this section. It is immaterial that the woman, on whom the intention is directed, turns out not to be pregnant. This provision targets persons like health workers who provide abortion services to women and girls. It should be noted that the actions prohibited in the section have to be unlawful. If a health worker administers medication in the ordinary course of his or her business therefore, they would not be held criminally liable under this section.

Section 142 is titled 'Procuring a miscarriage' and provides as follows:

*'Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means, or permits any such things or means to be administered to or used*

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<sup>9</sup> Art 44.

<sup>10</sup> Art 43.

<sup>11</sup> Penal Code Act Laws of Uganda Cap 120.

*on her, commits a felony and is liable to imprisonment for seven years.'*

This provision criminalises actions of the pregnant woman intended to procure her own abortion. The provision is broad enough to capture any actions, means or methods used to procure an abortion. Important to note is that such actions have to be unlawful. Therefore if a woman engages in such actions but do so lawfully, they would not be criminally liable. Lawful actions would for example include taking medications genuinely prescribed by a medical doctor. It should be noted that from the provision, it is immaterial whether the abortion actually occurs or not. For as long as one intends to procure their miscarriage, and overtly acts on the intention, they have committed the offence in section 142.

Section 143 of the Penal Code criminalises any person who unlawfully supplies drugs or any other substance necessary for the procurement of an abortion. It provides that:

*'Any person who unlawfully supplies to or procures for any person anything, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, commits a felony and is liable to imprisonment for three years.'*

Like section 141, this section also criminalises actions of persons other than the woman intending to terminate the pregnancy. It criminalises mere supply and procurement of what is used to cause miscarriages or abortions. One can only be criminally liable under this section if they had knowledge of the fact that the things they are supplying or buying for someone are to be used to procure a miscarriage. It is therefore not enough that the things being so supplied or procured for another are generally used to cause miscarriages or abortions, except where there is one known use for it. It is also immaterial here that the miscarriage or abortion did not occur. The provision also has the component of unlawfulness and therefore anything done within the ambit of the law does not occasion criminal liability on a person. This provisions targets among others, health workers and other health practitioners such as pharmacists.

Section 212 criminalises 'killing an unborn child' as follows:

*'(a)ny person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that if the child had been born alive and had then died, he or she would be deemed to have unlawfully killed the child, commits a felony and is liable to imprisonment for life.'*

This section distinguishes the termination of a pregnancy from the killing of a foetus, which would have been able to survive outside of the mother's womb.<sup>12</sup>

Section 224 of the Penal Code implicitly provides an exception to the criminal provisions above. It is the only provision in Ugandan law that can be said to operationalise Article 22(2) of the Constitution by providing circumstances in which termination of a pregnancy can be permitted. The section is titled 'surgical operations' and provides that:

*'A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his or her benefit, or upon an*

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<sup>12</sup> CEHURD *Facing Uganda's law on abortion: Experiences of women and service providers* (2016) 5.

*unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.'*

The section expressly mentions surgical operations on unborn children as one of the operations in which a health practitioner is exonerated, if such operation is done to preserve the mother's life. By implication, this section provides a narrow exception to the criminalisation of termination of pregnancies. An abortion may be such operation.

It is however important to note that under this section the decision to terminate a pregnancy is not the decision of a pregnant woman, but rather of the health practitioner. Also this exception only applies to surgical operations. The section should therefore not be interpreted to include termination of pregnancies effected by any means other than surgical means.

## 2.5 National Policy Guidelines

Policy documents developed by the Ministry of Health also address abortion. Policies are strictly not legally binding, but nevertheless they contain benchmarks, standards and targets against which the performance of government may be measured. Courts have also referred to relevant policy frameworks as part of the socio-economic context in which a particular law was developed and is applied.<sup>13</sup> International human rights law also recognises the important role played by administrative measures, including policy frameworks.<sup>14</sup>

There are a number of policy documents which deal with abortion in Uganda. These are:

*The National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights, 2012*: These provide for circumstances under which safe abortion services should be availed. These are: severe maternal illnesses threatening the health of a pregnant woman e.g. severe cardiac disease, renal disease, severe pre-eclampsia and eclampsia; severe foetal abnormalities which are not compatible with extra-uterine life e.g. molar pregnancy, anencephaly; cancer of the cervix; HIV-positive women requesting for termination; and rape, incest and defilement.<sup>15</sup>

*Standards and Guidelines on Reducing Maternal Morbidity and Mortality from Unsafe Abortions in Uganda 2015 (currently stayed)*: These were issued by the Ministry of

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<sup>13</sup> See for example, *Adrian Jjuuko v Attorney General* Constitutional Petition I of 2009 (Constitutional Court of Uganda) and *Patricia Asero Ochieng & Others v The Attorney General & Another*, Petition 409/2009 (High Court of Kenya).

<sup>14</sup> See for example, para 1 of the ESCR, *General Comment 9: The Domestic Application of the Covenant* (Nineteenth Session, 1998), UN Doc E/C.12/1998/24 (1998).

<sup>15</sup> Uganda Ministry of Health *National Policy Guidelines and Service Standards for Sexual and Reproductive Rights* (2012) 47. The fourth edition of these guidelines, which will replace the 2012 National Policy Guidelines, have been drafted and is currently under final review by the Ministry. This new edition of the Policy Guidelines permits abortion in cases of severe maternal illness or severe foetal abnormalities, *National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights* (2016) 41 (Draft on file with HRAPF).

Health. The aim of these standards and guidelines is to ensure access to family planning contraceptive service delivery in order to prevent unsafe abortion. The guidelines also make clear provision for the safe termination of pregnancy and post-abortion care. The guidelines seemingly provide that abortions are permissible in order to save the mother's life; when the pregnant women's mental and physical health is at risk or where the pregnancy is a result of rape, defilement, incest or other forms of gender-based violence.<sup>16</sup>

According to the Standards and Guidelines, the filing of a police report is not to be a requirement for access to safe abortion services for survivors of rape, defilement or incest and other forms of gender-based violence.<sup>17</sup> The guidelines also call upon health care workers to provide abortion services in order to preserve the life or health of a girl or woman and while taking into consideration the circumstances of each case and the state of the patient at the time.<sup>18</sup> It is a guiding principle of this policy that high quality services for termination of pregnancy should be available and accessible to all women and girls regardless of age or marital status.<sup>19</sup>

The Ministry of Health stayed the dissemination of these guidelines in December 2015 because they considered it necessary to consult further with various stakeholders and with religious leaders in particular.<sup>20</sup>

*Professional ethics of medical practitioners:* The 'Medical and Dental Practitioners: Code of Professional Ethics' has been adopted under section 34 of the Medical and Dental Practitioners Act of 1998.<sup>21</sup> The Code requires of medical practitioners to respect the rights of their patients as protected under Uganda's Constitution and international human rights law.<sup>22</sup> Doctors must, as provided under clause 8 of this Code, not deny emergency treatment or health care to a patient. This section serves as a justification on the part of the health worker for the completion of incomplete abortions, which are often emergency operations.

Clause 6 provides that a practitioner shall observe the patient's confidentiality and privacy and shall not disclose any information regarding the patient without express consent of the patient or in order to 'protect the public or advance greater good of the community'.

*Training Curriculum for health professionals: The Management of Providers of Sexual and Gender-Based Violence (SGBV Handbook)* is a standard national curriculum, used in the

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<sup>16</sup> Uganda Ministry of Health *Standards and Guidelines on Reducing Maternal Morbidity and Mortality from Unsafe Abortion in Uganda* (2015) 3-4, 10 & 15.

<sup>17</sup> As above Part I, sec 4.

<sup>18</sup> Ministry of Health (n 16 above) Part II, sec 3.

<sup>19</sup> As above.

<sup>20</sup> The Minister of Health is quoted by the media to have said that the dissemination of the Guidelines was stopped because they are against the law and would promote abortion. See Emmanuel Ainebyona, 'Ministry on the spot over abortion guidelines', *Daily Monitor*, 5 August 2016.

<sup>21</sup> Uganda Medical and Dental Practitioners Council 'Code of Professional Ethics' (2013).

<sup>22</sup> As above at sec 4.



training of nurses, midwives, clinical officers, medical officers, and other health professional trainees in the management of survivors of sexual and gender-based violence.<sup>23</sup> The health service providers are supposed to be trained in how to offer good quality services to survivors, and such services include 'prevention and management of pregnancy'.<sup>24</sup> They should also be able to ensure freedom of choice of the survivors<sup>25</sup> and their privacy.<sup>26</sup> Where the pregnancy is as a result of rape, the handbook requires the health service providers to counsel the patient on the 'possibilities available to her.' While not expressly stating that health service providers should make the option of termination of a pregnancy caused by sexual violence known to the patient, the curriculum has been drafted to suit a legal regime where abortion in the case of rape is permitted.

## 2.6 Abortion and international law

Under Article 123(1) of the Constitution, the President or a person authorised by the President is empowered to enter into international treaties. The Ratification of Treaties Act,<sup>27</sup> provides for the procedure for the ratification of treaties.<sup>28</sup> Others are of the view that through signing and ratification, the state is bound by the treaty.<sup>29</sup> The Constitution requires that Uganda's foreign policy shall be based on among other things, respect for international law and treaty obligations.<sup>30</sup> The Courts in Uganda have also used international law as a guide to the interpretation of the Constitution.<sup>31</sup> Article 26 of the Vienna Convention on the Law of treaties requires that the states parties fulfil treaty obligations in good faith. It may thus be concluded that the state is bound by the obligations laid down in treaties to which it is a party.

### 2.6.1 International law obligations at the regional level

Uganda is a party to the African Charter on Human and Peoples' Rights (African Charter). The African Charter provides for the enjoyment of human rights by all persons without discrimination of any kind on grounds like race, ethnic group, colour, sex, language, religion,

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<sup>23</sup> Ministry of Health 'Management of sexual and Gender Based Violence Survivors Handbook' 49 (2007), 7.

<sup>24</sup> As above at 45.

<sup>25</sup> As above at 46.

<sup>26</sup> As above at 71,73.

<sup>27</sup> Cap. 204.

<sup>28</sup> See for example, B Kabumba 'The Application of International Law in the Ugandan Judicial System: A Critical Inquiry' in M Killander (ed) (2010) *International Law and Domestic Human Rights Litigation in Africa*. Pretoria: Pretoria University Law Press.

<sup>29</sup> For example GP Mukubwa 'International Human Rights Norms in the Domestic Arena' (1997) *East African Journal of Peace and Human Rights* 33.

<sup>30</sup> Objective XXVIII(i)(b) of the Constitution; Art 287 of the Constitution.

<sup>31</sup> See for example, *Tinyefuza v Attorney General*, Constitutional Petition 1/1996; *Charles Onyango Obbo & Another v Attorney General*, Constitutional Petition 2/2002; *Col (Rtd) Dr. Kiiza Besigye v Yoweri Museveni Kaguta*, Election Petition 1/2001; *Attorney General v Susan Kigula & Others*, Constitutional Appeal 3/2006.

political or any other opinion, national and social origin or other status.<sup>32</sup> It requires states parties to 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.<sup>33</sup> It also guarantees the right of all persons to the highest attainable standard of physical and mental health which includes access to safe and legal abortion,<sup>34</sup> and requires respect for human dignity.<sup>35</sup>

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (The African Women's Protocol), addresses abortion explicitly. The Protocol provides that member states must take all appropriate measures to protect the reproductive rights of women by allowing medical abortion in cases of sexual assault, rape or incest and where the pregnancy endangers the mental and physical health of the mother or the life of the mother or the unborn child.<sup>36</sup> The African Women's Protocol explicitly calls upon states to reform laws and practices that discriminate against women.<sup>37</sup> States are expected to take special steps to ensure that women, and women in rural areas in particular, do not suffer discrimination in accessing health care services.<sup>38</sup> States are also expected to abolish laws and practices which discriminate against women, this means that the criminalisation of abortion, which only applies to women, ought to be abolished.<sup>39</sup> In order to enjoy rights on an equal footing with men, all women should be able to decide when to have children and how many children to have. It also protects the right to dignity of the woman.<sup>40</sup>

Uganda signed this treaty, but made a reservation to the effect that it would not be bound by the abortion provision.<sup>41</sup> This reservation however does not absolve the state of its responsibility to uphold constitutionally protected human rights which are adversely affected by the criminal abortion laws.

## 2.6.2 Uganda's obligations under the UN system

Uganda is a party to numerous international human rights instruments, which recognise the right to safe abortion services. These instruments include: the International Covenant

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<sup>32</sup> Art 2.

<sup>33</sup> Arts 2, 3 and 18.3.

<sup>34</sup> Art 16.

<sup>35</sup> Art 5.

<sup>36</sup> Art 14.

<sup>37</sup> This rights is furthermore protected under Art 2 of the Universal Declaration, Art 2.1 and 3 of the ICCPR, Art 2.2 and 3 of the CESCR and Art 1,2 and 3 of CEDAW.

<sup>38</sup> As above, par 36.

<sup>39</sup> See Committee on Economic, Social and Cultural Rights *General Comment No. 22 on the Right to Sexual and Reproductive Health*, 2016, E/C.12/GC/22 paras 34, 35 and 45.

<sup>40</sup> Art 5.

<sup>41</sup> Ministry of Foreign Affairs, AOG 238/01, 'Instrument of Ratification Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (July 21 2010), cited in Centre for Reproductive Rights, n 6 above at 10 (fn 19).

on Civil and Political Rights (ICCPR); the International Covenant on Economic Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>42</sup>

These instruments recognise the right to life which is understood to apply to both the unborn child as well as the mother. The CEDAW Committee has recognised clandestine abortions as a major cause of high maternal mortality rates in Uganda.<sup>43</sup> These clandestine abortions are a result of the criminalisation of abortion, which thus amounts to the violation of the right to life.<sup>44</sup> The UN Human Rights Committee has expressly stated that state parties must take measures to ensure that women do not have to undergo secret abortions as part of their obligation to increase their life expectancy.<sup>45</sup>

International law furthermore recognises a woman's right to health to include a right to control her health and to enjoy the highest attainable standard of health.<sup>46</sup> Uganda is expected to adopt measures to improve sexual and reproductive health services, including access to family planning, pre- and post-natal care and emergency medical services.<sup>47</sup> The CEDAW, which focuses on the human rights of women in particular, has been interpreted to support the decriminalisation of abortion.<sup>48</sup>

The right to privacy, as protected under international human rights law, extends to a woman's decision to have an abortion. The state should not be allowed to interfere in a woman's personal decisions regarding her reproductive health.<sup>49</sup> The right to privacy also expects healthcare providers to protect patient confidentiality.<sup>50</sup>

The ICCPR, the Universal Declaration and the United Nations Convention Against Torture (UN-CAT) provide that a person shall not be subjected to torture or cruel,

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<sup>42</sup> See Art 6 of the ICCPR; Art 4 of the ACHPR and Art 4 of the Maputo Protocol.

