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LEGAL REGULATION OF SEX WORK IN UGANDA: EXPLORING THE CURRENT TRENDS AND THEIR IMPACT ON THE HUMAN RIGHTS OF SEX WORKERS

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ABOUT HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)

Human Rights Awareness and Promotion Forum 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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GLOSSARY

AIDS	Acquired Immuno-Deficiency Syndrome
Cap	Chapter, of the Laws of Uganda 2000 edition
CBO	Community Based Organisation
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law
DPP	Directorate of Public Prosecutions
EAC	East African Community
EOC	Equal Opportunities Commission
FGD	Focus Group Discussion
FSW	Female Sex Workers
HIV	Human Immunodeficiency Virus
HRAPF	Human Rights Awareness and Promotion Forum
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGLHRC	International Gay and Lesbian Human Rights Commission
LGBT	Lesbian, Gay, Bisexual and Transgender Persons
MARPS	Most at Risk Populations
MCA	Magistrates Courts Act Cap 16
MSM	Men who have Sex with Men
MSW	Male Sex Workers
NDA	National Drug Authority
NDPA	National Drug Policy and Authority Act
NDPSA	Narcotic Drugs and Psychotropic Substances (Control) Act, 2015
NGO	Non-Governmental Organisation
OC	Officer in Charge
RSA	Resident State Attorney
SMUG	Sexual Minorities Uganda
UDHR	Universal Declaration of Human Rights
UGX	Uganda Shillings
USD	United States Dollars
WONETHA	Women's Network for Human Rights Advocacy

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EXECUTIVE SUMMARY

i. Introduction and background

The Penal Code Act criminalises various activities related to sex work including: prostitution; living on the earnings of prostitution; aiding and abetting prostitution; and operating brothels. In recent years, a number of laws, beyond criminal provisions, have been enacted which impact upon the rights of sex workers. These Acts include the Anti-Pornography Act 2014, the NGO Act 2016 and the HIV/AIDS Prevention and Control Act 2014. A new Sexual Offences Bill with the prostitution offences largely as they are in the Penal Code has also been introduced in Parliament. These developments have created the need to critically assess the legal framework in which sex workers operate, and how this environment affects their rights.

Sex work is not recognised under Uganda's employment and labour laws yet it is a means of livelihood for many women and men. Consequently, sex workers face numerous socio-economic difficulties including arrests, imprisonment and prosecution, stigmatisation, exploitation, prosecution, lack of protection, limited access to public services and vulnerability to sexually transmitted diseases. Since sex work is prohibited, sex workers battle to find legal remedies, support and services to aid them when their rights are violated. These violations are suffered despite the fact that the rights of sex workers are guaranteed in both international instruments and the Ugandan Constitution.

While the criminalisation of sex work is globally recognised and studied as an infringement of the rights of sex workers, Uganda's unique social context and moralistic legal framework warrants a deeper assessment of the impact of the legal regime on the rights of sex workers.

ii. Methodology

This study is qualitative as it seeks to investigate the impact of existing laws on the human rights of sex workers through in-depth stakeholder interviews and a thorough analysis of secondary data.

A study period of two years, from 2014 to 2016 was selected. This period was selected since the study aims at determining the impact of a number of recent laws, which have all been enacted since 2014. The study was carried out in Makindye Division, one of the five administrative divisions of Kampala, the largest and capital city of Uganda. Makindye Division is one of the hubs of sex work activity in Uganda. It also has police presence, its own court, its own Resident State Attorney and is the location of WONETHA, the leading sex worker organisation in Uganda.

Primary data was collected using face to face key informant interviews and Focus Group Discussions (FGDs). The study population, drawn from Makindye Division,

involved a total of 50 respondents, mainly female, male and transgender sex workers and people with experience in working with sex workers in the Uganda Police Force, Uganda Prisons Services, the Directorate of Public Prosecution, lawyers, paralegals and civil society leaders. Secondary data was collected by way of identifying, compiling, reviewing and critically analysing the relevant legislations and case law as well as publications such as reports, literary journals and online materials.

iii. Findings

a) Laws that regulate sex work in Uganda

The main provisions in the Penal Code that regulate sex work are: the provisions criminalising prostitution (section 139), living on the earnings of prostitution (section 136) and operating a brothel (section 138). The other provisions in the Penal Code which do not directly deal with sex work but are nevertheless used are: ‘being a rogue and vagabond’ or ‘being idle and disorderly.’ For male sex workers and transgender sex workers, offences on having carnal knowledge against the order of nature (section 145) and attempts to commit unnatural offences (section 146) are also used as charges. Section 253 and 254 of the Penal Code Act, which criminalises theft are also sometimes used to charge sex workers.

The other laws which do not directly concern sex work but which nevertheless affect sex workers are:

The Anti-Pornography Act 2014: This has such a wide definition of pornography that it restricts the way women dress.

The HIV Prevention and Control Act 2014: The criminalisation of willful transmission of HIV affects sex workers as they are usually suspected of having HIV and thus very likely to be accused of willful transmission.

The Equal Opportunities Commission Act, 2007: Section 15(6)(d) of this Act prevents sex workers from seeking redress from the Equal Opportunities Commission as it stops the Equal Opportunities Commission from investigating matters regarded as immoral or social unacceptable by the majority of the cultural groupings in Uganda.

The Employment Act 2006: This does not cover sex workers and therefore they do not enjoy the benefits of employees under the Employment Act including the right to form or join a labour unions, protection from sexual harassment at the workplace and the right to remuneration.

b) Trends in enforcement of the Penal Code provisions

In terms of trends in enforcing the Penal Code Act, the study found the following:

Trends regarding arrests

As regards arrests, female sex workers are often arrested in large groups simply for the purpose of extorting money from them. They are rounded up and those who have money on them and can pay are released while those who cannot pay are taken to the police cells. Sometimes they are released after offering sex to the police officers in return for their release. However, such mass arrests have become less common since 2008. This was attributed to closer cooperation between the Police and sex workers and increased sensitisation. In some cases, police officers even offer security to sex workers in collaboration with brothel managers. Police operations which used to take place as early as 7pm are now only taking place after midnight.

Male sex workers and transgender sex workers, on the other hand, do not suffer mass arrests but rather targeted arrests after being watched and followed by neighbours, landlords and police officers for long periods of time. Transgender sex workers are particularly targeted as they are seen as ‘the public image of homosexuality’.

Sex workers are often kept in custody beyond 48 hours when arrested. The sex workers who are arrested are usually paraded before the media. In Makindye Division, the media has replaced the law and the police as the most fearsome weapon against sex workers.

Trends regarding charges

The provisions that strictly criminalise sex work are not enforced. The police station in the study district had never investigated any of the prostitution offences and not a single charge relating to any of the prostitution offences could be found at the Chief Magistrate’s Court serving the area. The explanation for this infrequency in enforcement is that prostitution and related offences are difficult to prove beyond reasonable doubt during a criminal trial. The only potential witnesses are clients and fellow sex workers, who are usually unwilling to testify.

The most common charges against sex workers are ‘being a rogue and vagabond’ or ‘being idle and disorderly’ rather than the provisions which actually criminalise sex work. For male sex workers and transgender sex workers, offences on having carnal knowledge against the order of nature (section 145 of the Penal Code Act) and attempts to commit unnatural offences (section 146) are also used as charges. Section 253 and 254 of the Penal Code Act, which criminalises theft are also used to charge sex workers and these charges are often unfounded.

Sex workers are also charged under the National Drug Policy and Authority Act, 2006 for smoking opium; frequenting a place used for smoking opium or for the

possession of narcotic drugs.

Although the prostitution laws are not being enforced, the arrest of sex workers under other provisions of law is largely fuelled by the fact that sex work is illegal in Uganda.

Trends in prosecution, convictions and sentences

Many of the charges instituted against sex workers make it to the courts and are prosecuted. This is despite the fact that many of them are vague.

Sex workers usually plead guilty to the offences with which they are charged due to pressure from managers and their handlers, fear of imprisonment and lack of legal representation. Pleading guilty usually has the outcome of serving a lesser punishment such as fines, cautions and community service and avoiding the uncertainty of a full criminal trial. Where convicted, sex workers are usually sentenced to pay a fine ranging between UGX 200,000 and UGX 500,000, to perform community service under the Community Service Act or, in rare cases, to a short period of imprisonment.

Although these sentences appear to be minor, they do have a profound effect on sex workers who do not earn large incomes and could easily be imprisoned because they are unable to pay the fines imposed. Remand periods sometimes extend to up to six months, even though the final sentences imposed are not heavy.

Sex workers largely lack legal representation because they cannot afford legal fees. Even though there are organisations which provide legal services to sex workers, these organisations are limited in their resources and capacity and find it challenging to secure competent sureties and bail money.

c) Trends in enforcing other laws other than the Penal Code

The enforcement of the other laws is rather lukewarm. Only the Anti_Pornography Act has been enforced against a performer who does not necessarily qualify as a sex worker. However, its mere existence has made sex workers more cautious on how they dress in public. The HIV Prevention and Control Act has not been enforced against sex workers but has discouraged sex workers from undertaking HIV tests since the offence requires knowledge of one's status. Concern was also expressed about the mandatory testing and disclosure of status requirements. A few female sex workers noted that the HIV Prevention and Control Act provides them with leverage to ensure that their male clients use condoms, which is a positive aspect of the impact of this law. None of the respondents have attempted to access the Equal Opportunities Commission despite the wide range of violations regularly suffered, which speaks to the real and perceived accessibility of the Commission to this group. Their exclusion from the Employment Act makes them to suffer as an invisible work group that do not enjoy the regular rights that accrue to workers

The enforcement trends of laws affecting sex workers show mixed signals with strict and overzealous enforcement of selected criminal provisions and a general apathy towards others. The study finds that, whether enforced or not, the presence of laws which affect sex work feeds into the stigma, oppression and violations of sex workers.

d) Violation of human rights occasioned by the criminalisation of sex work

The criminalisation of sex work makes sex workers to suffer widespread violations of their rights. The violated rights are:

The right to liberty of sex workers is violated in that they are arrested without the intention of successfully prosecuting their cases. The main purpose of arrest of sex workers has been shown to be the collection of bribes. This right is also violated in that sex workers are not informed of the reason for their arrest and that they are often detained beyond the prescribed 48 hours.

The right to equality of female sex workers is violated because they bear the worst brunt of the enforcement of these laws. The right to equality is also violated since sex workers are targeted for arrest due to their social and economic status as sex workers.