<sup>43</sup> CEDAW Committee, Concluding Observations, Uganda, para. 35 CEDAW/C/UGA/CO/7 (2010).

<sup>44</sup> UN Human Rights Committee, Concluding observations, Mauritius, para. 9, U.N. Doc. CCPR/CO/83/MUS (2005); UN Human Rights Committee, Concluding Observations, Madagascar, para. 14, U.N. Doc. CCPR/C/MDG/CO/3 (2007).

<sup>45</sup> UN Human Rights Committee, *General Comment No. 28, Equality of rights between men and women (article 3)*, para. 10, U.N.Doc. CCPR/C/21/Rev.1/Add.10 (2000).

<sup>46</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 14 'Article 12: The Right to the Highest Attainable Standard of Health'* Adopted on 11 August 2000 U.N. Doc. E/C.12/2000/4 available at <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC14.pdf> accessed 19 May 2016.

<sup>47</sup> As above at para 14.

<sup>48</sup> CEDAW Committee *General Recommendation No. 24 'Article 12: Women and Health'* Adopted at the twentieth session of the CEDAW Committee U.N. Doc. No. A/54/38/Rev.1 (1999) at para 31(c) <http://www.refworld.org/docid/453882a73.html> accessed 19 May 2016.

<sup>49</sup> UN Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Ireland, CCPR/C/IRL/CO4, June 2016.

<sup>50</sup> As above at para 12(d).

inhuman or degrading treatment or punishment.<sup>51</sup> In terms of international law, the denial of access to abortion services is regarded as a violation of the right to be free from cruel, inhuman and degrading treatment or punishment, due to the mental suffering this causes.<sup>52</sup>

International instruments also link the right to information with women's right to health services. The ESCR Committee has expressed that the right to health is an inclusive right, which includes access to information on sexual and reproductive health.<sup>53</sup> CEDAW obligates state parties to ensure that rural women have access to 'adequate health care facilities, including information, counselling and services in family planning'.<sup>54</sup>

As such Uganda is bound to fulfil its obligations under these international standards and is in violation by continuing to criminalise abortion.

## 2.7 Conclusion

From the discussion above, it is clear that the law in Uganda does not entirely prohibit abortion but rather restricts it. Parliament has not passed laws to spell out circumstances when abortion is lawful and regulated thus the Penal Code Act remains the only law that has provisions on abortion, with a very narrow exception. To fill this void, policies have been passed that suggest grounds and circumstances in which a woman can be permitted to terminate a pregnancy. However these do not have the force of law. The laws criminalising abortion are both unconstitutional and violate human rights standards at the regional and international levels.

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<sup>51</sup> See Art 5 of the Universal Declaration; Art 7 of the ICCPR and Art 1(1) and 2(1) of the United Nations Convention Against Torture (UN-CAT) which Uganda ratified in 1986.

<sup>52</sup> CAT Committee, Concluding Observations: Peru, para. 23, U.N. Doc. CAT/C/PER/CO/4 (2006). See also UN Human Rights Committee *A & M v Ireland* CCPR/C/116/D/2324/2013 para 1.5 (2016).

<sup>53</sup> Committee on Economic Social and Cultural Rights (n 46 above) par 11.

<sup>54</sup> CEDAW Committee (n 48 above) par 28. A/34/46 (1979).

# **SECTION III**

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# TRENDS IN THE ENFORCEMENT OF LAWS CRIMINALISING ABORTION IN UGANDA

## 3.1 Introduction

This section reflects the findings of the study on the trends of enforcement of abortion laws. It discusses trends from arrests, prosecution, and convictions/acquittals or dismissals. It is based on data obtained from national police records and from the two districts of Kampala and Kitgum for the last five years.

## 3.2 Trends in the arrests of women, girls and health workers under abortion laws

### 3.2.1 Number of arrests

To establish the number of arrests based on abortion charges, the study focused on the four provisions of the Penal Code on abortion: section 141, which criminalises attempts to procure an abortion and is aimed at health workers and other third parties; section 142 which is aimed at criminalising the woman who undergoes the abortion; section 143 which is also aimed at criminalising the actions of a healthcare provider or other third party who supplies or procures things knowing that they are intended to be used for an abortion; and section 212 which criminalises the 'killing of an unborn child'. The data that will be considered will be limited to these offences.

#### **Number of arrests nationally**

The Uganda Police Force issues national Annual Crime and Traffic/Road Safety Reports which show the number of cases handled by the Police every year. They also note the trends in crime and compare the year's data with data from the previous year. The reports show who the victims of crime were, and who the perpetrators were in terms gender and whether they were adults or juveniles. They also discuss the cases in terms of geographical regions. The specific data on offences is categorised in terms of cases reported and how they were handled by the police. The reports are detailed as they show the number of cases investigated,<sup>1</sup> and then among these, those that are under inquiry,<sup>2</sup> those taken to court, those submitted to the Directorate of Public Prosecutions, those with convictions, those with acquittals, and those pending in court. It then breaks them down in terms of the gender of accused persons and how many of these have been convicted, acquitted or had cases dismissed.

Among the categories of cases, is a category referred to as 'abortion'.<sup>3</sup> The 2011 report shows that 54 abortion cases were investigated in that year, 36 were put under inquiry,

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<sup>1</sup> According to Olal Johnson, CID Commander and Robert Baluma, records officer / exhibits storer at Kampala Metropolitan Police Headquarters, cases investigated are those cases which the Police has actually followed up and conducted investigations. Interview with Olal Johnson and Robert Baluma, 3 November 2016.

<sup>2</sup> According to Johnson and Baluma, 'Under inquiry' means that the matter is pending and that they are awaiting further information before they can investigate. As above.

<sup>3</sup> This, according to Johnson and Baluma, include all abortion related cases. As above.

24 were submitted to the Directorate of Public Prosecutions (DPP) and 18 were taken to courts.<sup>4</sup> According to the 2012 Annual Report, 48 cases were investigated, 35 cases were put under inquiry, 14 were submitted to the DPP and 13 were taken to court.<sup>5</sup> The 2013 report shows that 1003 cases were reported and of these 425 cases were investigated, 174 were put under inquiry, 39 submitted to the DPP and 21 taken to court.<sup>6</sup> The 2014 report shows that the cases of abortion received were 1689, and of these 786 were investigated, 702 were put under inquiry, 105 were submitted to the DPP and 84 taken to court.<sup>7</sup> The 2015 report has not yet been released to the public and this is because the Police have been busy with the presidential and parliamentary elections and their aftermath.<sup>8</sup>

In Uganda, it is a common practice for the police to carry out arrests and then investigate thereafter and so it is probable that all these cases investigated had an arrest. This would have made the number of arrests 54 in 2011, 48 in 2012, 425 in 2013, and 786 in 2014. However, this could not be confirmed by the police officers interviewed and therefore for a greater measure of certainty, only those cases submitted to the DPP were counted as having had arrests.<sup>9</sup> This would bring the number of persons arrested and charged nationally to 24 in 2011, 14 in 2012, 39 in 2013, and 105 in 2014, and a total of 182 arrests during the four year period. The actual numbers of persons arrested are certainly higher than these,<sup>10</sup> but for absence of more disaggregated data on arrests, the study can only make conclusions on those who were charged.

**Table 1: National data on abortion cases investigated by police**

Year	Cases reported	Cases investigated	Cases put under inquiry
2011	-	54	36
2012	-	48	35
2013	1003	425	174
2014	1689	786	702
2015	Not available		

<sup>4</sup> Uganda Police Annual Crime and Traffic/Road Safety Report 2011, appendix i

<sup>5</sup> Uganda Police Annual Crime and Traffic/Road Safety Report 2012, appendix i,

<sup>6</sup> Uganda Police Annual Crime and Traffic/Road Safety Report 2013, appendix i.

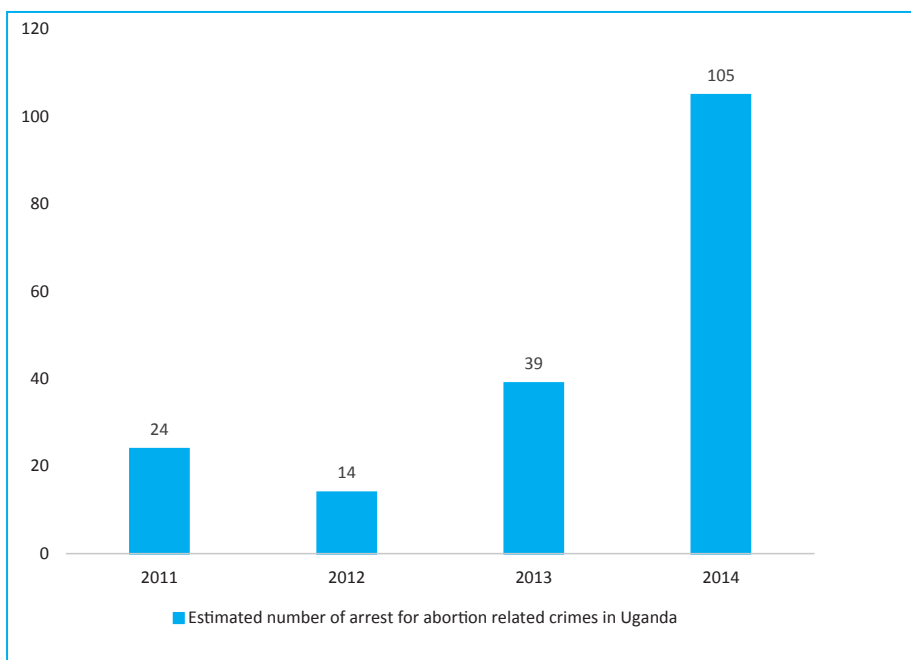
<sup>7</sup> Uganda Police Annual Crime Report 2014, appendix ii.

<sup>8</sup> Interview with a senior police officer, 4 November 2016.

<sup>9</sup> Cases are usually submitted to the DPP after police had completed investigations and are satisfied that there is sufficient evidence available to warrant the case being taken to court. The arrest of the suspect would usually be a part of a successful investigation, though some files are submitted to the DPP with particulars of the accused but without any arrest being made. Preferred charges are those charges which, looking at the circumstances, are the only ones which can fit the facts as unveiled by the investigation. Interview with Olal Johnson and Robert Baluma, 3 November 2016.

<sup>10</sup> The research team has come across a number of cases where a woman or health worker was arrested and released without any charges being laid. One such an instance was the midwife arrested from a Maternity and Health Centre in Kampala (Interview with midwife at a Maternity and Health Centre, 21 April 2016).

**Chart 1: Estimated number of abortion related arrests in Uganda per year**



The figures above show an exponential increase in the number of arrests in 2013 and in 2014. A senior police official who is privy to the compilation of the report was questioned about this dramatic increase.<sup>11</sup> The explanation he provided was that record keeping methods were steadily improving from one year to the next and that the low figures in years preceding 2013 may not be a true reflection of the number of cases in which charges were laid. Indeed the data below from Kampala and Kitgum does not actually show any increment in the number of cases that can be attributed to the different years.

### **Number of arrests in Kampala district**

Data on the numbers of women, girls and health workers arrested for abortion-related crimes in the two study districts were collected through the perusal of records at six main police stations that serve Kampala City. Police stations/divisions were selected from each of the three police regions that serve Metropolitan Kampala. These were: Jinja Road Police Station and Kiira Road Police Station for Kampala Metropolitan East; Old Kampala and Kawempe Police Stations for Kampala Metropolitan North; and Kabalagala and Katwe Police Divisions for Kampala Metropolitan South.

For curiosity purposes, although not included in the sample, the records at the Central Police Station were also studied as it serves Kampala Central.

The Crime Record Books (CRBs) of these selected stations were perused. All cases reported to a police station are recorded in the Station Dairy. These entries are transferred to the Minor Contravention Book, the CRB or the disciplinary offences book or if found

<sup>11</sup> Interview with unnamed senior police official in charge of police records, 4 November 2016.



to be a civil rather than a criminal matter, the case is not recorded elsewhere.<sup>12</sup> This means that the CRB is the book of second entry for recording reported crimes that are considered to be of a more serious nature than minor contraventions. The CRB captures the nature of the complaint, brief particulars of the offence and an initial classification of the alleged crime by the officer in charge of criminal investigation or the officer in charge of the station. The CRB is also intended to capture details of both the accused and the complainant. Provision is made for recording the progress of the case, the date the file was taken to court (if applicable) and result of a transfer or closure of the case.<sup>13</sup>

Abortion cases recorded in the CRB includes cases where the body of a foetus has been found or where an unknown person is suspected of having carried out an abortion.<sup>14</sup> Cases such as these would not necessarily lead to the arrest of any person since they would be unknown. The CRB does not explicitly indicate whether the accused person had been arrested in a particular case. In order to estimate the number of arrests that have taken place at each of the Kampala police stations, only those cases where it was clearly indicated that an arrest had taken place or where the particulars of the suspect have been recorded were counted as arrests.

The table below indicates the number of abortion cases recorded at the selected police stations in Kampala along with the number of arrests made on the strength of one of the four abortion-related crimes.

**Table 2: Total number of abortion arrests per year**

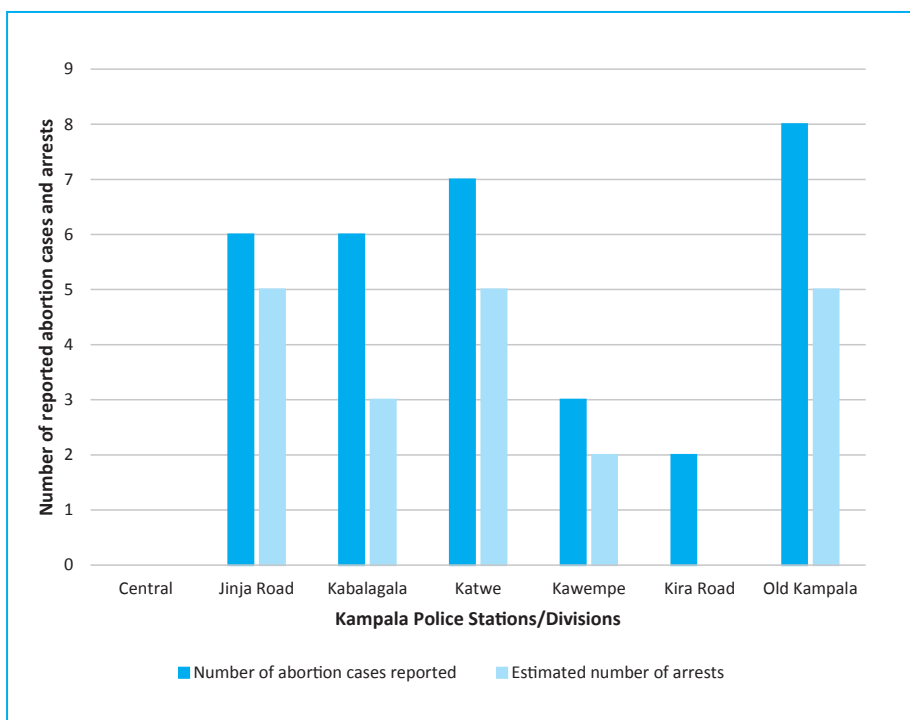
Year	Total number of arrests in year
2011	4
2012	4
2013	4
2014	4
2015	4
<b>Total:</b>	<b>20</b>

<sup>12</sup> Interview with Olal Johnson, CID Commander and Robert Baluma, records officer / exhibits storer at Kampala Metropolitan Police Headquarters, 3 November 2016.