Sex workers suffer the violation of their right to be free from cruel, inhuman and degrading treatment and punishment when they are beaten, assaulted, verbally abused and fondled by police during arrest.

Sex workers also suffer the violation of their right to property in that they are deprived of their money in police custody, and also their property is usually vandalized. after they have been arrested

The right to privacy of sex workers is also infringed in that the media often takes their pictures during and after their arrests and publish these images exposing them as sex workers.

Sex workers also suffer the violation of their right to work and practice their profession of choice because sex work is not recognised by Uganda's labour laws, even though they engage in it as a means of generating a livelihood.

The study also highlighted a number of violations which do not fall neatly under the expressly recognised rights in the Constitution. These are the disruption of family life; the exposure of a dual identity and increased vulnerability to Sexually Transmitted Infections.

e) Empowerment of sex workers

The criminalization of sex work has had an unexpected benefit from sex workers as a number of organisations have come out to defend, empower and protect them. There is a discernible trend of empowerment of sex workers through human rights education which has led to a notable decrease of the number of arrests of sex workers in the Makindye Division. Sex workers are learning how to engage and interact with police and increasingly have the services of paralegals at their disposal. Instances have also been found where sex workers have instituted cases of police abuse at the Uganda Human Rights Commission and the Police Professional Standards Unit.

iv. Recommendations

To the President and Cabinet

- Issue a directive staying the enforcement of the criminalisation of sex work, either by use of section 136, 137, 138 and 139 or any other provision of the Penal Code Act.

To the Uganda Law Reform Commission

- Review section 136, 137, 138 and 139 of the Penal Code Act in light of Constitutional and international human rights standards.

To Parliament

- Repeal section 136, 137, 138, 139, 145, 148 and 149 of the Penal Code Act.
- Do not include repetitions of section 136, 137, 138 and 139 of the Penal Code Act in the new Sexual Offences Bill.
- Repeal section 167 and 168 of the Penal Code Act.
- Amend the Employment Act to recognise sex work as work.
- Amend section 30 of the Non-Governmental Organisations Act and section 36 of the Companies Act to avoid leaving room for government authorities to exclude sex workers from forming organisations.
- Amend or repeal section 41 of the HIV Prevention and Control Act, which criminalise attempted transmission of HIV; section 43 which criminalises willful transmission and section 12 which provides for mandatory HIV testing.
- Amend section 2 and 13 of the Anti-Pornography Act to limit the overbroad definition of ‘pornography’.

To the Judiciary

- Dismiss cases brought under section 167 and 168 of the Penal Code Act or section 47 and 48 of the National Drug Policy and Authority Act 2006 which are clear attempts to use these provisions to harass, expose or extort money from sex workers, especially where the accused is unrepresented.
- In cases where sex workers are accused under Penal Code offences, consider

carefully whether all the elements of the crime had been proven, prior to making a conviction.

- Where sex workers are convicted under criminal provisions, opt for non-custodial sentences and small fines, taking into account that sex workers are often the breadwinners of their homes and that their prolonged absence from home has a profound impact on their families.

To the DPP

- Refuse to sanction vague charges which are clearly aimed at using overbroad offences to expose, intimidate or extort sex workers.

To the Uganda Police Force

- Refrain from arresting persons in the absence of the availability of evidence to prove that the alleged offence had been committed.
- Refrain from parading sex workers before the media during and after arrests.
- Put strong sanctions in place against police officers who torture and solicit for bribes from sex workers upon arrest.
- Provide strong remedies to sex workers who have suffered the violation of their rights at the hands of the police through the Police Professional Standards Unit.
- Continue to work with sex workers to weed out wrong elements amongst themselves and vice versa.
- Train its officers on the way in which the laws criminalising sex work ought to be enforced.
- Organise trainings of police officers which would sensitise them in respect of the rights and reality of sex workers.

To Civil Society

- Engage the police on the rights of sex workers.
- Institute cases in the Constitutional Court to challenge legislative provisions which discriminate against sex workers.

To the sex workers

- Continue to proactively engage and cooperate with Police.
- Make use of mechanisms to enforce rights such as the Uganda Human Rights Commission and the Police Professional Standards Unit.

SECTION I:

INTRODUCTION

1.1 Introduction

This is a study of how sex work is legally regulated in Uganda, and the impact of this regulation on the human rights of sex workers. The relationship between sex work, legislation and the enforcement of laws has been a matter of public discussion concerning the economic and social welfare of sex workers in Uganda and this research endeavors to enrich the discourse with a human rights perspective.

1.2 Background to the study

Uganda's population was 34.6 million people at the time of the last census in 2014,¹ with the youth unemployment rate officially at 19.2%,² and at around 60%³ from unofficial estimates. This has inevitably led people to look for innovative ways of earning a living and engaging in commercial sex work is one such innovative way.

Sex work is prevalent in almost all the urban centers and some rural areas in Uganda.⁴ Sex workers, however, operate clandestinely for fear of arrest, prosecution, harassment and stigmatisation, and it is thus difficult to estimate their population and reach.⁵ At a continental level, it is estimated that the

¹ Uganda Bureau of Statistics 'National Population and Housing Census 2014: Main Report' (2016) 8.

² Uganda Bureau of Statistics '2015 Statistical Abstract' (2015) 28.

³ See for example Brookings 'Youth unemployment challenge in Uganda and the role of employment policies and job creation' 26 August 2014 <http://www.brookings.edu/blogs/africa-in-focus/posts/2014/08/26-youth-unemployment-uganda-ahaibwe-mbowa> (accessed 18 August 2016).

⁴ Studies have been conducted on specific aspects relating to sex workers in various areas of Uganda beyond Kampala, which indicates that sex work is not restricted to urban centres but is in fact prevalent in towns and rural parts of Uganda as well. See M Gysles et al 'Women who sell sex in a Ugandan trading town: life histories' (2002) 54 *Social Science and Medicine* 179-192 in which 34 female sex workers participated in a two-year long study in a Ugandan trading town. A study conducted by Tamale included sex workers operating in Jinja, confirming their presence in the Eastern region of Uganda, see S Tamale 'Paradoxes of sex work and sexuality in modern-day Uganda' in S Tamale (ed) *African Sexualities: A Reader* (2011) 145-173. See also H Pickering et al 'Sexual behaviour in a fishing community on Lake Victoria, Uganda' (1997) 7(1) *Health Transit Review* 13-20; H Pickering et al 'Sexual networks in Uganda: Mixing patterns between a trading town, its rural hinterland and a nearby fishing village' (1997) 8 *International Journal of STD and AIDS* 495-500 and M Erickson et al 'Structural determinants of dual contraceptive use among female sex workers in Gulu, Northern Uganda' (2015) 131 *International Journal of Gynaecology and Obstetrics* 91-95.

⁵ While multiple studies have been conducted on the prevalence of HIV and AIDS among sex workers in Uganda (see Uganda Ministry of Health 'CRANE Survey Report: High risk group surveys conducted in 2008/9, Kampala, Uganda' (2010) and MH Swahn et al 'Prevalence of HIV and associated risks of sex work among youth in slums of Kampala' (2016) *AIDS Research and Treatment*), these studies do not determine or even estimate the number of sex workers in the country. Sex workers are considered to be a 'hidden' or 'hard-to-reach' study group due to the fact that sex work is illegal in Uganda (R Magnani et al 'Review of sampling hard-to-reach and hidden populations for HIV surveillance' (2005) 19 *AIDS* s 67). The fact that multiple studies can

prevalence of female sex workers in capital cities of sub-Saharan African countries stands at between 0.7% - 4.3%.⁶

Commercial sex work has been in existence for centuries. Victorian morality laws were introduced to Uganda when the country was declared a British protectorate in 1894.⁷ With the adoption of the Order-in-Council in 1902, the laws of the United Kingdom formally became applicable in Uganda.⁸ Such laws included the criminalisation of the public nuisance aspects of sex work.⁹ The sale of sex for money was criminalised under the 1950 Penal Code Act, which is Cap 120 of the Laws of Uganda, 2000. Apart from the Penal Code provisions, many other laws have been enacted which either directly or indirectly influence sex work and related activities including the Anti-Pornography Act 2014, the Employment Act 2006 and the HIV/AIDS Prevention and Control Act.

As a result of this legal environment coupled with religious and morality based stigma against them, sex workers are forced to operate underground resulting in dangerous working conditions, stigmatisation, exploitation, prosecution, lack of protection and limited access to public services such as public health care.¹⁰ Vulnerability of sex workers to sexually transmitted diseases has also increased. A study in 2011 revealed that the HIV prevalence rate among sex workers in Kampala was 37% compared to the national average of 7.3%.¹¹ A similar picture was painted by the UNAIDS Gap Report (2014) which, after analysis of 16 countries in sub-Saharan Africa including Uganda, concluded that the HIV prevalence among sex workers is 12 times greater than among the general population owing to stigma and discrimination, violence and punitive legal and social environments.¹²

be carried out in different parts of Uganda and large numbers of sex workers can be found to participate in these studies (see n 4 above), despite the fact that sex workers are a 'hidden' population, indicates that the prevalence of sex work, though not determined in numbers, is rife.

⁶ See J Vandepitte et al 'Estimates of the number of sex workers in different regions of the world' (2006) 82 *Sexually Transmitted Infections* 18. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2576726/> (accessed 18 August 2016).

⁷ A Jjuuko 'The incremental approach: Uganda's struggle for decriminalisation of homosexuality' in Lennox, C & Waites, M (eds) (2013) *Human Rights, Sexual Orientation and Gender Identity* 386.

⁸ As above.

⁹ Tamale (n 4 above) 154.

¹⁰ BK Twinomugisha 'Beyond "malaya" or prostitute: Interrogating sexual and reproductive health rights of young female sex workers in the context of HIV/AIDS in Uganda' *HURIPPEC Working Paper No. 37* (2012) 25.

¹¹ J Vandepitte et al 'HIV and Other Sexually Transmitted Infections in a Cohort of Women Involved in High-Risk Sexual Behavior in Kampala, Uganda' (2011) 38 *Journal of American Sexually Transmitted Diseases* 316.

¹² UNAIDS 'The Gap Report' (2014) 15. http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf (accessed 19 August 2016).

Besides the health related risks, sex workers face continuous harassment, arrests and legal battles at the hands of law enforcement agencies. For example in Kampala, including Makindye Division, the Uganda Police has been implementing the practice of carrying out night operations to round up and incarcerate sex workers *en masse*. Arrested sex workers are usually charged with a host of offences under the Penal Code such as prostitution, living on the earnings of prostitution, being idle and disorderly and being a rogue and vagabond. It is only upon paying bribes or offering sex that they are released.¹³ Inevitably, these arrests lead to widespread violations of human rights, loss of income and physical and mental harm. Makindye Division, being a home or workstation for a vibrant sex work community, has witnessed its fair share of sex work associated violations.

HRAPF provides legal aid services to sex workers and it is the only dedicated legal aid service provider to this group in Uganda. It interfaces with sex workers who have been arrested and are in conflict with the law, on a daily basis.

It is against this background that Human Rights Awareness and Promotion Forum (HRAPF) conceived the present research to investigate the trends of regulation of sex work and the impact of sex work related laws on the human rights of sex workers.

1.3 Problem Statement

The Constitution of the Republic Uganda, 1995 incorporates guarantees of fundamental human rights and freedoms on which the modern Ugandan state is based. Among these, the ones most relevant to sex workers are: equality before and under the law; freedom from discrimination; freedom from torture, inhuman and degrading treatment; the right to dignity and the right to work.¹⁴ Uganda is also a signatory to numerous international and regional human rights instruments which proclaim fundamental rights for all including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social, Cultural and Economic Rights (ICESCR) and the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW). However, translating these lofty constitutional pronouncements and international human rights obligations into reality presents numerous challenges. Among these challenges is the incompatibility of the texts and implementation of domestic laws with principles of human rights embedded in both the Constitution and international instruments. This mismatch has, among others, given rise to the predicament of sex workers. Numerous legislations remain in place and in fact others are being enacted which directly or indirectly prohibit sex work and

¹³ Amnesty International 'We are not criminals, we are people; a Ugandan sex worker tells her story' 26 May 2016 <https://www.amnesty.org/en/latest/news/2016/05/bad-black-sex-worker-testimony-uganda/> (accessed 19 August 2016).

¹⁴ Fundamental rights and freedoms are entrenched in Chapter 4 of the Constitution.

negatively impact upon the rights of sex workers including the Penal Code Act, the Anti-Pornography Act 2014, the HIV/AIDS Prevention and Control Act 2014 and the Employment Act 2006.

Currently, sex work and related practices are deemed to be such harmful conduct deserving of criminal sanctions and social stigma. The Penal Code Act Cap 120 under a general heading 'offences against morality' outlaws various activities related to sex work including prostitution¹⁵, living on the earnings of prostitution¹⁶, aiding and abetting prostitution¹⁷ and operating brothels.¹⁸ It is clear from these provisions that they target not only those engaged in sex work but also their dependants, family members and business managers and associates. These provisions are used by the Police, other law enforcement agencies and vigilantes to arrest, harass, abuse, rape and extort bribes and sexual favours from vulnerable sex workers.¹⁹

Beyond criminalisation, sex work is also not recognised under Uganda's employment and labour laws yet it is a means of livelihood for many women and men without formal education and training.²⁰ This is in spite of the fact that article 40 of the Constitution provides for economic rights including the right to work and obliges parliament to make laws regulating conditions of work, equal pay and discrimination at work. Consequently, sex workers face numerous socio-economic difficulties including arrests, imprisonment and prosecution, stigmatisation, exploitation, prosecution, lack of protection, limited access to public services and vulnerability to sexually transmitted diseases.²¹ The prohibition of sex work infringes upon the human dignity of sex workers. Since sex work is prohibited, sex workers battle to find legal remedies, support and services to aid them if their rights have been violated.

Thus the national laws and their implementation are oblivious of the fact that sex work is work from which many women, and to some extent men, derive their livelihood. Indeed, there is no evidence that the criminalisation of sex work has reduced its prevalence in Uganda or elsewhere around the world. With or without these legislations, sex work is work and it is here to stay.²² And so are sex

¹⁵ Section 138 & 139.

¹⁶ Section 136(1).

¹⁷ Section 136(2).

¹⁸ Section 137.

¹⁹ Testimony of a transgender female sex worker in Makindye Division.

²⁰ As above.

²¹ Stanford Medicine 'Sex Work in Uganda: Risky Business' 19 March 2014 <http://scopeblog.stanford.edu/2014/03/19/sex-work-in-uganda-risky-business/> (accessed 19 August 2016).

²² Unpublished: B Kyokuzire 'Is criminalisation of commercial sex work an answer? A case

workers, who in spite of having protection of their rights guaranteed by human rights standards enshrined in both international instruments and the Ugandan Constitution, continue to face numerous violations of these rights.

1.4 Study Objectives

1.4.1 Main Objective

To assess the implementation of laws affecting sex workers and their implications on the human rights of sex workers

1.4.2 Specific Objectives

1. To ascertain and analyse the national legal and policy framework regulating sex workers in Uganda.
2. To study the current trends of regulation of sex work in Uganda with a focus on Makindye Division.
3. To study how Uganda's legal framework on sex work has impacted on the human rights of sex workers.
4. To make recommendations on specific actions required to bring Uganda's legal framework affecting sex workers in conformity with human rights standards.

1.5 Research Questions

The study sought to answer the following questions:

1. What are the laws affecting sex workers in Uganda?
2. What are the trends prevalent in the regulation of sex work in Uganda, with a focus on Makindye Division?
3. How have the laws affecting sex workers impacted on their human rights and their lives?
4. What are the specific actions required to bring Uganda's legal framework affecting sex workers in conformity with human rights standards?

1.6 Study rationale/Justification

In recent years, a number of laws have been enacted which contain provisions impacting upon the rights of sex workers. These Acts include: the Anti-Pornography Act 2014; the NGO Act 2016 and the HIV/AIDS Prevention and Control Act 2014. The new Sexual Offences Bill 2015 which seeks to re-create the prostitution offences in the Penal Code and introduce new aspects and punishments has also been tabled in Parliament and there are also reported attempts to amend the Anti-Pornography Act 2014 to broaden its scope and extend its prohibitions to a greater number of

study of commercial sex workers in Kampala district, Uganda' Unpublished LLM dissertation, University of Zimbabwe, 2006.

activities.²³ These developments have created the need to critically assess the legal framework in which sex workers operate, and how this environment affects their rights.

While the criminalisation of sex work is globally acknowledged and studied as an infringement of the rights of sex workers, Uganda's unique social context and moralistic legal framework warrant a deeper assessment of the impact of the legal regime on the rights of sex workers.

1.7 Literature Review

The intersection between sex work and fundamental human rights and freedoms in Uganda is an intriguing phenomenon, which has attracted a number of studies by scholars and human rights advocates alike. This section reviews the available literature and explores the gaps that this study seeks to bridge.

A 2006 study by Kyokunzire sought to interrogate the criminal laws affecting commercial sex workers in Kampala in light of human rights.²⁴ The study also tackled ways of addressing health and safety issues of commercial sex workers. Kyokunzire's conclusion that criminalisation of sex work is a violation of human rights as it takes away one's freedom to use and employ their bodies as they wish is a familiar tale. The study also highlighted the prevalent violations, abuses and exploitative practices that sex workers face and attributed them to factors that include their illegal status. Scorgie et al (2013) did a related study at the regional level covering Uganda, Kenya, Zimbabwe and South Africa.²⁵ They investigated and reported wide-ranging human rights violations inflicted on sex workers by not only the police and state actors but also other stakeholders such as family members, clients and brothel managers. The study found that, while a significant number of these violations could be attributed to the criminalisation of sex work and hence the absence of legal protection in the countries investigated, other social and economic factors such as illiteracy among sex workers, conservative cultural practices, religion and the general marginalisation of women cannot be discounted. In its approach and scope, the study goes beyond criminalisation per se but does not delve into the impact of other laws.

Tamale conducted research in Kampala and Jinja in order to explore the link between sex work, gender and the law in Uganda. She found that the Penal Code provisions criminalising prostitution are redundant since they are near impossible

²³ 'Uganda Cabinet bans erotic dances, sexually suggestive language' *Daily Monitor* 28 April 2016 <http://nairobinews.nation.co.ke/news/ugandan-cabinet-bans-erotic-dances-sexually-suggestive-language/> (accessed 19 August 2016).

²⁴ Kyokunzire (n 22 above).

²⁵ F Scorgie et al 'Human rights abuses and collective resilience among sex workers in four African countries: a qualitative study' (2013) 9 *Globalization and Health* 33.

to enforce through the courts.²⁶ Instead, the Ugandan police uses the law to harass and abuse sex workers, reducing it to ‘a scarecrow by the patriarchal state to control women’s sexuality’.²⁷ The study found that other Penal Code offences, such as the ‘Idle and disorderly’ laws under section 167 and 168 as well as the trespass of ‘disturbing peace’ under Rule 27(c) and 72 of the Urban Authorities Rules, Statutory Instrument 27-19 are used to arbitrarily arrest sex workers. Tamale also identifies a number of complexities and paradoxes in respect of sex work in Uganda. One such paradox is the fact that while women would be forced into sex work for economic reasons, which renders the trade oppressive, it is simultaneously a liberating force that frees them from abject poverty. Another paradox lies in the fact that while the criminalisation of sex work and the way in which this criminal status has been abused reinforces gender inequality, women nevertheless are able to exercise a measure of agency over their own sexuality which is not the reality for the majority of Ugandan working class women who are not engaged in the trade. Tamale’s study was published in 2011 and therefore it does not take into account the numerous legislative developments which are deemed to impact upon sex workers that came to the fore from 2014 onwards. The study also looks at sex work in Uganda through the lenses of gender and power relations and does not specifically interrogate human rights abuses suffered by sex workers due to the legal regime. The study is furthermore focused on female sex workers only and does not consider the impact of the social and legal framework on male sex workers.

Twinomugisha conducted a study on the sexual and reproductive health rights of young, female sex workers in the context of HIV/AIDS in Uganda.²⁸ The study found that the criminalisation of sex work increases sex workers’ vulnerability to sexual violence, which in turn increases their risk of contracting sexually transmitted diseases and becoming infected with HIV.²⁹ The lack of participation of young, female sex workers in policy design and implementation as far as their sexual and reproductive health rights are concerned is also criticised.³⁰ While the study does make a strong case for the decriminalisation of sex work in Uganda, its scope was limited to young female sex workers and also had a narrow focus on sexual and reproductive rights only. The impact of the criminalisation of sex work on male sex workers as well as human rights beyond sexual and reproductive health rights were not carefully considered. Laws beyond the laws used to criminalise sex work were not considered either.