<sup>13</sup> As above.

<sup>14</sup> As above.

**Chart 2: Number of abortion cases reported and number of subsequent arrests at the selected Kampala Police Stations 2011 - 2015**



The tables and charts above show that at least 4 persons every year were arrested in Kampala for abortion cases between 2011-2015. The trends do not show a major difference between the number of people arrested over the years as the number hovers around 4 every year. Similarly, there seems to be no significant differences in the number of arrests as classified by police station. Kawempe Police Station recorded the highest number of cases reported at 8 and with 5 arrests, while Kira Road Police Station recorded only 2 cases over this period with no arrests while no abortion case was reported at Central Police Station for this period. According to a detective constable attached to Central Police Station, the reason for the absence of abortion cases reported at that station is that they are more likely to occur in residential areas which are outside of the city centre.<sup>15</sup>

What the data shows is that indeed arrests do take place in Kampala, but not at an alarming rate as compared to the estimated number of abortions carried out per year.

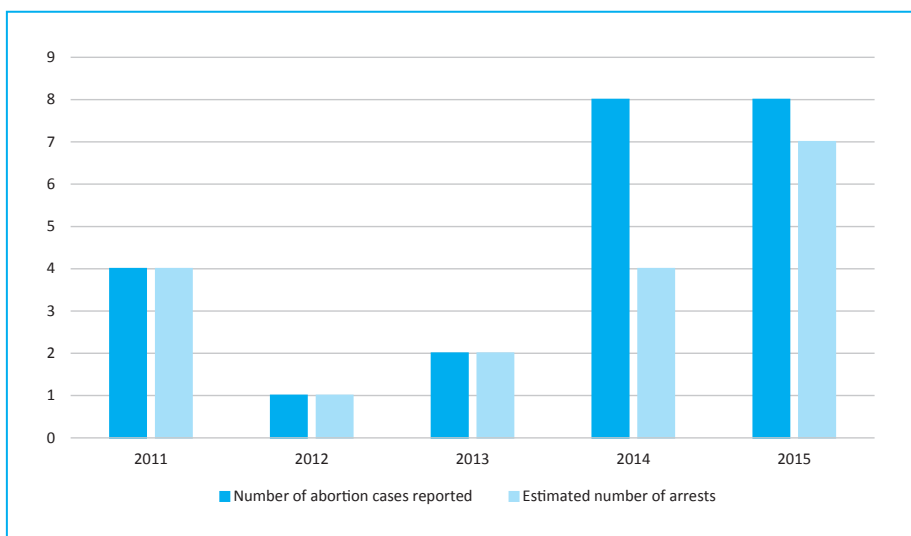
### **Number of persons arrested in Kitgum**

In Kitgum, there were 23 abortion-related cases reported in the Crime Record Books (CRB) at the Central Police Station during the five-year study period. Researchers were informed that abortion-related matters reported at other police posts and stations in the

<sup>15</sup> Interview with unnamed Detective Constable at Central Police Station, 3 November 2016.

area are referred to the Central Police Station.<sup>16</sup> The research team nevertheless visited Akwang Police Station, Amida Police Post, Lagoro Police Post, Layomo Police Post, Matidi Police Post and Okid Police Post in order to interview police officers from these stations, who also confirmed this statement. The 23 recorded reports of abortion cases in Kitgum resulted in an estimated 18 arrests.

**Chart 3: Total number of abortion cases reported and abortion-related arrests per year in Kitgum, 2011-2015**



Kitgum had a total of 23 cases reported for this period, and 18 arrests, and the numbers varied every year with the lowest being 1 arrest in 2012 and the highest being 7 arrests in 2015. In all, the numbers of arrests are very low compared to the estimated number of abortions carried out in Uganda every year.<sup>17</sup> A police officer interviewed in Kitgum who had been in service since 1984 stated that he had only conducted three abortion-related arrests in his entire career.<sup>18</sup>

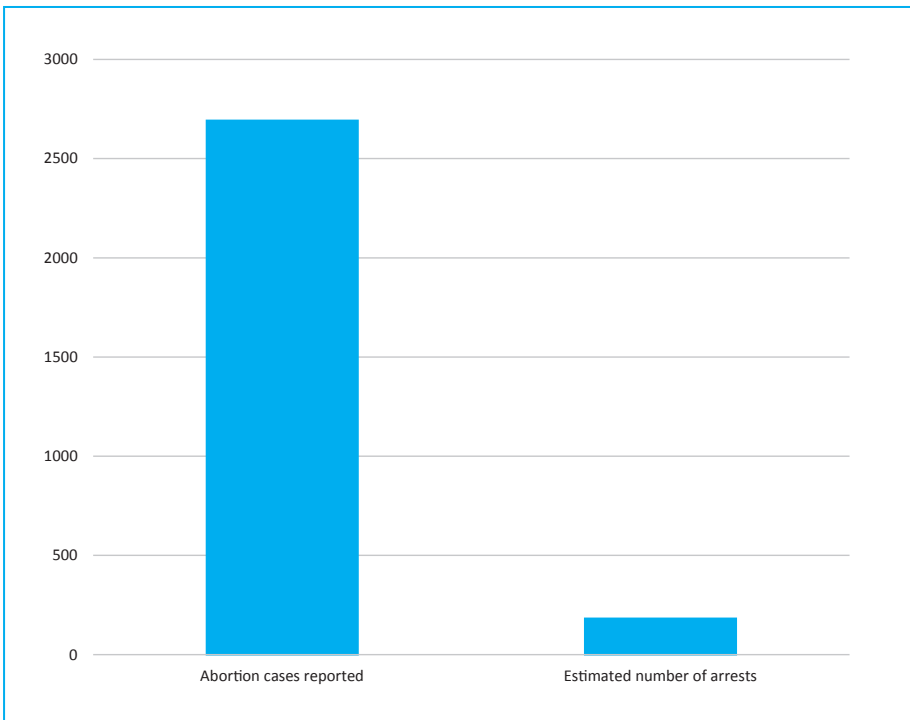
<sup>16</sup> Interview with Captain Okech Akonyo Henry, Okid Police Post, Kitgum, 26 July 2016.

<sup>17</sup> Police officers based in Kitgum, such as Captain Odongara Alfred based at Matidi Police Post and Captain Okech Akonyo Henry based at Okid Police Post could not provide an explanation for the variance in arrests when questioned about this in follow-up telephonic interviews, 5 November 2016.

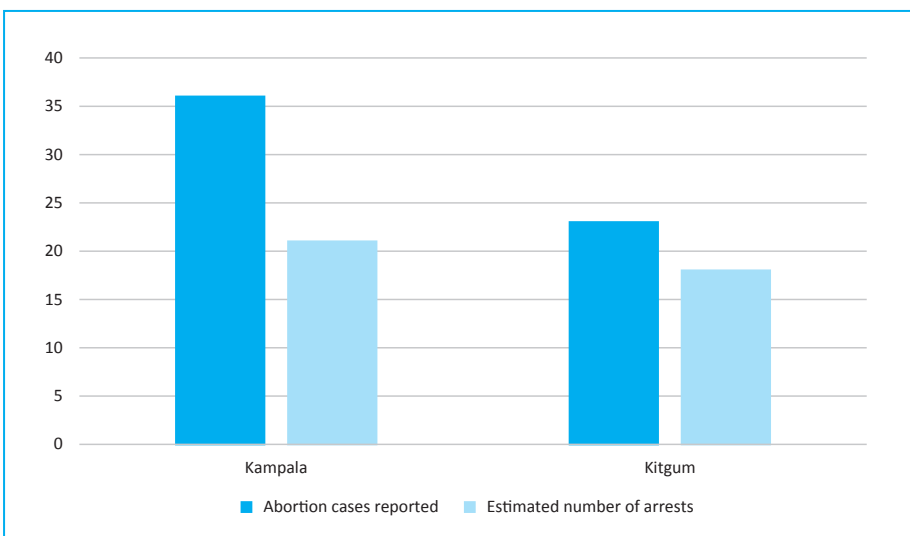
<sup>18</sup> Interview with detective Apenyo Albert at Akwang Police Post in Kitgum, 27 July 2016.

**Comparing national data, and the data from Kampala and Kitgum**

**Chart 4:** Numbers of abortion cases reported and estimated number of arrests nationally, 2011 – 2015



**Chart 5:** Number of abortion cases reported and estimated number of arrests, Kampala and Kitgum, 2011-2015



Nationally, 182 cases of arrests are estimated to have been carried out during the four year period. In Kampala, these were 20 cases and in Kitgum, there were 18 cases for the same period. This would imply that Kitgum and Kampala alone contribute about 20% of all arrests in Uganda. This however would not be accurate as there seemed to be underreporting in the national data for the years before 2013 as already explained above, and also the fact that the research team studied records in Kampala and Kitgum would imply that even cases that did not make it to the national records were found.

Comparing, Kampala and Kitgum, it is interesting to note that even though Kitgum has a significantly smaller population than Kampala,<sup>19</sup> only three fewer arrests took place in Kitgum (18) in comparison with Kampala where a total of 21 arrests took place. This suggests that there is a much higher proportional rate of reporting and arresting of suspects in abortion cases in Kitgum, which could be attributable to the fact that living in a small community would make it more difficult for a woman or girl to undergo an abortion in secret. Therefore urbanisation plays a role in the number of arrests as the community is not so close knit and many people can get away with abortions especially if done in safe environments. It is usually where abortions go bad that people get arrested especially when there is a death involved.<sup>20</sup> Urbanisation seems to be able to provide a measure of protection against being arrested for an abortion-related crime or, in the case of health workers, at least allows a measure of secrecy surrounding the arrest itself. Health workers who were known to have performed abortions in Kitgum suffered severe stigma in their communities, up to the point of finding staying on in the region unbearable.<sup>21</sup> Midwives who had been arrested for abortion in Kampala, however, reported that their lives within their communities were not greatly influenced by the arrest experience. One midwife, based at a maternity clinic in Kampala city centre, had been arrested for abortion related crimes on two occasions and said that her community remains unaware of both of these incidences.<sup>22</sup> A midwife based at a Maternity and Health Centre in Kampala also expressed that her community was not aware of the arrest because she was arrested from the clinic.<sup>23</sup>

Overall, the national figures, and the figures from Kampala and Kitgum suggest that arrests under abortion cases do occur but that they are not common. Considering that 300,000 abortions are estimated to be taking place in Uganda every year, 21 arrests of women, health workers and third parties under abortion cases over a five year period in the populous capital city are few, and so is 18 cases from Kitgum over a five year period. Nevertheless, it is clear that people still get arrested, and those who do, suffer the consequences.

### 3.2.2 Using arrests for extortion and unrecorded arrests

Interviews conducted with key informants showed that there are some arrests taking place merely for the purpose of extortion by both family members and the police. A woman or health worker is arrested, and then to avoid the case going further, the police and the woman or health worker negotiate and money changes hands and the person

<sup>19</sup> Kampala has a population of 1,516,210 while Kitgum has a population of 204,012, Uganda Bureau of Statistics *The National Population and Housing Census 2014 – Main Report* (2016) 19-20.

<sup>20</sup> Interview with Irene Nakimbugwe, assistant public relations officer, Directorate of Public Prosecutions, 3 November 2016.

<sup>21</sup> Interview with medical doctor at Kitgum Referral Hospital, 25 July 2016.

<sup>22</sup> Interview with midwife at a Maternity Clinic in Kampala, 4 November 2016.

<sup>23</sup> Interview with midwife at a Maternity and Health Centre in Kampala 21 April 2016.

arrested is released. This trend was mainly highlighted by health workers who stated that the women they help and/or their family members connive with police officers to extort money from health workers.<sup>24</sup>

A midwife who had been arrested for carrying out an abortion reported being released after paying UGX 400,000 (110 USD) to a police officer and a relative of the girl she had helped to abort.<sup>25</sup> In some cases, they are even taken to the police stations and charges may or may not be instituted.<sup>26</sup> Another midwife was held at one of the police stations surveyed in Kampala from 28 May to 2 June 2012 after being reported by the mother of the girl she had assisted. She was only released after paying UGX 2,500,000 (750 USD) to the Police officers and the State Attorney.<sup>27</sup> Another midwife, who has been practising in Kampala for 25 years, conveyed that she had been arrested for carrying out an abortion on two occasions and was released after paying UGX 1,000,000 (USD 300) and UGX 300,000 (USD 90) to the police in the two respective cases and the matters ended there.<sup>28</sup> On the second occasion she was reported by the uncle of the girl that she had helped. It is evident that the 'concerned family member' was not truly interested in seeing the ends of justice met, but was satisfied to rest the case after the bribe had been paid. The identification of this pattern of extortion adds to the explanation of why many cases that are reported to the police are not submitted to the DPP: it was never the intention of the police or the complainant to secure a conviction of the health worker.

Usually these arrests are not even recorded in the police records. The midwife arrested on 28<sup>th</sup> May 2012 confirmed that she had been imprisoned at a specific police station, but when the police records were checked, there was no record of the arrest.<sup>29</sup> This also goes to show that the numbers of arrests may be much higher than what is actually recorded in the police books.

### 3.2.3 Categories of arrestees

Three categories of arrestees under the abortion offences were identified. These three categories were: women or girls who had undergone abortions; health workers who had procured abortions and third parties (usually the men responsible for the pregnancies) who were involved in procuring an abortion.

An interesting finding about the women who are arrested is that sometimes they would have suffered spontaneous miscarriages rather than carrying out abortions, but they are nevertheless arrested. A case in point is a woman in Mityana who was arrested after suffering a spontaneous miscarriage of a six month foetus (Woman interviewed in

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<sup>24</sup> Interview with a midwife at a Maternity and Health Centre in Kampala, 21 April 2016; interview with midwife at a Health Centre in Mengo, Kampala 14 June 2016; and interview with medical doctor at Kitgum Referral Hospital, 25 July 2016.