A study conducted under the auspices of the Open Society Initiative in 2008

²⁶ As above at 155.

²⁷ As above.

²⁸ Twinomugisha (n 10 above).

²⁹ Twinomugisha (n 10 above) 27-30.

³⁰ Twinomugisha (n 10 above) 49.

explored the intersection of HIV/AIDS, human rights and legal services in Uganda.³¹ The findings of this study exposed violations of human rights attributable to one's HIV/AIDS status and identified sex workers as a vulnerable group among People Living With HIV/AIDS, due to the hostile legal environment. Thus this study underscored the contribution of laws and their implementation to the violation of human rights of sex workers. However, commercial sex workers were not the principal concern of this study and neither was the legal framework that affects their rights.

A joint study conducted by the Human Rights Awareness and Promotion Forum (HRAPF) and the Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL) examined the human rights implications of the criminalisation of consensual same-sex sexual conduct.³² The study, however, was not focused on the criminalisation of sex work, but critiqued sections of the Penal Code Act (Cap 120) that criminalise carnal knowledge against the order of nature. In spite of the existence of commercial sex workers involved in same sex transactions,³³ this aspect was not included in the scope of the research.

Beyond the highlighted studies, there is a paucity of Ugandan studies focused on investigating the relationship between legislation and the human rights of sex workers. A number of studies focus on specific aspects of sex work such as access to health care and public medical services. For example, Bukenya et al, addressed the issue of condom use by commercial sex workers.³⁴ Another relevant health services study was carried out by Nagaddya, Wooding and Nabankema in 2014³⁵ in order to examine the practices of (female) sex workers in respect of circumcised and uncircumcised (male) clients and access to health care. The study was conducted in Makindye Division and provides a good guide for the present study in terms of context and setting. Although inconsistent condom use was reported, the inconsistency was not attributed to law or the hostile legal environment generally but rather to other factors such as drunkenness, client preference, the state of being married or pregnant among others. In fact the authors call for implementation of specific HIV reduction interventions for commercial sex workers in spite of the fact

³¹ S Mukasa & A Gathumbi *HIV/AIDS, Human Rights and Legal Services in Uganda: a country assessment* (2008).

³² Civil Society Coalition on Human Rights and Constitutional Law & Human Rights Awareness and Promotion Forum *Protecting morals by dehumanising suspected LGBTI Persons; a critique of the enforcement of laws criminalising same sex conduct in Uganda* (2013).

³³ Some LGBTI persons are involved in sex work for example those under organisations like Men of the Night and Youth on Rock Foundation, see <http://www.nswp.org/news/sex-workers-uganda-form-sex-work-network-uneso> (accessed 19 August 2016).

³⁴ J Bukenya et al 'Condom use among female sex workers in Uganda' (2013) 25:6 *AIDS Care* 767.

³⁵ T Nagaddya et al 'Understanding the dynamics and practices of female sex workers with both circumcised and non-circumcised men in Makindye Division' *International Health Sciences University* (2014).

that sex work is illegal in Uganda.

The literature review thus reveals that a number of significant studies have been carried out on the impact of criminalisation of sex work on the human rights and social economic welfare of sex workers in Uganda and neighbouring countries. What is missing is a comprehensive analysis of all the laws and proposed laws that directly or indirectly affect sex workers and contribute to the violation of their human rights in Uganda. This research seeks to build on existing efforts by expanding the scope beyond criminalisation and into the broader spectrum of legislations affecting sex workers.

It must also be stated that this study is not just another research focusing on female sex workers, but broadens the frontiers to incorporate the plight of Male Sex Workers (MSWs) and Men who have Sex with Men (MSMs) as well as transgender males and females. It is also specifically focused on the enforcement of the law and the human rights violations that arise as a result. The focus on Makindye Division is meant to ground the work with concrete examples.

1.8 Methodology

1.8.1 Study design

The present study is qualitative in nature and seeks to investigate the impact of existing laws on the human rights of sex workers through in-depth stakeholder interviews and a thorough analysis of secondary data. The research did not have any pre-set theories and derived understanding of data from data analysis.

1.8.2 Periodic scope

Court records at Makindye Magistrate's Court for the period of 2014 to 2016 were reviewed. The study was carried out from 2nd May 2016 to 30th June 2016. This study period was selected since the study aims at determining the impact of new laws, which have all been enacted since 2014, on sex workers.

1.8.3 Study location

The study is based on data collected from Makindye Division. Makindye was selected through purposive sampling as the case study area. This is because it has a very vibrant nightlife, with sex work hotspots like Kabalagala. It also has police presence with Katwe Police Division being the most prominent police station, and it has its own court, the Makindye Chief Magistrates Court and its own Resident State Attorney. Also located in Makindye is the leading sex worker organisation in Uganda, WONETHA, which extends services to sex workers. HRAPF also receives a big share of its cases from Makindye.

The study was carried out in Makindye Division, one of the five administrative

divisions of Kampala, the largest and capital city of Uganda. Makindye Division is home to a pulsating nightlife in suburbs such as Kabalagala, Katwe, Ggaba, Kansanga and Kibuye which makes it one of the hubs of sex work activity in Uganda. Makindye Division also hosts Katwe Police Division and the Chief Magistrate's Court at Makindye as well as a number of pioneer female sex worker and growing male sex workers' organisations.

As already alluded to, sex work practice in Uganda is predominantly carried out in discreet locations, by discreet practitioners and for a discreet clientele. This reality made it imperative to carry out the study in a known hub such as Makindye Division.

1.8.4 Study population

The study population was drawn from Makindye Division and involved a total of 50 respondents, mainly female, male and transgendered sex workers and people with experience in working with sex workers in the Uganda Police Force, Uganda Prisons Services, the Directorate of Public Prosecution, lawyers, paralegals and civil society leaders. There were no specific biases on gender thus both male and female respondents were targeted. However, since the majority of sex workers are female, female respondents dominated the study.

1.8.5 Sample and sample selection

A sample space comprising of institutions, organisations and individuals in Makindye Division which are most concerned with/affected by the application of laws affecting sex workers was drawn and the purposive sampling and snowball sampling methods used to select specific institutions and respondents for inclusion in the study.

Purposive sampling can be described as a non-probability sampling technique which is used to select a sample based on the characteristics of the population and objectives of the study. It is a judgmental, selective and subjective method which is better suited in situations where there is need to reach a targeted sample.³⁶ The use of the purposive sampling approach was guided by the literature review and preliminary mapping which led to specific organisations/institutions that were most relevant to the study. Purposive sampling was furthermore used to select key informants from civil society and law enforcement agencies such as the Police, Prisons and State Attorneys.

On the other hand, snow-ball sampling was used to select sex workers to participate in the study. Snowball sampling is a technique for finding research subjects where one subject gives the researcher the name of another subject, who

³⁶ About Education 'Understanding purposive sampling' <http://sociology.about.com/od/Types-of-Samples/a/Purposive-Sample.htm> (accessed 18 August 2016).

in turn provides the name of a third, and so on.³⁷ As a sampling technique, the snowball method is meant to overcome the problems associated with sampling concealed populations such as the deprived, the socially stigmatised and elites.³⁸ This sampling technique was preferred because of the discreet nature of commercial sex work which makes the application of the other sampling methods difficult. The researchers thus identified initial respondents with the assistance of organisations which provide services to sex workers, and these initial respondents nominated additional respondents.

1.9 Research methods and tools

The study employed methods and tools that sought to investigate the context, system and framework as well as the impact of laws concerning sex workers in Uganda. The study was carried out in a participatory manner involving consultations with key stakeholders, and drawing analyses of existing literature, laws and court records.

1.9.1 Data Collection

During the study, both secondary and primary data was collected and analysed using a combination of qualitative and quantitative methods in order to capture the human rights implications of laws concerning sex workers.

1.9.2 Primary data

Primary data was collected using face to face key informant interviews and Focus Group Discussions (FGDs). The Consultant also engaged beyond verbal responses and employed the observation method to record a number of phenomena. The missing links identified during the study were used to guide further and deeper discussions with key informants. Key informants were selected from among the key stakeholders in the field under study including sex workers, human rights activists, police officers, prison wardens and judicial officers. Interviews were conducted with 28 respondents: 10 female sex workers, 8 male sex workers, 2 transgender persons and 8 key players in the justice system including the Chief Magistrate Makindye, state attorneys, officers at the Women's Prison Luzira and civil society leaders and lawyers. Two Focus Group Discussions (FGDs) were conducted; the first involved 12 participants which were mainly female sex workers and the second had 10 participants all of whom were male sex workers and transgender persons.

1.9.3 Secondary data

Secondary data was collected using the desk-based approach by way of identifying, compiling, reviewing and critically analysing the relevant legislations and case law as well as publications such as reports, literary journals and online

³⁷ R Atkinson, & J Flint 'Accessing hidden and hard-to-reach populations: Snowball research strategies' (2001) 33 *University of Surrey Social Research Update*.

³⁸ As above.

materials. The search for secondary data was guided by the overall objective to study the Ugandan laws affecting sex workers from a human rights perspective. The relevant literature which was collected and analysed included:

- a) Legislation such as the Constitution of Uganda 1995; the Penal Code Act Cap 120; the Anti-Pornography Act, 2014; the Police Act cap 303; the Employment Act, 2006; the HIV/AIDS (Prevention and Control) Act 2014; the Equal Opportunities Act, 2007 and the Non-Governmental Organisations Act 2016.
- b) Proposed legislation such as the Sexual Offences Bill, 2015.
- c) Records and files of Makindye Chief Magistrates Court and Katwe Police Division.
- d) Reports, decided cases, books, journals, publications and online materials.

1.9.4 Research tools

Since meetings with key informants were primarily consultative and interrogative, interview guides were developed and used as the main tool of data collection. Interview guides were also used during FGDs. The research tools were pretested at WONETHA and Katwe Police Division.

1.9.5 Data analysis

The data collected was transcribed, coded and reviewed in accordance with the objectives of the study. Coding was done thematically following key themes, which formed the premise for interpretation. The process of data analysis was done continuously throughout the fieldwork. At the end of each day, the notes taken were checked to ensure consistency and accuracy after which a thorough analysis of ideas, experiences and viewpoints was carried out. A more comprehensive analysis of the interview scripts and field notes was done through both inductions and deductions of the themes within the data. The Consultant extracted and recorded direct quotations of phrases and statements from respondents to represent their feelings and attitudes on the subject. Follow up inferences to the interviews were done to verify the data.

1.10 Ethical considerations

This study and particularly the field research involved interaction with and study of human subjects. The researchers maintained a high degree of ethical standards so as to protect the dignity, privacy and integrity of all research participants. In particular, respondents were informed of the following:

- i) The aims, methods, anticipated benefits and potential hazards of the research;
- ii) One's right to abstain from participating in the research as well as their right to terminate participation at any point;

iii) The confidential nature of their responses.

The researchers ensured that all participants gave their consent to participate freely and no pressure or inducement of any kind was used to encourage a person to become a subject of research. Further, given the fact that sex work is illegal in Uganda, information concerning identities and contact details of the individual respondents is held in strict confidence and is not available for publication. Where personal stories are told, pseudo names are employed.

1.11 Challenges

There were a number of challenges that were encountered during the study.

To start with, because sex work is illegal in Uganda, most of the respondents were wary of disclosing their identities or even engaging in the interviews. A number of those who accepted to participate only did so on condition that they remained anonymous and were permitted to speak off record.

A number of sex worker respondents could not recall which offences they were charged with upon arrest or even the legal process for their release, or why they paid money to court. For example, they could not tell whether the payments made were court bond fees to obtain bail, fines upon conviction or bribes.

SECTION II:

THE LEGAL FRAMEWORK GOVERNING SEX WORK IN UGANDA

2.1 Introduction

Uganda's legal framework is governed and informed by both international and domestic laws. This comprises of international law instruments that Uganda is a state party to and laws enacted by Uganda's Parliament. This legal system jointly presents both opportunities and challenges for sex workers in terms of the human rights framework and existing penal laws respectively. As regards the human rights framework, Uganda's Constitution 1995 is a progressive document incorporating fundamental human rights and freedoms for all persons. Uganda is also a state party to various international human rights instruments that provide adequate safeguards and protection measures for sex workers. In contrast, there exists numerous domestic legislations which not only criminalise sex work and related activities but directly or indirectly seek to deny sex workers the very rights guaranteed under international human rights law and the Constitution. This section considers these laws on a merely textual basis while the next chapter examines the actual impact of the legislation on the human rights of sex workers.

2.2 International human rights law

International and regional human rights treaties lay down obligations, which are binding on the states that ratify them. Uganda has ratified all the core international and regional human rights treaties.¹ At the United Nations level, Uganda has ratified the International Covenant on Civil and Political Rights,² the International Covenant on Economic, Social and Cultural Rights,³ the Convention on Elimination of All forms of Discrimination Against Women,⁴ and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or punishment.⁵ In addition, Uganda is also a member of the International Labour Organisation.⁶

At the regional level, Uganda has ratified the African Charter on Human and

¹ There are quite a number of core international and regional treaties but this discussion will only focus on those relevant to sex workers.

² UN General Assembly *International Covenant on Civil and Political Rights* (16 December 1966) UN Treaty Series 999 p. 171. Uganda ratified it on 21 June 1995, and it came into force on 21 September 1995.

³ UN General Assembly *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) UN Treaty Series 993 p.3. Uganda ratified it on 21 January 1987.

⁴ UN General Assembly *Convention on Elimination of All forms of Discrimination Against Women* (18 December 1979) UN Treaty Series 1249 p.3.

⁵ UN General Assembly *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984) UN Treaty Series 1465 p.85. Uganda acceded to it on 3 November 1986.

⁶ Uganda became a member of the International Labour Organisation in 1963.

Peoples' Rights,⁷ the Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa;⁸ the African Youth Charter;⁹ and the Treaty for the Establishment of the East African Community.¹⁰

From the onset, it should be noted that Uganda is a dualist country, and international law therefore does not operate automatically but requires a process of domestication and incorporation into the national legal system.¹¹ When questions of international law arise in Uganda courts, the respective judicial officers tend to avoid dealing with them. However, this is not usually the case when it comes to issues of human rights. Kabumba notes¹² that the courts' use of international human rights law constitutes a recognition that the Constitution of Uganda, and the Bill of Rights in particular, is inspired and based on international human rights law. This makes the above mentioned international human rights instruments easily implementable in Uganda. When looking for international law applicable to sex workers' rights, one should be alive to the fact that sex workers are not defined by one single trait. There is therefore no single codified instrument or domestic law specifically dedicated to sex workers. As a matter of fact, the international human rights instruments do not refer to sex workers. The more appropriate framework therefore, is to understand a sex worker as an intersection of many different traits, whose rights can only be effectively and holistically addressed at this intersection.¹³

2.2.1 United Nations System

The United Nations is the largest international body and has the most human rights instruments. These instruments provide for various rights and freedoms and these shall be discussed individually below.

The right to equality and freedom from discrimination

This right is provided for in article 2 of the UDHR, articles, 2 and 26 of the ICCPR,

⁷ African Union (AU) *African Charter on Human and Peoples' Rights* (27 June 1981) CAB/LEG/67/3. Uganda ratified it on 10 May 1986 and it came into force on 27 May 1986.

⁸ African Union (AU) *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (11 July 2003). Uganda ratified the Protocol, with a reservation to Article 14, on 22 July 2010.

⁹ African Union (AU) *African Youth Charter* (2 July 2006) http://www.au.int/en/sites/default/files/treaties/7789-file-african_youth_charter.pdf Uganda ratified it on 6 August 2008 and it came into force on 22 October 2008.

¹⁰ East African Community *The Treaty for the Establishment of the East African Community* (30 November 1999) Publication 1. It came into force on 7 July 2000.

¹¹ B Kabumba 'The application of International Law in the Ugandan judicial system: A critical enquiry' in M Killander(ed) *International and domestic human rights litigation in Africa* (2010) 83.

¹² As above.

¹³ K Mosolf 'International Human Rights Standards and the rights of sex workers' (2005) *Sex Workers Project* 1.

article 3 of the ICESCR, article 1 of the ILO Convention against discrimination¹⁴ and article 1 of CEDAW. Article 1 of the CEDAW defines discrimination to mean any distinction, exclusion or restriction, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms. This right implies that all human beings should enjoy the rights provided for in the treaties, on an equal basis and in their totality.¹⁵ The full effect of this is impaired whenever **any person** (emphasis added) is denied the full and equal enjoyment of any right. States have an obligation to remove obstacles to the equal enjoyment of rights and to adjust their domestic legislation so as to give effect to the undertakings set forth in the Covenant. The treaties provide different prohibited grounds of discrimination, which are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁶ While the grounds do not include work generally, or sex work specifically, the list is open-ended and sex work can be imputed in the 'other status' ground.

The right to freedom from torture, cruel, inhuman and degrading treatment

This right is anchored in article 7 of the ICCPR and article 2 of the Convention Against Torture. Article 1 of the Convention Against Torture defines torture to include any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for any reason based on, among other grounds, discrimination. Although cruel, inhuman and degrading treatment (collectively referred to as ill treatment) is not defined in the Convention, the Committee Against Torture has noted that experience has demonstrated that the conditions that give rise to ill treatment facilitate torture.¹⁷ The aim of the provision is to protect both the dignity and the physical and mental integrity of the person.¹⁸ This provision encompasses the positive obligation in article 10 of the ICCPR, which enjoins states to treat people deprived of their liberty with humanity and respect. The acts prohibited include both acts inflicted by persons in official capacity, and persons in private capacity.¹⁹ The protection of certain minority or marginalised individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill treatment.²⁰ Sex workers in Uganda are some of the marginalised persons because of laws criminalising them and existing negative prejudices emanating from cultural and religious beliefs. They are therefore vulnerable to abuse and attacks, including sexual attacks from both private citizens and law enforcement

¹⁴ International Labour Organisation *Convention concerning Discrimination in Respect of Employment and Occupation* (25 June 1958) No 111.

¹⁵ Human rights Committee, General comment No 28, HRI/GEN/1/Rev.9 (Vol. 1) Para 2.

¹⁶ UN ICCPR (n 2 above) article 2.

¹⁷ Committee Against Torture, General Comment No 2, CAT/C/GC/2.

¹⁸ Human Rights Committee, General Comment No 20, HRI/GEN/1/Rev. 1.

¹⁹ As above, para 2.

²⁰ As above.

agencies, and are entitled to the protection of the state under these provisions. It should be noted that this guarantee is absolute and cannot be derogated from.

Right to liberty

This right is provided for in article 3 of the UDHR and article 9 of the ICCPR and it protects the liberty and security of a person. The article also provides safety guarantees to ensure protection of this right. These include informing an arrested person of the cause of their arrest, the charges against them and prompt production in courts of law. Liberty concerns freedom from confinement of the body, while security of a person concerns freedom from injury to the body and the mind, or bodily and mental integrity.²¹ Under the right, arbitrary arrest and detention and unlawful deprivation of liberty are prohibited. Arbitrariness is not equated with ‘acts that are against the law’ and is to be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability, due processes of law, reasonableness, necessity and proportionality.²² Sex work is criminalised in Uganda and therefore persons can be arrested under those penal provisions. The provisions in the covenant do not purport to prohibit arrest of persons completely but provide safeguards within which these arrests should be carried out. The Covenant provides that even in cases like enforcement of criminal laws, arrests have to be done within the ambits of the covenant and available domestic laws.

Right to work

The right to work is protected under article 6 of the ICESCR which provides that states must ‘include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual’. While it is recognised that there are a broad spectrum of motivations behind entering sex work, the need to escape poverty remains a primary reason.²³ This right is applicable to sex workers in that the criminalisation of sex work can be contested in the absence of viable alternatives of employment. Unless it can be shown that Uganda is indeed taking steps to achieve the full and productive employment of its citizens, the criminalisation of what may be the only means of income for members of this group amounts to a violation of this right. In respect of female sex workers, article 11.1(c) of CEDAW protects the right to ‘free choice of profession and employment’. The CEDAW Committee has held that ‘voluntary

²¹ Human Rights Committee, General Comment No 35, CCPR/C/GC/35.

²² As above, para 12.

²³ CEDAW Committee General Recommendation 19, Violence against Women, 11th Session (1992) para 14: the Committee expressed that poverty and unemployment force women into sex work; S Tamale ‘Paradoxes of sex work and sexuality in modern-day Uganda’ in S Tamale (ed) *African Sexualities: A Reader* (2011) 150-151.

prostitution' falls within the ambit of this right.²⁴ Uganda, in criminalising sex work, thus violates the right of women to choose their profession and employment as protected under this instrument.