<sup>25</sup> Interview with midwife at a Maternity and Health Centre, Kampala, 21 April 2016.

<sup>26</sup> No charges were instituted against the midwife arrested from the Maternity and Health Centre in Kampala, while abortion-related charges were instituted against the midwife arrested from a Maternity Clinic in Kampala.

<sup>27</sup> Interview with midwife at a Health Centre in Kampala, 14 June 2016.

<sup>28</sup> Interview with midwife at a Maternity Clinic in Kampala, 4 November 2016.

<sup>29</sup> n 25 above.

Mityana, 12 October 2016.)

In the tables and chart below, the data from both Kampala and Kitgum police stations are disaggregated to indicate arrests per category of arrestee.

### **Category of arrestees nationally**

The Police Annual Crime Reports indicate the number of accused persons under abortion crimes according to gender. While this data does not tell us how many of the women arrested were health workers, third parties or the woman or girl who had undergone the abortion herself, we know that all of the men arrested under these crimes are either health workers or third parties.

**Table 3: National data on number of men and women arrested for abortion-related crimes, 2011-2015**

Year	Male	Female
2011	5	13
2012	1	14
2013	12	13
2014	64	26
2015	-	-
<b>Total:</b>	<b>82</b>	<b>66</b>

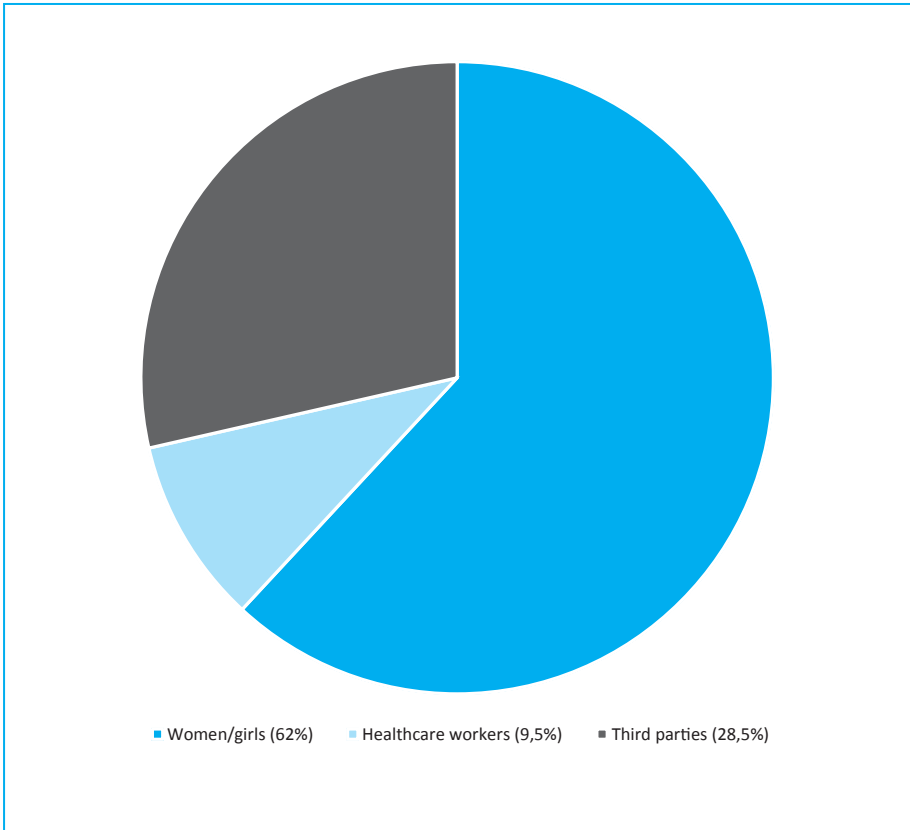
This data indicates that a far greater number of health workers and third parties are arrested in comparison with the number of women/girls involved. All of the 82 men, and some of the 66 women, arrested for abortion crimes would be either health workers or third parties.

### **Category of arrestees in Kampala**

**Table 4: Numbers of arrests under three categories of arrestees in Kampala**

	Kampala Police Station / Division	Women / girls	Healthcare Workers	Third parties	Total number of arrests per station
1.	Central Police Station	0	0	0	<b>0</b>
2.	Jinja Road Police Station	4	0	1	<b>5</b>
3.	Kabalagala Police Division	3	0	0	<b>3</b>
4.	Katwe Police Station	3	1	1	<b>5</b>
5.	Kawempe Police Station	1	0	1	<b>2</b>
6.	Kira Road Police Station	0	0	0	<b>0</b>
7.	Old Kampala Police Station	2	1	2	<b>5</b>
	<b>Total:</b>	<b>13</b>	<b>2</b>	<b>5</b>	<b>20</b>

**Chart 5: Arrests of three categories of arrestees under abortion crimes in Kampala**



From the figures above, in Kampala, the majority of arrestees are women who undergo abortions (62%). These are followed by third parties who are usually partners of the women (28.5%) and then finally health workers who assist women to have abortions (9.5%).

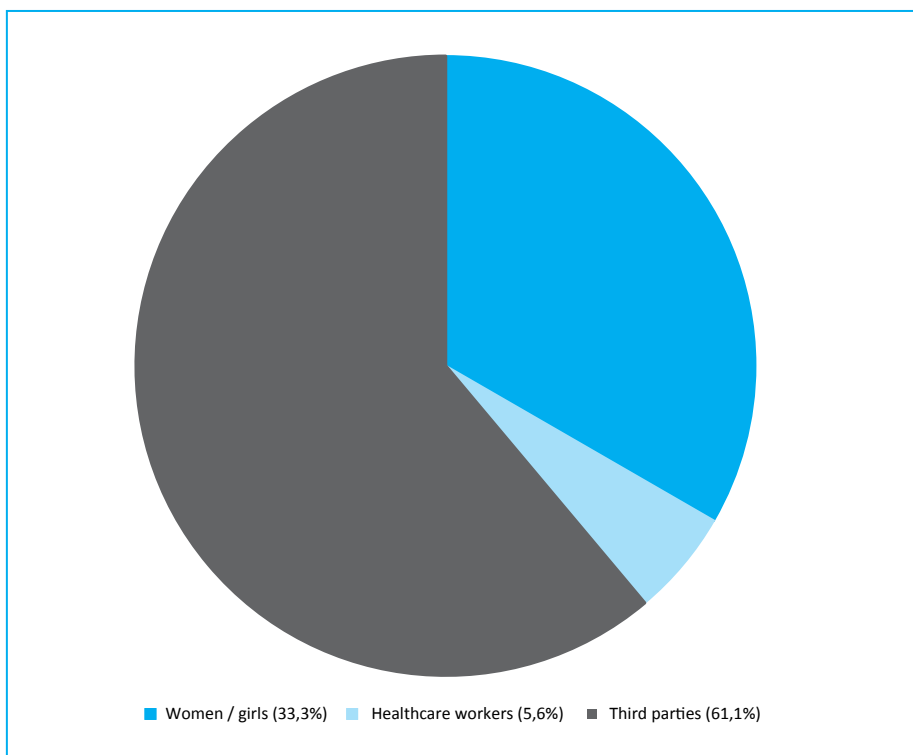
**Categories of arrestees in Kitgum**

**Table 5: Numbers of arrests under three categories of arrestees in Kitgum**

	Women/girls	Healthcare workers	Third parties	Total
Kitgum Central Police Station	6	1	11	<b>18</b>



**Chart 6: Arrests of three categories of arrestees in Kitgum**

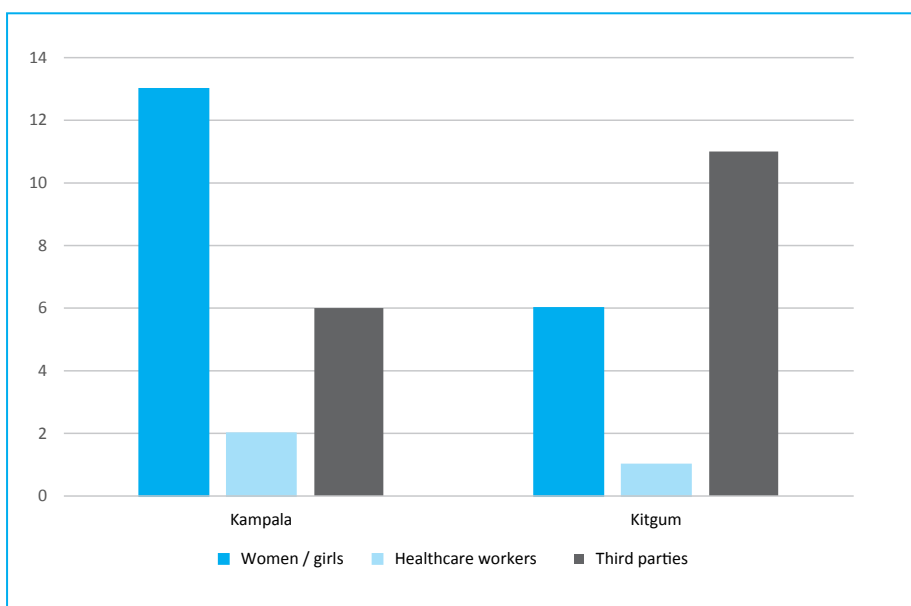


In Kitgum, third parties made up 61.1% of arrests while only a third (33.3%) of the arrests were carried out on women or girls, and only 5.6% on health workers.

***Categories of arrestees in Kampala and Kitgum compared***

There is a difference between the categories of arrestees in Kampala and Kitgum as the graph below shows:

**Chart 7: Total number of arrests per category of arrestee in Kampala and Kitgum, 2011-2015**



In Kampala, more women are arrested while in Kitgum more third parties are arrested. One explanation for this higher rate of third party arrests in Kitgum is the endemic defilement which is viewed as part of the legacy of the war which the area experienced. According to one of the police officers interviewed in Kitgum, rape and defilement were common occurrences in the post-war settlement camps and have permeated the society, even after the war.<sup>30</sup> Another officer went as far as suggesting that the social ills of rape and defilement ought to be addressed as a method of reducing unsafe abortions in the region.<sup>31</sup> There were a number of cases where under-aged girls would be convinced or coerced into aborting after being impregnated by a much older man. In these cases, it is the man rather than the under-aged girl who is arrested.<sup>32</sup> In one particular case which is still pending in the Kitgum Chief Magistrates Court, a 16-year old induced an abortion after she was impregnated by a 38-year old man.<sup>33</sup> The girl in this matter was not charged and the state attorney preferred charges of defilement against the man.<sup>34</sup> In both districts healthcare workers are rarely arrested.

One reason to explain this may be because most of the women do not necessarily go to health workers for abortion and thus carry out unsafe abortions. This is partly because of the prohibitive fees charged by health workers for abortions. For example it was reported that health workers within government facilities who are willing to perform

<sup>30</sup> Interview with Corporal Agboang Godliver, Amida Police Post, Kitgum, 25 July 2016.

<sup>31</sup> Interview with Captain Okech Akonyo Henry, Okid Police Post, Kitgum, 26 July 2016.

<sup>32</sup> Interview with midwife at Biva Maternity and Health Centre, 21 April 2016.

<sup>33</sup> *S v Kaduchu Denis* CRB 401/2014.

<sup>34</sup> Telephonic follow-up interview with Resident State Attorney Obale Innocent, based in Kitgum, 12 September 2016.

abortions would charge women up to UGX 150,000 (USD 45) which is a prohibitive amount of money for most unemployed Ugandan women.<sup>35</sup> The result is that the woman is left with no choice but to consult a person who does not necessarily have the skill to perform an abortion. The other reason may be because of the high esteem in which health workers, especially doctors, are generally regarded in Uganda, they are made less prone to arrests.<sup>36</sup> It is usually in cases where the abortion goes wrong, especially where there is loss of life that health workers may get arrested. In both districts, there were known doctors and health workers who offered abortion services but who nevertheless were never arrested.<sup>37</sup>

### 3.2.4 Social economic status of persons arrested

The study also delved into the socio-economic status of the people who get arrested under the abortion laws. It was found that almost without exception, the persons arrested were poor women, and men. For example all the women who were interviewed and who had been arrested were either young unemployed women or house-wives. The men who were arrested as third parties were also equally of low social economic status. One of the men interviewed in Kitgum who had reported the mother of his unborn child for procuring an abortion explained that the reason why he had not married the woman in question was because the small salary that he earned as a radio talk show host which meant that the costs involved with a wedding were prohibitive.<sup>38</sup> Among the health workers, there were some doctors who were arrested, but the majority were midwives.<sup>39</sup> This shows that those who are most likely to fall foul of the law on abortion are the poor.

### 3.2.5 Community perspectives about abortion and motivation for reporting or not reporting abortion cases

It seems that even though abortions are rampantly taking place, the cases which reach the knowledge of the police are few and far in between. Midwives interviewed explain that they have carried out more abortions, or have dealt with more cases of incomplete abortions, than they can count or remember.<sup>40</sup> One midwife who has been practising in Kampala for ten years says that she deals with four to five cases of incomplete abortions every month.<sup>41</sup> Police officers, on the other hand, tend to be able to recall only a handful of abortion arrests which they were involved in, while many of the police officers interviewed had not carried out a single abortion-related arrest in their career.<sup>42</sup>

The research furthermore indicates that those aware of abortion cases would not necessarily report them to the police. There were instances of communities trying to

<sup>35</sup> Interview with midwife in Kampala, 5 November 2016.

<sup>36</sup> Harrington shows that in East Africa, 'doctors have maintained a relatively privileged position within the health care system and in the wider society from the colonial period, through the early years of independence to today.' J Harrington 'Between the state and civil society; medical discipline in Tanzania' *The Journal of Modern African Studies*, 37:2 (1999) 207-240.

<sup>37</sup> Interview with Sergeant Okello Patrick at Layamo Police Post, Kitgum, 27 July 2016.

<sup>38</sup> Interview with Mr. Frank Kidega, Boma Hotel Kitgum, 28 July 2016.

<sup>39</sup> As discussed in section 3.2.2 above.

<sup>40</sup> Interview with midwife in Kampala, 21 April 2016.

<sup>41</sup> Interview with midwife in Kampala, 5 November 2016.

<sup>42</sup> Interview with Corporal Agboang Godliver, Amida Police Post, Kitgum, 25 July 2016.

protect women, health workers and even third parties from arrest and communities showed resistance toward the enforcement of abortion laws.<sup>43</sup> One community banished a woman who had reported the health worker that had performed an abortion on her.<sup>44</sup> Even a police officer reported a reluctance to ensure that abortion cases lead to arrests. He expressed that there was a school nurse in an area just outside of Kitgum town who was known for performing abortions but that the police officers would not arrest her because many people in the area supported abortion.<sup>45</sup>

On the other hand, some communities strongly feel that abortion laws are to be enforced and most of the cases against women or girls were reported by neighbours, community members or Local Council (LC) chairs. An instance was reported where community members were so intent on seeing the law implemented that they carried a school girl who had been wounded after an unsafe abortion to a nearby police station without caring to take her to hospital first.<sup>46</sup> A girl interviewed in Arua was arrested by four civilians.<sup>47</sup> In Iganga, the stepmother of a 16-year old girl called the matter of her abortion to the attention of 20 villagers and the LC Chairman, which made her arrest inevitable.<sup>48</sup> There were also instances of male partners who viewed the law as a tool of settling a score against their female partners who aborted.<sup>49</sup> In other cases, it is the issue of sharing money that leads to cases being reported. In a case recorded in Jinja, a mother reported her daughter to the police for allegedly attempting to abort.<sup>50</sup> The girl explained that her mother's motivation for reporting her was simply that she had refused to share the money she received from the unborn child's father with her mother.

The motivation behind reporting healthcare workers to the police appears particularly sinister. Three of the healthcare workers interviewed were reported by the family members of the woman or girl they had assisted in aborting.<sup>51</sup> In all three of these cases the matter was dropped after the healthcare worker had paid a substantial bribe to the family members and arresting officers.<sup>52</sup> The unenviable position in which healthcare workers are placed due to the criminalisation of abortion, along with the uncertain limits of the law as far as exceptions are concerned, is used to extort healthcare workers and subject them to the humiliating experience of being arrested.

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<sup>43</sup> Interview with midwife at a clinic in Mengo, 14 June 2016.

<sup>44</sup> As above.

<sup>45</sup> Interview with a police officer at Layamo Police Station, Kitgum, 27 July 2016.

<sup>46</sup> Interview with an unnamed Sergeant at Kitgum Central Police Station, 25 July 2016.

<sup>47</sup> Interview with young woman in Arua, 29 September 2016.

<sup>48</sup> Interview with young woman in Iganga, 12 October 2016.

<sup>49</sup> In two of the cases the father of the aborted child was the one to report the woman who had undergone an abortion to the police.

<sup>50</sup> Interview with woman in Jinja, 12 October 2016.

<sup>51</sup> Interview with midwife at a Maternity and Health Centre in Kampala 21 April 2016; interview with midwife at a Health Centre in Mengo, Kampala 14 June 2016; interview with medical doctor at Kitgum Referral Hospital, 25 July 2016.

<sup>52</sup> Interview with midwife at a Maternity and Health Centre Kampala, 21 April 2016.

More than 300,000 abortions are taking place in Uganda every year,<sup>53</sup> yet the law is rarely enforced beyond being used as a tool for personal gain. Apart from the fact that criminal abortion laws lead to unsafe abortion, the sporadic way in which the law is enforced casts a further shadow of doubt on the justifiability of its existence.

### 3.3 Trends in prosecution

The next stage after arrest and investigation is preferring charges against the suspects. The police prefer charges depending on the ingredients of the offence and the facts as unveiled by the investigations.<sup>54</sup> The charge is preferred by the police officer filling in a charge sheet after identifying a suspect. In cases where the facts do not clearly bring out a particular offence, a holding charge can be preferred as more investigations go on. Where there are many alternative charges that can be preferred, sometimes the investigating officer may submit the case to the DPP and request a legal opinion on which charges ought to be preferred.<sup>55</sup> In most cases, the police would make an arrest, conduct thorough investigations, prefer a charge against the accused and submit the file to the DPP for purposes of having the charge sanctioned.<sup>56</sup> When the DPP sanctions the file, then the case is filed in court and prosecuted. This section is going to focus on cases that have reached this stage.

#### 3.3.1 Number of women, girls and health care providers prosecuted under abortion laws

##### **Trends at the national level**

The Police Annual Crime reports show that a number of cases were referred to the Directorate of Public Prosecutions. These were: 24 in 2011 of which 18 were taken to court; 14 in 2012 of which 13 were taken to court; 39 in 2013 of which 21 were taken to court and 105 in 2014 of which 84 were taken to court.

**Table 6: Numbers of abortion cases submitted to the DPP and taken to court at the national level**

Year	Cases submitted to the DPP	Cases taken to court
2011	24	18
2012	14	13
2013	39	21
2014	105	84

<sup>53</sup> E Prada et al 'Incidence of induced abortion in Uganda, 2013: New estimates since 2003' *PLoS ONE* 11(11) (2016) 8.

<sup>54</sup> Interview with Olal Johnson, CID Commander Kampala Metropolitan Police Headquarters, 3 November 2016.

<sup>55</sup> Interview with Robert Baluma, records officer/ exhibits storer, Kampala Metropolitan Police Headquarters, 3 November 2016.

<sup>56</sup> Sanctioning of cases involves considering whether sufficient evidence is available on file to secure the conviction of the accused.

The table above indicates that slightly fewer cases than those submitted to the DPP ended up in court. The DPP sanctions 80% of the abortion charges preferred by the police.

The figures furthermore indicate a noticeable increase in the number of cases submitted to the DPP from 2012 to 2013 and again from 2013 to 2014.

In terms of the Directorate of Public Prosecution's Prosecution Policy, prosecutors, when deciding whether or not to institute criminal proceedings against an accused, should assess whether there is 'sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution'.<sup>57</sup> According to Irene Nakimbugwe, the Assistant Public Relations Officer of the DPP, there is no specific policy pertaining to the prosecution of abortion cases.<sup>58</sup> In her view, very few abortion cases are submitted to the DPP and even fewer cases actually reach the courts. She explained the reasons for this as follows:

*...in court you need much circumstantial evidence to prove an abortion. The witnesses are the very people you are charging. Abortions mostly occur among young girls and they are usually only reported when the girls have run away from home or where someone has taken advantage of the girl. The authorities get to know about an abortion when something bad has happened. The people directly involved in the abortion can all be incriminated. So unless someone knows something sinister is going on, usually the bystanders or if it is your daughter or niece, the case might not be reported. Even in cases where the abortion is reported people lose interest. People are usually paid off. If the person who has defiled your daughter comes up and says that he will actually look after her and then give you some money, most people are willing to shelve the case. Even where the case has proceeded to the Resident State Attorney (RSA)'s office, the parties can write and say they are not interested in pursuing the matter any further. The parties are the witnesses. If they are not compellable you will not have anyone to testify in your case. Even before being dismissed these cases do not go far.'*

On why then 80% of the cases brought to the DPP get sanctioned, according to the police reports, she stated that in some cases state prosecutors experience much pressure from the community to sanction charges after it has come to light that an abortion had taken place.

### **Categories of persons prosecuted under these offences**

Aggregated data is available on the gender and age of accused and convicted persons prosecuted under the abortion offences.

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<sup>57</sup> Directorate of Public Prosecutions 'Prosecution Policy' <http://www.dpp.go.ug/jdownloads/PROSECUTION%POLICY.pdf> (accessed 17 October 2016).

<sup>58</sup> Interview with Irene Nakimbugwe, assistant public relations officer of the DPP, 3 November 2016.

**Table 7: Aggregated national data on persons prosecuted under abortion laws in Uganda**

Year	Males	Females
2011	5	13
2012	1	14
2013	12	13
2014	64	26
2015	-	-
<b>Total</b>	<b>82</b>	<b>66</b>

The data indicates that most of those charged and prosecuted under these laws are males (82) as compared to 66 females. This shows that nationally more ‘third parties’ who may include health workers are prosecuted on abortion related charges than the women.

### ***Trends in prosecution in Kampala***

To establish the number of persons prosecuted within Kampala, the number of persons arrested was compared to the numbers of persons subsequently taken to court. In order to obtain statistics on the number of women, girls and health care providers who were taken to court on abortion charges, courts that have all levels of magistrates (Chief Magistrates Courts) and serve Kampala were visited.<sup>59</sup> Makindye Chief Magistrates Court was selected for Makindye Division; Mwanga II Chief Magistrates Court for Rubaga Division; Nabweru Chief Magistrates Court for Kawempe Division; Kiira Chief Magistrates Court for Nakawa Division and Buganda Road Chief Magistrates Court for the Central Division. Perusal of the court records for the study period of these five courts revealed not a single abortion case at Buganda Road, Mwanga II or Nabweru Magistrates Courts. There was one 2011 case in which a woman was charged under section 142 at Makindye Chief Magistrates Court. There were 5 abortion cases at Kiira Chief Magistrates Court, 1 under section 142, 2 under section 143 and 2 under section 212.

<sup>59</sup> There are four levels of magistrates in Uganda, with the lowest grade being ‘grade III magistrates’ (which no longer exist in practice) and the highest grade being ‘chief magistrates’ (section 4 of The Magistrates Courts Act, Cap 16). Only chief magistrates courts have all four grades of magistrates. This selection was made on the basis of the fact that only chief magistrates courts have the jurisdiction to impose the maximum sentences provided for under section 141 and 212 of the Penal Code Act. The maximum sentence which can be imposed by a grade I magistrates court is ten years’ imprisonment, which means that offences under section 141 and 212 cannot be heard in this court.

**Table 8: Number of persons arrested for abortion related cases and number of persons taken to court in Kampala 2011-2015**

Year	Number of cases taken before the DPP	Number of abortion cases taken to court
2011	4	1
2012	4	3
2013	4	1
2014	4	1
2015	4	0
<b>Total</b>	<b>20</b>	<b>6</b>

Many of the cases submitted to the DPP did not make it to court in Kampala. There were 4 cases submitted to the DPP in 2011 but only 1 made it to court; 4 in 2012 and 3 made it to court; 4 in 2013 but only 1 made it to court; 4 in 2014 but only 1 made it to court and of the 4 charges in 2015, none made it to court. This shows that in Kampala, many of the abortion cases do not get sanctioned by the DPP.

**Table 9: Number of abortion cases in Kampala per court per year**

	2011	2012	2013	2014	2015	Total number of cases per court
Nabweru	0	0	0	0	0	0
Makindye	1	0	0	0	0	1
Mwanga II	0	0	0	0	0	0
Kiira	0	3	1	1	0	5
Buganda Road	0	0	0	0	0	0
<b>Total number of cases per year</b>	<b>1</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>6</b>

**Table 10: Number of abortion cases under the four abortion provisions in Penal Code Act per year in Kampala courts**

	Section 141	Section 142	Section 143	Section 212
2011	0	1	0	0
2012	0	0	2	1
2013	0	0	0	1
2014	0	1	0	0
2015	0	0	0	0
<b>Total</b>	<b>0</b>	<b>2</b>	<b>2</b>	<b>2</b>



From the statistics above, of the six cases, two involved women who had undergone abortions, and four involved third parties. The trends indicate that few cases on abortion actually do make it from the police to the courts, and in some cases a year goes by without a single case being filed in any of the courts that serve Kampala.

### **Trends in prosecution in Kitgum**

For Kitgum, the number of cases submitted to the DPP were compared with those taken to court. The records perused were those obtained from Kitgum Chief Magistrates Court.

**Table 11: Number of abortion cases submitted to the DPP and number of persons taken to court in Kitgum 2011-2015**

Year	Number of cases taken to the DPP	Number of abortion cases taken to court
2011	4	2
2012	1	0
2013	2	0
2014	4	0
2015	7	1
<b>Total</b>	<b>18</b>	<b>3</b>

In 2011, 4 persons were arrested in Kitgum but only 2 were taken to court. In 2012, 1 person was arrested but not taken to court; and in 2013, 2 people were arrested and none taken to court. In 2014 it was 4 persons and still none was taken to court and finally in 2015 it was 7 persons who were arrested and only 1 was taken to court.

In terms of the persons charged in cases which reached the courts, two of the four people were women who had undergone abortions, one was a third party and another was a partner to a pregnant woman.

**Table 12: Number of abortion cases under the four abortion provisions in the Penal Code Act per year in Kitgum Chief Magistrates Court**

	Section 141	Section 142	Section 143	Section 212
2011	0	1	1	0
2012	0	0	0	0
2013	0	0	0	0
2014	0	0	0	0
2015	0	1	0	0
<b>Total</b>	<b>0</b>	<b>2</b>	<b>1</b>	<b>0</b>

In Kitgum, there were three abortion cases that reached the courts for the period of 2011

to 2015 as indicated by the crime records books at the Kitgum Chief Magistrates Court.<sup>60</sup> Two of these cases, which were filed in 2011, resulted from a single abortion; where the woman and the person who had supplied the drugs for the abortion were charged and tried separately.<sup>61</sup> The other case was a 2015 matter in which the first accused (a man) was charged with procurement of an abortion under section 142 and the second accused (a woman) was charged with procuring a miscarriage, also under section 142.<sup>62</sup> The two accused were found guilty and sentenced to pay UGX 600 000 (USD 180) in compensation or imprisonment for two years.

### 3.3.2 Comparison between prosecution of cases nationally, and in Kampala and Kitgum

Nationally, few of the reported cases actually get prosecuted. In 2013, out of 1003 reported cases, only 39 cases were submitted to the directorate of public prosecutions and 21 cases were heard in court,<sup>63</sup> while in 2014, out of 1689 cases reported, only 84 cases were taken to court.<sup>64</sup> It is clear that abortion cases are not easily sanctioned by the prosecution and would rarely reach a court. This trend is also discernible in both Kampala and Kitgum. In Kampala, out of 36 cases reported for the study period, only 6 cases reached the courts. Similarly in Kitgum, out of 23 reported abortion cases, only 4 reached the court.

The reason for this from the police's side is that abortion cases are inherently difficult to investigate and that the necessary expertise and facilities may be lacking. According to one police officer interviewed there are few facilities available to process medical evidence to be used in abortion cases.<sup>65</sup> Another police officer interviewed in Kitgum expressed that the arrests for abortion that he had carried out could not be investigated due to the absence of the necessary facilities and because '*the police system was not streamlined to allow professional investigation*'.<sup>66</sup>

A state attorney interviewed at Buganda Road Chief Magistrates' Court furthermore explained the difficulty in securing witnesses in these cases:

*Abortion cases rarely reach court; even when they do, they are difficult to prove. Who is the victim in the first place? The woman or girl will have willingly sought the services of a health worker or another person to abort. She cannot report such a person to the police. She cannot testify against him or her. That is why most of the women give additional statements at police withdrawing cases against suspects. If the abortion takes place in a family setting, it is concealed: it may only be reported where the*

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<sup>60</sup> Researchers perused the record books beyond the study period and also found four cases for the years 2005 to 2010 and one 2016 case.