Right to an adequate standard of living

Article 11 of the ICESCR provides for the right of everyone 'to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions'. Many sex workers engage in their chosen profession in order to ensure an adequate standard of living for themselves or their families. As discussed under the right to work, the motivation behind entering sex work would often be the absence of any other means of escaping poverty. By criminalising sex work while at the same time failing to fulfil to ensure the minimum core of continuously improving living conditions, the Ugandan government is breaching its obligations in respect of this right.

Right to the highest attainable standard of physical and mental health

Article 12 of the ICESCR provides for the right to the highest attainable standard of physical and mental health and 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness.' This right is also protected in as far as female sex workers are concerned under Article 12 of CEDAW which requires of states to take measures to eliminate discrimination in the provision of healthcare services and provide women with services relating to pregnancy. The right to health is of particular relevance to sex workers considering that the nature of their work makes them vulnerable to sexually transmitted diseases and HIV infection. Female sex workers are in particular need of health services in as far as it relates to their reproductive health. The criminalisation of sex work has the opposite effect of 'creating conditions' which would assure medical services to all: it enforces the stigma surrounding sex work and exposes sex workers to discrimination and ill-treatment in their pursuit of healthcare services. The right to health is therefore relevant to the protection of sex workers' interests and a basis for contesting the current legal regime.

Obligations in respect of 'prostitution'

Article 6 of CEDAW requires of states to take steps to prevent the exploitation of prostitution of women. Criminalising sex work drives the industry underground which renders women more vulnerable to exploitation and would make forced sex work even more difficult to detect and intercept. As a starting point for ensuring a stronger basis of support from authorities to women engaged in sex work and to fulfill the requirements of taking steps to prevent the exploitation of prostitution of women, it is a matter of necessity for sex work in Uganda to be decriminalised.

²⁴ CEDAW Committee, 43rd session, UN doc. CEDAW/C/DEU/CO/6 2 February 2009.

2.2.2 African Regional System

The African human rights system is fundamentally governed by the African Charter on Human and Peoples' Rights.²⁵ The Charter also has a Protocol regarding the rights of women in Africa which Uganda has ratified (Maputo Protocol) and which has particular bearing on female sex workers.²⁶ The Charter sets forth different rights, some of which are relevant to the rights of sex workers. Many of the rights protected under the regional system are simply a repetition and enforcement of rights existing under the international system.

The right to equality and freedom from discrimination

Both the African Charter and Maputo Protocol protect the rights to equality and non-discrimination.²⁷ The African Charter does not include 'sex work' or 'status as a sex worker' in its listed grounds. The ground of 'any status' can be interpreted to include 'status as a sex worker' and this provision can be used to desist discrimination which sex workers might face in service delivery and treatment by both private and public actors.

The right to dignity and freedom from cruel and degrading treatment

The right to dignity and freedom from torture and cruel and degrading treatment is protected under both article 5 of the African Charter and article 3 of the Maputo Protocol. These instruments provide protection against the violence and abuse which both male and female sex workers suffer at the hands of their clients and the police.

The right to liberty

This right is protected under article 6 of the African Charter which provides that 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.' This provision has bearing on sex workers in as far as their rights during and after arrest is concerned and can be relied upon in contesting abuse and extortion.²⁸

The right to health

The right to health is protected in the regional system under article 16 of the African Charter. Article 14 of the Maputo Protocol offers expansive protection of the right to sexual and reproductive health, which is of particular relevance to female sex workers. While both male and female sex workers run a high risk of contracting HIV and other sexually transmitted infections, female sex workers also have a heightened need to access health care in the exercise of their reproductive rights. Of particular interest to female sex workers is 'the right to choose any method of

²⁵ AU African Charter (n 7 above).

²⁶ AU Maputo Protocol (n 8 above).

²⁷ See articles 2, 3 and 19 of the African Charter and article 2 of the Maputo Protocol.

²⁸ Tamale (n 23 above) 160.

contraception'²⁹ and 'the right to self-protection and to be protected from sexually transmitted infections, including HIV'.³⁰ State parties are furthermore required to provide 'adequate, accessible and affordable' health services to women.³¹ These provisions are empowering to female sex workers and afford them a greater measure of agency and autonomy over their health and bodies.

2.2.3 East African Sub-regional System

The East African Treaty established the East African Community with Burundi, Kenya, Rwanda, Tanzania and Uganda as its members.³² This sub-regional system exists mainly for reasons of economic cooperation and support for sustainable development.³³ While the Treaty does not contain rights provisions, it does require of states to abide by their existing human rights obligations and their obligations in respect of the African Charter on Human and Peoples' Rights in particular.³⁴ The East African Court of Justice serves as a possible forum for sex workers to assert their rights as protected under international and regional instruments. Even though the Court does not have human rights jurisdiction per se, the court can assert jurisdiction over matters where the breach of Treaty principles is alleged, which would include article 6(d) and 7(2) that requires of states to maintain human rights standards.³⁵

2.3 Ugandan Laws

In addition to international and regional laws, Uganda is governed by domestic laws enacted by its Parliament. As already noted, Uganda is a dualist state and therefore these domestic laws form the core and primary legal framework.

2.3.1 The Constitution

The Constitution is the supreme law of Uganda and any laws that are inconsistent with it are void to the extent of their inconsistency.³⁶ Chapter Four of the Constitution guarantees fundamental human rights and freedoms to be enjoyed by all human beings in Uganda. Article 20(1), which proclaims that fundamental rights and freedoms of the individual are inherent and not granted by the state, in

²⁹ Article 14(1)(c).

³⁰ Article 14(1)(d).

³¹ Article 14(2).

³² Human Rights Awareness and Promotion Forum *A guide to the normative legal framework on the human rights of LGBTI persons in Uganda* (2015) 38.

³³ See article 5 of the East African Treaty.

³⁴ See article 6(d) and article 7(2) of the East African Treaty.

³⁵ *Katabazi and Others v Secretary General of the East African Community and Another (Uganda)* (2007) AHRLR 119 (EAC 2007) and *Attorney General of Rwanda v Plaxeda Rugumba* Appellate Division, Appeal No. 1 of 2012.

³⁶ The Constitution of Uganda 1995 article 2(2).

effect nullifies all legislative, executive or judicial actions, which arbitrarily interfere with human rights. This position is supported by article 20(2), which further stresses that the rights and freedoms of the individual and groups enshrined in the Constitution shall be respected, upheld and promoted by all organs and agencies of government and by all persons.

Article 21(1) provides for the right to equality of all persons before and under the law. Further, article 21(2) adds that no person shall be discriminated against on the grounds of sex, race or social or economic standing while article 21(3) defines 'discriminate' to mean giving different treatment to different persons attributable to their respective descriptions by sex, race, colour and social or economic standing.

In the same vein, article 23 guarantees the right to personal liberty and prohibits arbitrary arrests, provides for the right to apply for bail and imposes a duty on the state to present persons facing criminal charges to court within 48 hours. The right to dignity, freedom from torture and inhuman and degrading treatment is embedded in article 24. Article 25 bans forced labour, servitude and slavery while article 27 provides for the right to privacy of person and property. Personal property is protected under article 26.

The right to a fair hearing, including the presumption of innocence, is laid out extensively under article 28; and article 29 addresses the right to assemble and freedom of expression.

Significantly, affirmative action is provided for under article 32 which enjoins the state to take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them. Article 32(2) forbids laws, cultures, customs and traditions, which are against the dignity, welfare or interest of women or any other marginalised group while article 32(3) requires the establishment of the Equal Opportunities Commission. This part of the Constitution should be read with article 36 which recognises and promotes minority rights and article 33, which accords to women full dignity equal to men. Finally, article 40 declares economic rights and the right to work.

The Constitution has a limitation clause embedded in article 43. The article provides that in the enjoyment of rights guaranteed under the Bill of rights, a person shall not prejudice the rights and freedoms of others or the public interest. This clause in effect means that the rights enshrined under the Constitution are not absolute and in the event that there is need to protect the rights of others or the interest of the public, their enjoyment can be limited. It is because of this article that it can be said that although the Constitution does not in itself prohibit sex work expressly, there could be justification for the restriction of the rights of sex workers due to the presence of laws that criminalise sex work and related

activities. In the case of *Kasha Jacqueline & Others v Lokodo & Another*,³⁷ it was held that engagement or promotion to engage in prohibited activities amounts to behaviour that is prejudicial to the public interest and therefore falls within the confines of article 43, upon which enjoyment of rights can be limited.

That said, the article provides what has been dubbed a ‘limitation within a limitation’.³⁸ This is to say, when the enjoyment of a right is being limited under the article, the limitation should not permit political persecution, detention without trial or anything beyond what is acceptable and demonstrably justifiable in a free and democratic society. According to the Supreme Court in *Andrew Mwenda & Onyango Obbo v Attorney General*³⁹, when determining whether a limitation is acceptable and demonstrably justifiable in a free and democratic society, there are two standards that should be met. First, the objective of the limitation must be of sufficient importance as to justify the overriding of a constitutionally guaranteed right or freedom. The standard in determining this is high and it is intended to ensure that objectives that are trivial and discordant with principles of a free and democratic society are not afforded protection. The second standard to be met is that of proportionality. Once it has been established that the objective is of sufficient significance, the person seeking to enforce the limitation must show that the means chosen are acceptable and demonstrably justifiable in a free and democratic society. Therefore, although enjoyment of rights by sex workers can be limited under article 43, such limitation has to meet the standards set by the article itself, and human rights and constitutional jurisprudence.

2.3.2 Statutes

Statutes are the second most important sources of law in the hierarchy of laws. The following laws affect sex workers in Uganda:

The Penal Code Act

The Penal Code Act Cap 120 is the principal criminal legislation in Uganda that creates and defines offences and prescribes penalties for breach. Although it has undergone a number of modifications and amendments since it was first introduced in Uganda in 1950, it has retained much of its original content derived from the 1930 Penal Code Ordinance, which itself was modelled on the Griffith Code of Queensland, Australia of 1901.⁴⁰

³⁷ Miscellaneous Cause No 33 of 2012.

³⁸ *Andrew Mwenda & Onyango Obbo v Attorney General* Constitutional Petition No 15 of 1997.

³⁹ As above.

⁴⁰ For a more detailed history of the Uganda Penal Code, see A Jjuuko ‘The incremental approach: Uganda’s struggle for the decriminalization of homosexuality’ in C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender identity in the Commonwealth: Struggles for Decriminalisation and Change* (2013) 381-408.

Chapter 14 of the Penal Code Act is dedicated to defining, prohibiting and prescribing punishment for numerous offences, which are collectively referred to as ‘offences against morality’. There are provisions that expressly prohibit sex work and related practices and those that concern other sex practices but affect sex workers nonetheless.

Prostitution and related offences

Prostitution is prohibited by section 139, which also prescribes a maximum punishment of seven years imprisonment. Section 138 defines a ‘prostitute’ to mean ‘a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain’.

Other offences associated with prostitution include an offence for operating a brothel, which attracts a maximum sentence of seven years under section 137 and an offence in respect of living on the earnings of prostitution, which criminalises any person other than a prostitute that survives off earnings derived from prostitution, with knowledge of the origins of the earnings.

The way prostitution and related offences are defined is premised on the idea that prostitution is an identity as opposed to it being a commercial activity like any other business. This framing violates the constitutional human rights guarantees of equality, dignity, liberty, privacy, a fair trial and the right to work and earn a living.

There are also offences outside Chapter 14, which have a bearing on the human rights and welfare of sex workers.

Offences against health and convenience: Sections 167 and 168

Section 167 criminalises ‘idle and disorderly’ persons. It provides that:

Any person who-

- a) *being a prostitute, behaves in a disorderly or indecent manner in any place;*

...

shall be deemed an idle and disorderly person, and is liable on conviction to imprisonment for three months or to a fine not exceeding three thousand shillings or to both such fine and imprisonment, but in the case of an offence contrary to paragraph (a), (e) or (f) that person is liable to imprisonment for seven years.

Section 168 defines rogues and vagabonds in such wide terms that it is almost

impossible to meaningfully summarise it. The offence entails the following:

‘(1) Every—

(a) person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person;

(b) person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;

(c) suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself; and

(d) person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose,

shall be deemed to be a rogue and vagabond, and commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year.’

These provisions are so wide and vague. The provisions are used by the Police to undertake mass arrests of suspicious-looking people in public places. The offences as defined, however, are too wide and too vague to pass the requirements of article 28(12) of the Constitution, which states that, ‘*Except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.*’ The Constitutional Court provided guidance on article 28(12) when considering the now repealed Witchcraft Act in the case of *Salvatori Abuki and Another v Attorney General*⁴¹ where it was noted that:

The reasons for these requirements are not hard to find. Firstly, it is to notify the citizens clearly of what conduct the statute prohibits. This assists a citizen to distinguish the prohibited conduct from the permissible conduct and therefore be able to guard against violations. Secondly, in the event of a charge being labelled against him under the statute, a citizen shall be able to prepare his defense since the ingredients of the offense are known.

The High Court took the same view in *Uganda v. Sekabira & 10 Others*⁴² in the following terms:

⁴¹ Constitutional Court Case 2 of 1997.

⁴² High Court Criminal Case No. 0085 of 2010.

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

Thus a criminal provision must be able to give fair notice to those affected of what is prohibited. Moreover, sections 167 and 168 give the police a blank license to arrest anybody found on the street such as homeless people, street vendors, drug users, and, importantly, sex workers. The vague provisions of sections 167 and 168 permit violations of various fundamental rights including the right to equality, the right to dignity, freedom of personal liberty and movement, the right to work and the rights to assemble and associate with others.⁴³

Unnatural Offences: Sections 145, 146 and 148

Sections 145, 146, and 148 collectively form the anti-sodomy laws in the Penal Code. Although these provisions are commonly understood to criminalise people who identify as gay, lesbian or bisexual, there is nothing in the provisions themselves which suggests that restrictive interpretation.

Section 145

Any person who—

(a) has carnal knowledge of any person against the order of nature;

(b) ... or

(c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.

The act of ‘having carnal knowledge against the order of nature’ was traditionally understood to mean sex for non-procreation purposes, a position adopted in the 1925 Indian case of *Khanu v Emperor* which defined ‘carnal knowledge against the order of nature’ as involving penetration of a sexual organ into any orifice that is not connected to procreation and thus could include both oral and anal sex committed between a man and a woman.⁴⁴ These provisions are used to humiliate and persecute LGBTI persons or suspected LGBTI persons.⁴⁵

⁴³ Human Rights Awareness and Promotion Forum *The Implications of the Enforcement of ‘Idle and Disorderly’ Laws on the Human Rights of Marginalised Groups in Uganda* (2016) 51-55.

⁴⁴ Human Rights Watch ‘This Alien Legacy: the Origins of “Sodomy” Laws in British Colonialism’ (2008) 38.

⁴⁵ Civil Society Coalition on Human Rights and Constitutional Law & Human Rights Awareness and Promotion Forum *Protecting morals by dehumanising suspected LGBTI Persons; a critique of the*

The common interpretation of the provisions views them as referring to same sex conduct as illustrated by an International Gay and Lesbian Human Rights Commission (IGLHRC) report on LGBTI which observes: *'While the laws' language is gender neutral, rendering them potentially applicable to heterosexual acts as well, their application in reality is limited to same-sex practicing individuals.'*⁴⁶ On a textual basis, section 145 covers acts such as anal sex and oral sex, which criminalise acts that are part and parcel of the sex work trade. This is in addition to the fact that many Lesbians and Transgender women in Uganda are engaged in sex work. The continued presence of the sections on the law books therefore creates a continued presence of penal laws that could potentially be used against sex workers by law implementers.

Section 146 criminalises attempts to commit unnatural offences and covers the inchoate action of contravening section 145 with similar legal and human rights implications.

Equal Opportunities Laws

The Equal Opportunities Commission Act, 2007 (EOC Act) was enacted under the authority conferred by article 32 (1) and (2) of the Constitution, which requires parliament to make relevant laws including laws for the establishment of an Equal Opportunities Commission for the purpose of promoting affirmative action. In 2007 the EOC Act was enacted with its stated objective:

to provide for the composition and functions of the Commission (EOC); to give effect to the State's constitutional mandate to eliminate discrimination and inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnic origin, tribe, birth, creed or religion, health status, social or economic standing, political opinion or disability, and take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them; and to provide for other related matters.

Remarkably, the EOC Act defines equal opportunities to mean having the same treatment or consideration in the enjoyment of rights and freedoms, attainment of access to social services, education, employment and physical environment or the participation in social, cultural and political activities regardless of sex, age, race, colour, ethnic origin, tribe, birth, creed, religion, health status, social or economic standing, political opinion or disability.

enforcement of laws criminalising same sex conduct in Uganda (2013).

⁴⁶ International Gay and Lesbian Human Rights Commission & Sexual Minorities Uganda 'Report on the Rights of Lesbian, Gay, Bisexual, and Transgender People in the Republic of Uganda under the African Charter of Human and Peoples' Rights' (2006) 9.

It also defines discrimination to mean ‘*any act, omission, policy, law, rule, practice, distinction, condition, situation, exclusion or preference which, directly or indirectly, has the effect of nullifying or impairing equal opportunities or marginalizing a section of society or resulting in unequal treatment of persons in employment or in the enjoyment of rights and freedoms on the basis of sex, race, colour, ethnic origin, tribe, birth, creed, religion, health status, social or economic standing, political opinion or disability*’. Further, marginalisation is defined to mean ‘depriving a person or group of persons of opportunities for living a respectable and reasonable life as provided in the constitution’.

Under section 15, the EOC is granted extensive powers including the powers of a court of law; through its tribunal; to summon witnesses, inspect documents, require persons appearing before it to take oath, issue orders to any person and public and private institutions concerning taking measures to promote equal opportunities and adopt its own procedures for smooth carrying out of its operations.

Given its background and the highlighted provisions, the EOC Act is supposed to be the cornerstone legislation in the struggle to protect minorities and attain equality under the law. However, section 15(6) lays down a number of restrictions on the EOC’s mandate and powers; notably paragraph (d) which prohibits the EOC from investigating any matter involving behavior which is considered to be immoral and socially harmful, or unacceptable by the majority of the cultural and social communities in Uganda. The EOC Act does not expound on what constitutes such objectionable behavior but the parliamentary hansard makes for grim reading for the sex worker community and other minorities. Absent in the original draft, the text was inserted belatedly to close the door on LGBTI people and ‘the like’ ‘who would flock the Commission en masse seeking and claiming equal protection with other minorities.’⁴⁷ Due to this provision, sex workers are seemingly prevented from accessing the EOC for redress of their grievances and complaints.

The constitutionality of section 15(6)(d) has been contested in Constitutional Petition No. 1 of 2009, *Jjuuko Adrian vs. Attorney General* for being contrary to the Constitution.⁴⁸ The petition alleges that the provision violates:

- a) Article 20(1) which declares that fundamental rights are inherent and not granted by the state
- b) Article 20(2) which enjoins the state to uphold fundamental human rights and freedoms
- c) Article 21 which provides for the equality of all persons before and under the law in all spheres of political, economic, social and cultural life

⁴⁷ Parliamentary Hansard, December 12, 2006.

⁴⁸ Article 2(2) provides: ‘If any other law or custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of its inconsistency, be void.’

- d) Article 28(1) which guarantees the fundamental rights to a fair hearing before an impartial tribunal
- e) Article 36 which provides protection of minority rights

From the time of the establishment of the EOC in terms of the 2007, it appears that sex workers have not been able to access the EOC and they give the reason as the existence of section 15(6)(d) which locks them out.