<sup>61</sup> *Apoko Joyce v Uganda*, Case 150/2011 and Case 152/2011 *Oyello Kevin v Uganda*.

<sup>62</sup> *Uganda v Ayella Richard & Lakot Josephine*, Case 589/2015.

<sup>63</sup> Uganda Police Annual Crime and Traffic/Road Safety Report 2013.

<sup>64</sup> Uganda Police Annual Crime Report 2014. The number of cases report is not indicated in the 2011 and 2012 Uganda Police Annual Crime Reports.

<sup>65</sup> Interview with unnamed sergeant at Kitgum Central Police Station, 25 July 2016.

<sup>66</sup> Interview with Detective Apenyo Albert, Akwang Police Post, Kitgum, 27 July 2016.

*act is fatal. The parents of the girl may also not testify against the health worker or other person who carried out the abortion. They fear the stigma associated with abortion. They also fear to be avoided by neighbours, friends and the community. The girl or woman is viewed as a criminal and parents/family are taken to have abetted commission of crime. That is the challenge with enforcing largely moral offences.<sup>67</sup>*

The challenges presented in proving an abortion case therefore makes a reasonable prospect of successful prosecution unlikely.

It must be noted that not a single case of a health worker who had procured an abortion reached the court in either district.

In abortion cases which reached the courts, most of the people charged are the women who carried out abortions, followed by third parties. Health workers are rarely prosecuted. There was not a single case instituted against a health worker in either district.

According to Susan Baluka, a lawyer who has handled 10 abortion cases in her career, the crimes of abortion and defilement usually go hand-in-hand.<sup>68</sup> She explained that in many cases where an under-aged girl falls pregnant, the older man who impregnated her also convinces or forces the girl to undergo an abortion. The state prosecutors usually prefer charges of defilement and do not pursue the abortion matter. Regardless of the charges instituted, the girls' families tend to drop all charges once the man agrees to marry the girl. This position was affirmed by Doreen Elima, the Senior State Attorney at Nakawa Magistrates' Court:

*'Some cases are reported as defilement; some witnesses become hostile; some cases are settled out of court especially when the man responsible is willing to marry or look after the girl or pay the medical bills.'<sup>69</sup>*

The research team came across a case that demonstrated this phenomenon at the Kitgum State Attorney's office. In this matter, a 16-year old was impregnated by a 38-year old man (the accused) and he convinced her to have an abortion.<sup>70</sup> Even though a case of procuring an abortion in terms of section 143 could have been instituted against the accused, the State Attorney preferred a charge of defilement since he believed that there was a higher chance of successful prosecution of this charge.<sup>71</sup>

Therefore, all in all, few cases of abortion make it to the courts of law for prosecution.

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<sup>67</sup> Interview with Jonathan Mugwanya, Resident State Attorney, Buganda Road Chief Magistrates' Court, 3 August 2016.

<sup>68</sup> Interview with Susan Baluka, lawyer in Access to Justice: Sexual Minorities Unit of Human Rights Awareness and Promotion Forum, 12 October 2016.

<sup>69</sup> Interview with Doreen Elima, Senior State Attorney at Nakawa Magistrates' Court, 19 August 2016.

<sup>70</sup> *S v Kaduchu Denis* CRB 401/2014.

<sup>71</sup> Telephonic follow-up interview with Resident State Attorney Obale Innocent, based in Kitgum, 12 September 2016.

### 3.4 Trends in Convictions, Acquittals and Dismissals in abortion cases

#### *Trends at the national level*

**Table 13:** Trends in convictions, acquittals and dismissals of abortion cases at the national level

	Cases with convictions	Cases with acquittals	Cases with dismissals	Cases pending at the time of release of the report
<b>2011</b>	1	-	2	15
<b>2012</b>	6	1	1	5
<b>2013</b>	3	-	-	18
<b>2014</b>	25	-	-	59
<b>2015</b>	Not available			
<b>Total</b>	<b>35</b>	<b>1</b>	<b>3</b>	<b>97</b>

According to the 2011 Annual Crime and Traffic/Road Safety Report, 54 cases were investigated and 18 cases were taken to court, resulting in 1 conviction and 2 dismissals (with 15 cases still pending at the time of the release of the report).<sup>72</sup> The 2012 report reveals that there were convictions in 6 cases, acquittals in 1 and that one case was dismissed; 5 cases were pending in court at the time of the release of the report. According to the 2013 Annual Police and Traffic/Road Safety Report, out of 21 cases which went to court, 3 led to convictions and 18 were still pending at the time of publication of the report.<sup>73</sup> The 2014 report indicates that there were 25 convictions and no acquittals or dismissals; 59 cases were pending at the time of the release of the report.

This implies that at the national level, there are many more convictions than acquittals or dismissals for cases that go before the courts. Considering that the national data indicates that the number of cases reported, submitted to the DPP and taken to court have rapidly increased from one year to the next, it is expected that the number of convictions would also increase.

<sup>72</sup> Uganda Police Annual Crime and Traffic/Road Safety Report 2013.

<sup>73</sup> Uganda Police Annual Crime and Traffic/Road Safety Report 2011.

## Trends In Kampala

**Table 14: Outcome of abortion cases in Kampala heard in five selected magistrates courts<sup>74</sup>**

	Section 142	Section 143	Section 212	Total
Dismissal	1	2	0	<b>3</b>
Conviction	1	0	1	<b>2</b>
Out of court settlement	0	0	1	<b>1</b>

In Kampala, of the 6 abortion cases, there were 2 convictions, 3 dismissals and one out of court settlement. The convictions are largely due to pleas of guilt as such cases are usually difficult to prove.

## Trends in Kitgum

**Table 15: Outcome of abortion cases in Kitgum heard in Kitgum Chief Magistrates Court**

	Section 142	Section 143	Section 212	Total
Dismissal	0	0	0	<b>0</b>
Conviction	2	1	0	<b>3</b>
Out of court settlement	0	0	0	<b>0</b>

In Kitgum, all the three cases taken to court resulted in convictions.

Through the review of the files of the cases which were heard in Kitgum Chief Magistrates Court, it came to the fore that in both cases where women had been convicted under the abortion provisions, they had pleaded guilty. In the 2015 case of *Uganda v Ayella Richard and Another*, the 25-year old woman, LJ, who was charged under section 142 of the Penal Code Act pleaded guilty and was sentenced to either a fine of UGX 600 000 or two years' imprisonment upon conviction. In the 2011 case of *Uganda v AJ*, the accused also pleaded guilty and prayed for leniency. Considering the immense difficulty in securing evidence to prove beyond a reasonable doubt that a woman had aborted, it is doubted whether there would have been convictions in these cases if the women had pleaded not guilty. Magistrate Grade I Simon Peter Odo acknowledged this fact when he expressed that the accused had 'saved the court's time'.<sup>75</sup> The fact that AJ pleaded guilty was considered along with her remorse and willingness to go back to school to impose on her a very

<sup>74</sup> Interview with unnamed senior police official in charge of records, 4 November 2016.

<sup>75</sup> Case file 150/11.

lenient sentence.<sup>76</sup>

### **Comparison between the conviction trends at the national level and in Kampala and Kitgum districts**

In Kampala, the dismissal and conviction rates were almost equal. In Kitgum, all three cases resulted in convictions. Pleas of guilt are common in both places as evidence is difficult to come by and yet they come with an expectation of being let off with a minor sentence or fine.

## **3.5 Trends in sentencing**

The Penal Code Act provides for a prison sentence of fourteen years for a person convicted of attempting to procure an abortion. In terms of section 142, a woman who undergoes an abortion is liable to imprisonment for 7 years and a person who supplies drugs or any other thing for the procurement of an abortion under section 143 is liable to 3 years' imprisonment. A person convicted of killing an unborn child under section 212 is liable to imprisonment for life.

### **At the national level**

At the national level, some data is available from the annual crime reports on sentences imposed for abortion-related crimes.

**Table 16: Sentencing under abortion offences at the national level**

	Imprisonment				Caution	Com- munity Service	Fines	Amount of fines
	Male		Female					
	Adult	Ju- venile	Adult	Ju- venile				
<b>2011</b>	-	-	-	-	-	-	-	-
<b>2012</b>	-	-	7	-	-	-	1	UGX 300,000
<b>2013</b>	2	-	1	-	-	-	-	-
<b>2014</b>	25	-	-	-	10	-	-	-
<b>2015</b>	-	-	-	-	-	-	-	-

This data is considered along with the available information on the details of accused and convicted persons (table 12 above) which also appear in the police Annual Crime Reports.

<sup>76</sup> The accused was convicted and sentenced to incarceration for the duration of the court session.

**Table 17: Aggregated national data on persons accused and convicted under abortion laws in Uganda**

	Accused charged				Accused convicted			
	Male		Female		Male		Female	
	Adult	Juvenile	Adult	Juvenile	Adult	Juvenile	Adult	Juvenile
<b>2011</b>	5	-	12	1	-	-	1	-
<b>2012</b>	1	-	14	-	-	-	7	-
<b>2013</b>	11	1	12	1	12	-	1	-
<b>2014</b>	63	1	24	2	5	-	-	-
<b>2015</b>	Not available							

For 2012, 7 persons were convicted and they were women and were sentenced to imprisonment. There is an absence of logical flow of information for the years 2011, 2013 and 2014. The data captured for 2014 is particularly questionable since it records only 5 convictions, yet indicates that 25 adult males were imprisoned for abortion-related crimes. As indicated by a senior police official in charge of records, these discrepancies could be due to the manual system of data capturing employed by the Uganda Police Force at present which is dependent on human input and therefore subject to error.<sup>77</sup>

### ***In Kampala***

From the court records of the two cases in Kampala which led to convictions, the conviction under section 212 led to imprisonment but the period was not specified while the conviction of three people under section 142 in a 2014 case resulted in a two year prison sentence.

### ***In Kitgum***

Two cases of women who had undergone abortions were heard in Kitgum Chief Magistrates Court during the study period. In the 2011 case, a woman (AJ) was convicted under section 142 of the Penal Code Act and sentenced to 'incarceration' for the duration of the court session. In the 2015 case, the woman was convicted under section 142 and was sentenced to pay UGX 600 000 (USD 180) in compensation or to serve out a prison sentence of two years.

### ***Comparison of the trends nationally and in Kampala and Kitgum as regards sentencing***

There seems to be a tendency to impose light sentences on women or girls who have been convicted under the abortion provisions. A magistrate interviewed at Makindye Court revealed that she only gave a warning to the woman whose case she heard because she was 'moved by her story'.<sup>78</sup> Third parties involved in the procurement of abortions, however, are not generally treated with such leniency. In the 2011 Kitgum case

<sup>77</sup> Interview with unnamed senior police official in charge of records, 4 November 2016. n11 above.

<sup>78</sup> Interview with Chief Magistrate Nasambu Esther Rebecca at Makindye Chief Magistrates Court, Kampala, 5 April 2016.

in particular, the man involved in AJ's abortion was sentenced to 12 months imprisonment after being convicted under section 143 while the 21 year-old AJ herself was convicted and sentenced to 'incarceration' for the duration of the court session. The court noted that AJ was a first time offender, and showed remorse as well as willingness to go back to school and that she should therefore be given 'another chance.'<sup>79</sup>

### 3.6 Conclusion

This section has revealed that, even though thousands of abortions take place in Uganda every year, very few of these cases ever reach the criminal justice system. A fraction of the estimated abortion cases are reported to the police and out of the cases reported, numbers drastically decrease at every step of the enforcement process. Far fewer arrests are made than abortion cases reported; fewer cases are sanctioned by the DPP for prosecution, and less than half the cases which reach the courts lead to convictions. Overall, the enforcement of abortion laws in the two study districts appear to be undertaken haphazardly and is met with much resistance at every step of the way. Prosecutions of women and girls and health workers under these laws are rarely undertaken or successful and even when they are, the sentences imposed amount to mere warnings. This brings into question the utility of abortion laws in Uganda, as they are rarely used for prosecution but they are in some cases used to persecute women who undergo abortions, their partners and health workers. The fact that many women resort to unsafe abortions because of these laws should however not be forgotten.

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<sup>79</sup> *Uganda v AJ*, Case file No. 150/11 in matter of *Uganda v AJ* retrieved from Kitgum Chief Magistrates' Court registry.



# **SECTION IV**

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# THE IMPACT OF CRIMINAL ABORTION LAWS ON THE HUMAN RIGHTS OF WOMEN, GIRLS AND HEALTH WORKERS

## 4.1 Introduction

Although the preceding section shows that not so many people are arrested or convicted on abortion related charges, the impact of the law on the few women, health workers and third parties who fall victim to the law is very high. Still, the mere existence of the law on the law books even without rigorous enforcement scares away women from accessing safe abortions services leading to various violations of the rights of women. This section highlights the way that criminal abortion laws, both on paper and in their application violate the rights of women and girls, health workers and third parties.

## 4.2 Human rights violations occasioned by these laws

The human rights violations occasioned by the existence and enforcement of these laws against the women and health workers are:

### 4.2.1 Rights of women

Women face a lot of human rights violations occasioned both by the mere existence of criminal abortion laws and by their enforcement. The rights violated are:

#### **The right to life**

Uganda's regime governing abortion is severely restrictive and steps have not been taken to prevent women with pregnancies that are unwanted for a wide range of reasons from undergoing unsafe abortions. Because of this restriction, women and girls resort to using unsafe methods of abortions, and many end up dying. Uganda has a maternal mortality rate of 438 deaths per 100 000 live births, accounting for approximately 18% of all deaths among women aged 15 to 49 in Uganda.<sup>1</sup> It is estimated that unsafe abortions account for 26% of these deaths.<sup>2</sup>

The research team, in its interviews with members of the police force, judiciary, legal professionals and healthcare providers, came across numerous cases where unsafe abortions resulted in the death of the woman or girl involved. In one case, two medical assistants supplied drugs to a 22-year old student who wished to terminate her pregnancy and who later died in their care.<sup>3</sup> In another case, a woman who had been bleeding for days on end after taking drugs to procure an abortion was rushed to a general practitioner. The practitioner wished to provide emergency care to the woman but accidentally perforated her uterus in the process and she bled to death.<sup>4</sup> An abortion, when carried

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<sup>1</sup> Uganda Bureau of Statistics *Uganda Demographic and Health Survey 2011* (2011) 235.

<sup>2</sup> Uganda Ministry of Health *Roadmap for accelerating the reduction of maternal and neonatal mortality and morbidity in Uganda 2007-2015* (2007) 17.

<sup>3</sup> Interview with Joyce Barigye, State Attorney at Mwanga II Magistrates Court, 19 April 2016.

<sup>4</sup> Interview with Advocate Frederick Mbaziira at his offices in Kampala, 4 May 2016.

out by skilled practitioners under sanitary conditions, is a safe procedure.<sup>5</sup> The loss of life caused by the current restrictive and ambiguous legal framework is a severe human rights violation.

Corollary to the right to life is the right to livelihood. This right was recognised by the Supreme Court of Uganda in the case of *Salvatori Abuki v Attorney General*<sup>6</sup> where the petitioner was banished from his village for practicing witchcraft. The court noted that when someone has to be forced to leave a community, they also usually leave the land or their jobs, which are their source of livelihood. Therefore when a woman or girl is forced to leave their community as the case was in all the cases identified in Kampala and Kitgum, this would be a violation of their right to a livelihood.

### **The right to health**

Restrictive abortion laws in Uganda violate the right to health as women with unwanted pregnancies are left with little choice but to undergo unsafe and clandestine abortions.<sup>7</sup>

One of the medical practitioners interviewed recalled an incident where a 16-year old came to the government hospital where he was working, requesting an abortion.<sup>8</sup> He refused to perform the abortion because it would have been against the law. The girl returned to the hospital three days later with a perforated uterus which had to be removed. In the doctor's words 'We saved her life but wondered how much of her life was left. We killed her reproductive life. This is a failure of the health system - the failure to provide safe abortion.'<sup>9</sup>

Regardless of the limited and debatable exception which exists under Ugandan law, the fact that the law is restrictive and that women accordingly resort to unsafe measures to obtain abortions constitutes a violation of this right. Because the exception to the prohibition against abortion is rendered redundant and inoperational, Uganda is in violation of its obligation to realise the right to health.

### **The right to liberty**

The study revealed that women and girls are arrested, detained and intimidated in order to extort bribes from them.

The right to liberty includes a range of rights of arrested and detained persons which ought to be respected in order to offset the limitation of their right to liberty.<sup>10</sup> These are the rights to: be informed of the reason for arrest in a language that the person understands; and the right to a lawyer of his or her choice.' The study found that these rights are not respected when women and girls are arrested on the basis of abortion-related crimes. Four of the women and girls interviewed reported that they were not

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<sup>5</sup> Dudley, S & Kruse, B 'Safety of abortion' (2006) *National Abortion Federation* 1, available at [https://prochoice.org/wp-content/uploads/safety\\_of\\_abortion.pdf](https://prochoice.org/wp-content/uploads/safety_of_abortion.pdf) (accessed 19 October 2016).

<sup>6</sup> *Salvatori Abuki and Another v Attorney General* Constitutional Appeal No. 1 of 1998.

<sup>7</sup> CEDAW Committee, *Concluding Observations, Belize*, para. 56, U.N. Doc. 1/54/38 (1999).

<sup>8</sup> Interview with Dr. Charles Kiggundu, former President of the Obstetrics and Gynaecologists Association of Uganda, 26 September 2016.

<sup>9</sup> As above.

<sup>10</sup> Art 19 of the ICCPR and Art 6 of the ACHPR.

informed of their rights at the time of their arrest and were not told that they were entitled to a lawyer.<sup>11</sup> The only reason why the women who were interviewed had access to legal representation is because HRAPF's Access to Justice Unit responds to newspaper reports of arrests on abortion charges.<sup>12</sup> Had it not been for this external intervention, and the offering of a service which is free of charge, it is doubted whether representation by counsel would have been a reality for any of them.<sup>13</sup>

In the case of women and girls who seek abortion services, the existence of restrictive abortion laws compromises their physical integrity and security of person because it leaves them with little choice but to undergo secret and dangerous procedures under unsanitary conditions. They are furthermore rendered vulnerable to arrests by their community members and live with the constant threat that they will be found out and deprived of their liberty.

### **The right to be free from cruel, inhuman and degrading treatment and punishment**

Ugandan law does not allow a woman to terminate a pregnancy, even where the foetus has an incurable condition or where it is evident that the foetus would not survive outside of the womb thereby subjecting her to cruel, inhuman and degrading treatment.

The fact that the law leads women to seek unsafe methods to carry out abortions is a violation of the right to dignity. A police officer interviewed at Old Kampala Police Station recounted a case where he arrived at the scene just before the girl who had undergone an unsafe abortion passed away: *'As she was dying, she mentioned what she had done. She said that with the assistance of her friends, she had used a stick and punctured her uterus.'*<sup>14</sup> This case illustrates the severe violation of the right to dignity which women and girls suffer due to the current abortion regime.

The right to be free from torture and cruel, inhumane or degrading treatment or punishment finds particular application in cases where persons are interfacing with the criminal justice system. The criminalisation of abortion had seemingly created the perception that the enforcement of the law ought to trump the accused's need for urgent (and even emergency) medical assistance. A police officer in Kitgum told a harrowing tale of neighbours' treatment of a school-aged girl who suffered immense pain due to an incomplete abortion:

*'the neighbours got concerned after observing her critical condition because she could not walk and cried of abdominal pain and advised her to report to the school administration. She instead contacted another person who had advised her to carry out the abortion. This was not done but decided to contact the person who advised her to carry out abortion. This person together with other neighbours carried her and placed her near Kitgum Police Station. She managed to slowly move into the station and reported herself and it was only with the help of the police that the girl was finally*

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<sup>11</sup> This was reported by the women interviewed in Arua and Jinja as well as the two girls interviewed in Iganga.

<sup>12</sup> Interview with Susan Baluka, lawyer in HRAPF's Access to Justice Unit, 12 October 2016.

<sup>13</sup> As above.

<sup>14</sup> Interview with Inspector Tumwesigye Enock at Old Kampala Police Station, 18 April 2016.

taken to hospital.<sup>15</sup>

In another instance, a girl who was found weak and bleeding after undergoing an abortion was arrested and kept in police custody for days before being released. The police officer who was part of the team who arrested her stated that she was released because they were afraid that she might die in their custody.<sup>16</sup>

Keeping a woman who is suffering immense pain and complications due to an unsafe abortion from accessing medical assistance and keeping her in police custody amounts to cruel, inhuman and degrading treatment and punishment while at the same time denying her the right to dignity and healthcare services. A woman interviewed in Mityana reported maltreatment by the police who kept her in custody on abortion charges shortly after she had suffered a spontaneous miscarriage: *'They made me do a lot of work at the station. They tortured me so much yet I did not have energy.'*<sup>17</sup> The police, in this case, arbitrarily punished the woman for undergoing an abortion (as was claimed to have happened). The woman was six months pregnant when she lost the baby. Forcing a woman to do hard physical work a few days after the termination of a pregnancy, regardless of whether or not such termination was wilful, amounts to cruel, inhuman and degrading punishment.

Another aspect of the right to dignity which is implicated is the promotion of stigma that the enforcement of the laws comes with. None of the women in Kampala and Kitgum who had gone through the criminal justice system could be found. They had all apparently moved to other areas to avoid the embarrassment that the enforcement of these laws brought to them. This state of affairs, where a woman or girl feels compelled to leave her home, her social support structure and the place and means she has to earn a living is akin to being banished from the community.<sup>18</sup> It is a severe infringement of the dignity of the woman or girl involved to be forced to disappear from her community with her head bowed in shame.

### **The right to equality and non-discrimination**

The study has found that while abortion laws discriminate against women in general, women of lower socio-economic status, as well as girls under the age of 18, are particularly prone to suffer the effects of its enforcement. It should be noted that under-aged girls are vulnerable to sexual abuse and exploitation and would often be coerced into undergoing an abortion. For example, a primary seven girl was allegedly defiled by her teacher who later sponsored her abortion and she developed post abortion sepsis.<sup>19</sup>

The physical dangers and consequences of undergoing an unsafe abortion as well as the societal stigma which surrounds criminal abortion would be the girl's to bear. The effect of the enforcement of abortion laws is discrimination on the basis of age and economic status. Women in the Ugandan context are often economically dependent on men and, when abandoned by the father of the child, tend to see no other way than to terminate the

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<sup>15</sup> Interview with unnamed sergeant at Kitgum Central Police Station, 25 July 2016.

<sup>16</sup> Interview with detective Apenyo Albert at Akwang Police Post in Kitgum, 27 July 2016.

<sup>17</sup> Woman interviewed in Mityana, 12 October 2016.

<sup>18</sup> See *Salvatori Abuki* case.

<sup>19</sup> See for example Dan Wandera, 'P 7 pupil fighting for life after getting an abortion' *Daily Monitor*, August 17, 2016.

pregnancy. Considering that poverty makes women and, even more so, girls susceptible to sexual abuse and exploitation leading to unwanted pregnancies, the abortion law has an undeniable discriminatory effect on poor women. The Chief Magistrate at Mengo Chief Magistrates' Court recalled a case where a maid had aborted after she had been impregnated and subsequently dismissed by her employer.<sup>20</sup>

### **The right to information**

The criminalisation of abortion leads to a situation where women are reluctant and fearful of approaching health workers in order to obtain information on abortions. Two girls interviewed in Iganga were both unaware that abortion is criminalised.<sup>21</sup> Their main source of medical information on abortions were the local pharmacists in their areas. Health workers with expertise in sexual and reproductive health were not consulted. Despite the obligations on the state, the girls in question have not been placed in a position where they are capable of exercising their right to information as it relates to health, and this is because the law criminalises abortion and this is seen as a taboo that cannot be discussed.

### **The right to privacy**

In the enforcement of abortion laws, women who are arrested are often made into a public spectacle and arrests tend to expose the fact of the abortion as well as personal details which surround it. One of the girls interviewed was arrested in a public square, six months after carrying out an abortion.<sup>22</sup> This arrest meant that onlookers, and subsequently the community at large, were informed about her abortion.

Furthermore, in cases where women are arrested, these arrests would often come to the knowledge of the media and they are sometimes reported in very derogatory language.

Currently, HRAPF's Access to Justice team relies on daily newspapers in order to alert them of cases where women had been arrested on abortion charges.<sup>23</sup> Section III of this study has indicated that only a fraction of abortions which take place are reported to the police. In 2013, for instance, an estimated 314 304 abortions took place<sup>24</sup>, yet the Uganda Police *Annual Crime Report 2013* indicates that only 1003 abortion cases were reported. This means that the few abortion cases which are reported to the police, along with the sensationalism accompanying this stigmatised issue, are usually considered to be news-worthy.<sup>25</sup> Considering the sensitive, personal and often traumatising nature of abortions, arrests leading to the publication of an abortion to her community constitutes

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<sup>20</sup> Interview with Chief Magistrate Nasambu Esther Rebecca at Mwangi II Chief Magistrates Court, Kampala, 5 April 2016.

<sup>21</sup> Interviews with two unnamed girls, respectively aged 16 and 17, in Iganga, 12 October 2016.

<sup>22</sup> Interview with young woman in Iganga, 12 October 2016.

<sup>23</sup> Interview with Susan Baluka, lawyer in HRAPF's Access to Justice Unit. 12 October 2016.

<sup>24</sup> E Prada et al 'Incidence of induced abortion in Uganda, 2013: New estimates since 2003' *PLOS One* (2016) 11(11), 9.

<sup>25</sup> 'Two arrested over procuring abortion' *Daily Monitor* 14 September 2015; 'Two Arua girls arrested for procuring abortion' *Red Pepper* available at <http://www.redpepper.co.ug/2-arua-girls-arrested-for-procuring-abortion/> (accessed 24 November 2016); 'Dead KIU student attempted abortion twice' *Red Pepper* available at <http://www.redpepper.co.ug/shocking-dead-kiu-student-kyakunda-attempted-abortion-twice/> (accessed 24 November 2016).

an infringement of the right to privacy of the woman or girl involved.

#### 4.2.2 Violation of the rights of health workers

Health workers who carry out abortions for the purposes of saving a woman's life have the burden to prove that this was so, and even if they do the stigma that attaches to them remains forever. This is more so where the woman/girl dies in the process. The rights violations that health workers face are:

##### **The right to liberty and security of person**

The right to liberty and security of the person of health workers is violated by the enforcement of the laws. According to international and constitutional provisions, a person may only be deprived of their right to liberty through a criminal arrest if the purpose of the arrest is to bring that person before a court of law for prosecution.<sup>26</sup> When health workers are arrested when trying to save lives and have not been negligent, there is usually no valid reason for their arrest. This usually happens where women/girls die in hospitals after seeking post abortion services.

Again, health workers are usually arrested under the abortion laws for the purpose of blackmailing them and extorting bribes. A midwife, interviewed in Kampala recounted that after she saved the life of a woman who had come to her with an incomplete abortion, she was reported to the police by the woman's uncle.<sup>27</sup> The midwife recounts that she was arrested and made a statement, only to be rearrested two days later and released after paying UGX 400,000 to the police officers. In her own words she expressed:

*'They wanted to extort money from me: both the police and the uncle of the patient. I felt very bad for being arrested for no reason yet I had saved someone's life. My money was taken and there was a lot of stigma.'*

<sup>28</sup> A similar case was recorded in Kitgum, where a medical doctor at Kitgum Referral Hospital shared the ordeal which befell one of his colleagues at a Clinic where he had worked previously.<sup>29</sup> He told the research team that his colleague, who is also a medical doctor, was arrested by four police officers and a group of family members of a girl whom he had helped to abort. The charges against this doctor were withdrawn after he paid UGX 400,000 to the girl's family members and UGX 150,000 to the arresting officers. It is abundantly clear in both these cases that the health workers involved were not arrested for the purposes of bringing them before a court of law in order to prosecute the cases. The abortion law is used as a basis to arbitrarily arrest and extort health workers.

Arrests carried out for purposes of extortion and harassment are arbitrary arrests, and they violate the right to liberty of the victim.

##### **The right to exercise one's profession**

Article 40(2) of the Constitution provides that 'Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.' At

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<sup>26</sup> See Art 29(1).

<sup>27</sup> Interview with midwife at a Maternity and Health Centre in Kampala, 21 April 2016.

<sup>28</sup> As above.

<sup>29</sup> Interview with medical doctor practising at Kitgum Referral Hospital, 25 July 2016.

present, the abortion laws in Uganda are interfering with health workers' rights under this section. Health workers are placed in the unenviable position of attempting to serve the best interests of their patients, which include pregnant women and girls, while operating in an environment which severely restricts abortion. As a result, in case something goes wrong and a health worker is arrested on abortion related charges, their reputation and their practice suffers even where they have not been convicted. Health workers bear the brunt of stigmatisation due to the criminalisation of abortion, along with risking irreparable harm to their professional reputations and careers upon being arrested. This phenomenon was expressed by a medical doctor whose colleague was arrested on abortion charges in Kitgum:

*'We were referred to as murderers and actually my colleague was branded an abortionist, they would even call his car an abortion car and anything he would buy people would say that is the money he gets from conducting abortions. He was so traumatized and he even decided to leave Kitgum because he would not stand what was going on.'*<sup>30</sup>

Another case is of Dr. Kadaga Henry Francis, who was arrested and detained by the police for trying to save life by providing post abortion care to a bleeding woman that was referred to him by a colleague. Although he was released without charge, he suffered psychological and emotional trauma. His professional reputation was also injured.<sup>31</sup>

Health workers bear the responsibility and burden of being in a position where they can easily cause harm or even death to their patients as a result of negligent or accidental actions. The abortion laws serve to exacerbate this situation. In another case at Kitgum Referral Hospital, a clinical officer was arrested under abortion charges after he had given tablets to a woman which had caused her to miscarry.<sup>32</sup> The clinical officer was not aware of the fact that the woman was pregnant. On top of the anguish suffered due to accidentally causing the death of an unborn child, the clinical officer furthermore suffered the humiliation of an arrest and abuse by inmates.

These instances illustrate that abortion laws place a severe limitation on health workers' right to practice their profession.

### **The right to dignity and freedom from torture, inhuman and degrading treatment**

Health workers are not exempted from the consequences of stigma surrounding the criminalisation of abortion. The study has revealed that when arrested, health workers are subjected to treatment which is, in some cases, inhuman and at the very least, can be said to be degrading. One midwife arrested in Kampala reported being beaten by police officers during and after her arrest,<sup>33</sup> Even in cases where physical violence is not suffered during the course of an arrest or detention, it remains a humiliating and

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<sup>30</sup> Interview with medical doctor practising at Kitgum Referral Hospital, 25 July 2016.

<sup>31</sup> See Center for Reproductive Rights and CEHURD, Facing Uganda's Law on Abortion: Experiences From Women and Service Providers, July 2016, p. 10.

<sup>32</sup> Interview with former clinical officer of Kitgum Referral Hospital, Matidi Trade Centre, Kitgum, 28 July 2016.

<sup>33</sup> Interview with midwife at a hospital in Mengo, Kampala, 21 April 2016.



degrading experience for health workers to be taken from their places of work by police, to be detained and blackmailed into buying their freedom. The fact that the abortion laws are used by opportunistic family members and police officers to extort health workers undermines their dignity.

### **The right to freedom of thought, conscience and belief**

The right to freedom of conscience, thought and belief, as protected under international law and the Constitution of Uganda<sup>34</sup>, acknowledges 'moral diversity' in society.<sup>35</sup> This right is relevant to healthcare workers in as far as it protects their right to refuse to perform abortions, even where this is permitted by law, on grounds of personal belief and morality. The UN Human Rights Committee, commenting on Article 18 of the ICCPR, has noted that 'conscientious objection' should be understood as a derivative of the right to conscience.<sup>36</sup> The Committee has also noted that 'manifestations' of the right to conscience is subject to limitations.<sup>37</sup> Such limitations could be where a woman or girl requires abortion services, but there is no other health worker to provide it apart from the conscientious objector. Jurisprudence from the Constitutional Court of Columbia suggests that the sexual and reproductive rights of women should take precedence in such cases.<sup>38</sup> The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) has also stated, specifically noting the refusal to perform reproductive health services on the basis of conscientious objection as an example, that a state cannot refuse to provide health services for women.<sup>39</sup> The CEDAW Committee recommended that state parties refer women to alternative health providers in such cases.<sup>40</sup>

#### **4.2.3 Violation of the rights of third parties**

While this study focused on the experiences of women and girls as the first, and health workers as the second category of arrestees under abortion laws, a number of conclusions could also be drawn on the third category of arrestees. The study revealed that so-called 'third parties' comprise a large proportion of the people who suffer under the enforcement of abortion laws. In Kampala, 5 of the 20 persons arrested under abortion laws were third parties and in Kitgum this group comprised 11 of the 18 arrestees.

While the study has found that 'the third party' involved would often be an older man who would be charged for defilement rather than abortion-related crimes, this is clearly not always the case. Teachers, parents, elders, husbands and boyfriends of the women and girls, as well as drug shop attendants, are often implicated in the procurement of abortions.

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<sup>34</sup> See Art 18 of the Universal Declaration; Art 18 of the ICCPR; Art 29 of the Constitution.

<sup>35</sup> CG Ngwena 'Conscientious objection to abortion and accommodating women's reproductive health rights: Reflections on a decision of the Constitutional Court of Columbia from an African regional human rights perspective' *Journal of African Law* 28(2) (2014) 199.

<sup>36</sup> UN Human Rights Committee General Comment No. 22: ICCPR, Art 18 on freedom of thought, conscience or religion (30 July 1993): CCPR/C/Rev.1/Add.4. para 11.

<sup>37</sup> As above at paras 3 and 8.

<sup>38</sup> Case T-209/08 cited in Ngwena, n 35 above, 198.

<sup>39</sup> CEDAW Committee *General Recommendation 24, Article 12 of the Convention, 'Women and Health'* 20 Sess, para 11, A 54/38/Rev.1, Chap I 95 February 1989.

<sup>40</sup> As above.

The same difficulties in securing the conviction of a third party arises as is the case for women, girls and health workers. The witnesses available to testify against the third party would be the other parties who also took part in carrying out the abortion. This scenario would of course shift in cases where the abortion was carried out against the will of the woman or girl or where the woman or girl was influenced by a person that has a position of authority over her. One scenario which the research team came across was a case where a girl had been sexually abused by one of the teachers at her school, and the decision for the girl to undergo an abortion was made by the head teacher.<sup>41</sup>

Unlike convictions of women and girls, sentences imposed on third parties tend to be heavy. This was clearly illustrated in a 2011 case in Kitgum where a single abortion led to the institution of two separate cases against the girl and the third party involved. The cases were heard by the same magistrate who found both of the accused guilty. The girl, AJ, was convicted to incarceration 'for the duration of the court session'. OK, the 20-year old man involved who supplied drugs to AJ to enable her to abort, was sentenced to 12 months imprisonment.

In many cases, the third parties are assisting the woman or girl because she is not in a position to assist herself and in this regard they fall foul of the law. The main right violated is the right to liberty. This is because usually they are arrested in circumstances that do not amount to a crime and there is little evidence to prove the case against them, and in some cases they may not even be aware that a girl or woman needs the drugs for an abortion.<sup>42</sup>

## 4.3 Other violations

### Occasioning stigma

The study made it clear that a woman or girl who has been arrested for an abortion-related crime is severely stigmatised by her community. The girls interviewed concede that it has brought immense shame on themselves and their families to have been arrested under the abortion laws.<sup>43</sup> Due to this stigma, life in the community where the woman or girl has been living understandably becomes unbearable. Women and girls resort to either living reclusive lives where they are protected by their families, or opt to leave the life they know and start afresh in a new community where it is not known that they have aborted.

### Interference with livelihood of women and girls

The study has revealed that it is a very common occurrence for women and girls to be forced to leave their villages in cases where they have been arrested for having an abortion. While it is an infringement on their right to dignity to be shamed into leaving the community, the practical implications of such constructive 'banishment' cannot be discounted. Even though many of the women and girls interviewed were either of school-going age or unemployed, being arrested nevertheless interfered with their ability to have access to a livelihood. In cases where women are not employed themselves, they

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<sup>41</sup> Interview with young woman in Luwero, 15 October 2016.

<sup>42</sup> This usually includes pharmacists who sell drugs that can, among other uses, be used for abortion.

<sup>43</sup> Interview with young woman in Iganga, 12 October 2016.

would often be able to make a living from cultivating crops on family land or they would be maintained by their family members who are employed. Being forced to leave the communities where their resources are located, and the homes of family members, deprives women and girls of their livelihood.<sup>44</sup> One girl also reported that after the arrest she had to leave her home and is no longer enrolled in school.<sup>45</sup>

### **Psychological consequences of arrests**

The study revealed that being arrested for an abortion crime has a severe psychological impact on most women and girls. Women interviewed expressed that they felt a lot of shame which they stated did not result from what they did but rather the public exposure and humiliation.<sup>46</sup> One young woman, who did not know that abortion was a crime at the time she terminated her pregnancy, responded as follows when asked how the arrest impacted her: *'it affected me badly because it caused me a lot of embarrassment before the community members and my family.'*<sup>47</sup>

Even where a woman or girl is briefly arrested and returned to her home without being harassed by the police and without having abortion charges instituted against her; the psychological effects of suffering ostracism and alienation from family members and community cannot be downplayed. The study furthermore revealed that many of the women who had been arrested would choose not to return to the police station where they had been arrested in transgression of their bail or bond conditions. This trend forces women to live lives of secrecy, always being aware of the possibility of re-arrest. Living in such a state of constant anxiety also contributes to the anguished mental state of a woman who had been through a series of traumas.

## **4.4 Conclusion**

This section has illustrated that both women and girls as well as health workers and third parties suffer the violation of an array of rights through the existence as well as the enforcement of laws which criminalise abortion in Uganda. The section indicates a dire need for reforming the repressive legal regime which leads to the denigration of fundamental human rights and freedoms.

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<sup>44</sup> See *Salvatori Abuki and Another v Attorney General* Constitutional Case 1 of 1997.

<sup>45</sup> Interview with young woman in Iganga, 12 October 2016.

<sup>46</sup> Interviews with two young women, aged 16 and 17 respectively at the time of arrest, both based in Iganga, 12 October 2016.

<sup>47</sup> Interview with young woman, who was 16 years old at the time of her arrest, in Iganga, 12 October 2016.

# SECTION V

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## CONCLUSION AND RECOMMENDATIONS

### 5.1 Conclusion

Apart from a single, limited exception, abortion remains criminalised in Uganda. While statistics indicate that the number of annual abortions taking place are estimated at 300 000,<sup>1</sup> only a fraction of these cases are reported to the police. The study reveals that the criminal abortion law in Uganda is actively enforced in as far as the laying of complaints and arrests are concerned. Yet, cases of successful prosecution of either women, girls or health workers are rare. There is an inconsistency in the sentences imposed on persons who have been found guilty of abortion-related crimes.

The existence of criminal abortion law means that women with unwanted pregnancies face the dual terror of having an unsafe abortion as perhaps the only viable 'escape' from their situation while at the same time knowing that the law and society is not on their side. Along with the psychological and physical trauma of an unwanted pregnancy and the emotional toll of undergoing an abortion, the woman or girl will be haunted by the fear of being found out for her crime. The existence and enforcement of criminal abortion laws have the effect of violating the rights of women and girls to life, health, dignity, privacy, information as well as the right to be free from torture and cruel, inhuman and degrading treatment. Health workers also suffer the violation of their privacy, dignity, freedom from degrading treatment or punishment as well as an interference with their right to practise their occupation of choice. A surprising group that also falls victim to these laws is that of third parties who are usually the men who impregnate the girls, and those who assist the women who are in many cases seen as being the source of all the troubles.

### 5.2 Recommendations

#### To Parliament

- Repeal sections 141, 142 and 143 of the Penal Code Act. Introduce exceptions to sections 141, 142, 143 and 212 which should expressly include where: where the pregnancy is due to rape, incest or defilement; where the physical as well as mental health of the mother is threatened by the continued pregnancy and where the foetus suffers severe abnormalities and will not be able to survive outside of the womb.
- Fulfil the constitutional obligation in Article 21 (2) of the Constitution by adopting legislation, which lays down proper grounds under which an abortion can be secured and proper procedures. This could be modelled on the 2012 National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights as well as the Ministry of Health Standards and Guidelines on Reducing Maternal Mortality from Unsafe Abortions in Uganda, 2015 (which are now under review). Such an Act should serve to protect both the girls and women as well as the health care providers involved in providing abortion services.
- Adopt the new Sexual Offences Bill 2015 with more protective abortion provisions beyond the existing ones and include the provision of treatment to persons who are in need of emergency treatment due to abortions.

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<sup>1</sup> Uganda Bureau of Statistics *Uganda Demographic and Health Survey 2011* (2012) 235.

### To the Uganda Law Reform Commission

- Recommend ways of reviewing sections 141, 142 and 143 of the Penal Code Act in accordance with Uganda's domestic, regional and international human rights obligations and in light of evidence of the link between restrictive abortion laws and maternal mortality.
- Fast track the development of a bill to regulate abortion in Uganda.

### To the Ministry of Health

- Release the Standards and Guidelines on Reducing Maternal Mortality from Unsafe Abortions in Uganda, publication of which had been stayed in 2015.

### To the Uganda Police Force

- Make a professional decision not to arrest healthcare workers for abortion-related offences bearing in mind the effects of a mere arrest on the reputation of a healthcare provider and the conflicted situation in which health workers find themselves due to restrictive abortion laws.
- In arresting women or girls accused of undergoing an abortion, ensure that emergency healthcare provision always takes precedence over criminal law enforcement.
- Keep meticulous records of all abortion cases handled.

### To the Judiciary

- Be responsive to any constitutional violations involved in arresting suspects on abortion related charges and bringing them before courts.
- Continue the trend of subtle push-back against the restrictive abortion regime by avoiding prison sentences for convicted women, girls and health workers.

### To the DPP

- Continue to refrain from sanctioning abortion charges where a prosecution cannot reasonably be sustained.
- Develop a specific prosecutorial policy in terms of how abortion charges against health workers are to be dealt with. The policy should make plain the distinction between abortion crimes and acts of medical negligence.

### To mainstream civil society organisations and legal aid service providers

- Lobby for the revision of section 141, 142, 143 and 212 of the Penal Code Act to make exceptions to the abortion prohibition that are in accordance with Uganda's domestic, regional and international human rights obligations and in light of evidence of the link between restrictive abortion laws and maternal mortality.
- Lobby for the adoption of an Act which broadens and clarifies the grounds for legal abortion in Uganda.

- Ensure the availability of legal representation for women, girls and health workers arrested and charged with abortion crimes.
- Ensure the widespread accessibility of information on the legal regime governing abortion, especially to women in rural areas and women belonging to marginalised groups such as sex workers and those living with HIV/AIDS.
- Engage the judiciary, police and government on the issue of the violation of rights of women, girls and health workers through the existence and use of abortion laws.
- Conduct awareness-raising and sensitisation of government officials and law enforcers on the issue of abortion.

### **To the President and Cabinet**

- Approach the incidence of unsafe abortion as a public health emergency rather than as a criminal justice issue.

## **5.2 Areas for further research**

- The enforcement of abortion laws in areas of Uganda beyond Kampala and Kitgum.
- The discrepancy between the estimated number of abortions taking place annually and the number of cases reported, investigated and prosecuted.

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