Laws governing associations

There are two laws that govern registration of associations/organisations that have an impact on sex workers. These are:

i) The Non-Governmental Organisations Act 2016 (NGO Act)

This was passed amidst protests from the civil society community who accused the law of seeking to stifle civil society space. Indeed, the NGO Act imposes restrictions on operation of civil society generally. As far as sex workers are concerned section 30 prohibits registration of an organisation whose objectives as specified in its constitution are in contravention of the laws of Uganda. Section 31 equally prohibits any organisation operating without a valid permit issued by the NGO Bureau under the NGO Act.⁴⁹ Failure to produce a permit or any other required document is a criminal offence under section 40. Thus the Act poses a threat to sex workers' freedom to associate and form legally recognised groups, associations and organisations as stipulated under article 29(1)(e) of the Constitution. This is so because prostitution and related practices are illegal under the Penal Code Act. The potential implication of this provision is that one cannot register or operate an NGO, CBO or any other organisations or association whose objectives are stated to be the promotion of the interests of sex workers.

ii) The Companies Act 2012

This governs and regulates business associations, both profit making (companies limited by shares) and charitable undertakings (companies limited by guarantee). Organisations that exist to provide services to sex workers can thus register as companies limited by guarantee under the Act. The Companies Act generally focuses on incorporation and management of companies and would pass as a fair piece of legislation but for section 36(2), which provides that 'no name shall be reserved and no company shall be registered by a name, which in the opinion of the registrar is undesirable.' Needless to say, the provision itself is undesirable to the extent that it gives the Registrar of Companies unlimited discretion to

⁴⁹ According to the decision of the Constitutional Court in *HURINET & Others v Attorney General*, Constitutional Petition No 5 of 2009, the mandatory requirement of an operating permit for an organization to operate in Uganda is not a violation of constitutional rights and is a permissible limitation within article 43 of the Constitution. This means that for organisations that work on issues that can be interpreted as contravening the laws of Uganda, operating as organisations might not be possible.

determine and reject company names which are undesirable. At the time of this study this provision was the subject of a High Court challenge by Sexual Minorities Uganda (SMUG) against the Attorney General.⁵⁰ The case stems from an incident where the Registrar rejected the name 'Sexual Minorities Uganda' on the ground that it is unclear. When pressed for details, the Registrar asked for copies of the Memorandum and Articles of Association after which he concluded that SMUG's objectives included advocating for the rights of people who engage in criminal activities under section 145 of the Penal Code Act and therefore its incorporation would be tantamount to promoting an illegality.

Given this history, it is unlikely that a company or organisation, be it profit making or not-for-profit, whose name bears the words 'sex work' or 'sex workers' would pass the Registrar's scrutiny. Still, as can be seen from the SMUG example in its application, the Registrar can dig deeper than the proposed names and into scrutiny of objectives and activities of the intended organisation. This provision supplements sections 30, 31 and 40 of the NGO Act in the violation of the right of sex workers to form associations and assemble which is guaranteed under article 29(1)(e). Further, because sex workers may not freely form business associations such as companies and trade unions in their occupation's name, their right to work and related economic rights which are constitutionally protected under article 40 are severely restricted.

Employment laws

The Employment Act 2006 ushered in a new employee based dispensation. While it does not contain direct prohibitions of sex work, the Act defines an 'employee' to mean a person who has entered into a contract of service or apprenticeship or a person employed by or for the government. A contract of service is defined as any contract whether oral or in writing and either express or implied where a person agrees in return for remuneration to work for an employer. The Act is one of those laws that are notable for what they do not provide for as opposed to what they actually stipulate. Sex workers are excluded by the Employment Act of 2006 and therefore sex workers do not enjoy the benefits of employees under the Act including the right to form or join a labour unions, protection from sexual harassment at the workplace, the right to remuneration, the right of access to complaint settlement mechanisms such as the labour officer and the Industrial Court.

Drug laws

i) The National Drug Policy and Authority Act, Cap 206

On the face of it this legislation is innocuous. Its purpose is stated to provide for the establishment of a national drug policy and a national drug authority; to ensure

⁵⁰ *Frank Mugisha and Others v Attorney General* High Court Miscellaneous Cause No. 96 of 2016.

the availability, at all times, of essential, efficacious and cost-effective drugs to the entire population of Uganda, as a means of providing satisfactory health care and safeguarding the appropriate use of drugs.⁵¹ However, submerged deep in the text section 48(a) creates a criminal offence in the following terms: ‘No person shall smoke opium or Indian hemp or frequent any place used for the smoking of opium or Indian hemp.’

A related section 47(1) of the same Act outlaws possession, without lawful excuse, of narcotic drugs and psychotropic substances under international control and imposes the burden to prove presence of the lawful excuse on the person found in possession.

With the Chapter 14 offences of the Penal Code on offences against morality falling out of favour with the police and state prosecutors due to the difficulty encountered when attempting to prove them beyond reasonable doubt, sections 47 and 48(a) of the National Drug Policy and Authority Act have notoriously become the ‘go to’ offences for charging sex workers.⁵² As the study shows, sex workers are routinely arrested in large numbers and charged with offences under section 47 and 48(a) which violates not only the right to liberty under article 23 but also the right to dignity and freedom from degrading and inhuman treatment which are protected under article 24. Furthermore, enforcement of section 48(a) also inevitably infringes on the right to work and economic rights (article 40) because the places where sex workers ply their trade are often raided and those present charged with ‘frequenting a place used for smoking opium or Indian hemp.’

Section 47 is particularly notable for the fact that it shifts the burden to prove a lawful excuse for possession of drugs to the person facing the charges. The conformity of this provision with the presumption of innocence which is embedded in absolute terms in article 28(3)(a) is questionable. Shifting of the evidential burden of proof to an accused person, as opposed to the ultimate burden of proof, which always lies on the state, is a practise employed by some legislations in defined circumstances in many Commonwealth jurisdictions. But the effect of section 47 is to actually shift the entire burden of proof to an accused person to prove that they are innocent.

ii) The Narcotic Drugs and Psychotropic Substances (Control) Act, 2015

This is the new legislation that is aimed at streamlining the law on drugs. It has not yet gained the force of law because the Minister of Internal Affairs is yet to issue a statutory instrument for its commencement. The Act repeals sections 47 and 48 of the NDPAA. Despite this, it creates numerous criminal offences concerning possession, use and dealing in narcotic drugs which will have adverse effects on sex

⁵¹ Long title to the National Drug Policy and Authority Act.

⁵² See Section 3 below. Also see Human Rights Awareness and Promotion Forum The Implications of the enforcement of “Idle and disorderly” laws on the human rights of marginalised groups in Uganda (2016) 39.

workers. Section 4 adopts a strict liability prohibition of possession of narcotic drugs and section 5 outlaws trafficking in narcotic drugs. Moreover, section 6 lists various forms of prohibited acts relating to drugs including smoking, inhaling, chewing, manufacture, production, sale, preparation for smoking or sale, possession of tools and equipment used for smoking narcotics, promoting the use of narcotic drugs and recruitment into drug use among others. Sex workers, like many other persons, also use drugs. As a consequence, penal law on drug use form another tool of oppressing sex workers as they are likely, more than anyone else, to fall prey to them. Therefore for as long as the penal rather than the harm reduction approach is taken towards drug use in Uganda, sex workers remain victims of various penal laws that continue to criminalise their work in various ways.

Anti-Pornography laws

The Anti-Pornography Act, 2014 was famously nicknamed the ‘Miniskirt Law’. While the Act seeks to control pornography, it represents the most modern legislative affront on sex-worker existence and welfare in Uganda.

Section 2 defines ‘pornography’ *to mean any representation through publication, exhibition, cinematography, indecent show or by whatever means of a person engaged in real or stimulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual excitement.* This definition of pornography has been criticised and is the subject of a petition before the Constitutional Court in the matter of *Centre for Domestic Violence Prevention & Others v the Attorney General*.⁵³ The case contends that the section is overbroad, vague and subjective in character and that it contravenes the principle of legality guaranteed under articles 2(1) and (2), 28(12), 24, 23, 33(1), 29 and 44(c) of the Constitution.

The result of the section has and continues to be the source of inspiration of the harassment and mistreatment of both sex workers, and women in general. Upon its enactment into law, the Act was interpreted as a license for vigilante youth to enforce morality by attacking scores of women who were deemed to be dressed ‘indecently’.⁵⁴ There were also arrests and prosecutions by police.

Considering the fact that sex work is about sexually attracting and exciting other persons, it is highly probable and expected that sex workers will engage in what would amount to pornographic behavior. This is especially in the case of dressing that exposes one’s body parts, with the exclusive intention of sexually exciting another. This prohibition of pornography, with the wide sweeping definition, contributes to the pile of penal provisions in Uganda that account for the multiple criminalisation of sex work.

⁵³ Constitutional Petition No. 13 of 2014, currently pending in the Constitutional Court.

⁵⁴ ‘Confusion about Uganda’s mini-skirt ban leads to public attacks on women’ *The Guardian* 28 February 2014 <https://www.theguardian.com/fashion/fashion-blog/2014/feb/28/uganda-miniskirt-ban-attacks-women> (accessed 19 August 2016).

HIV laws

Sex workers are also likely to be prosecuted under the HIV and AIDS Prevention and Control Act of 2014, which creates the offence of attempted transmission of HIV under section 41. The offence carries a maximum fine of two hundred and forty thousand shillings or imprisonment for a maximum term of five years or both. Section 43(1) creates the offence of willful and intentional transmission of HIV to another person and it carries a fine of two million and four hundred thousand Uganda shillings or imprisonment for a term of not more than ten years or both. Sex workers have been identified as some of the Most At Risk Populations as regards HIV/AIDS infections.⁵⁵ This is attributable to their sexual interaction with multiple partners and lack of bargaining power, which causes them to be engaged in unsafe sex practices. This is in addition to the negative societal prejudices and criminalisation of sex work. Owing to this, in any scenario involving two HIV infected persons with one being a sex worker, it would be more probable that the odds would be against the sex worker as the person that transmitted HIV, hence being held criminally liable. This is not helped by the gender dynamics in the country where women are usually accused by their male counterparts of being the carriers of HIV in heterosexual relationships. Considering that most sex workers are female, this leaves them vulnerable to not only violence, but also criminal liability.

The HIV Act is also discriminatory in as far as it subjects persons charged with sexual offences to mandatory HIV testing under section 12 yet section 9 of the same Act provides for informed consent for HIV testing. This mandatory testing contravenes article 24, which guarantees the right to freedom from torture and cruel, degrading or inhumane treatment, article 21 on the right to equality and non-discrimination and also the right to privacy of the person under article 27 of the Constitution. The mandatory testing goes hand-in-hand with disclosure of test results to other people, which results in stigmatisation of the sex workers among family members and the communities where they live.

Uganda's HIV law prioritises criminalisation of the different aspects of the HIV/AIDS epidemic and public health, an approach that could prove counter-productive once the law is fully operational. This approach is a gross departure from the East African Community HIV/AIDS Prevention and Management Act 2012, which espouses the human rights based approach to HIV/AIDS management and public health. The Act also places Uganda at variance with the EAC approach as Article 118 of the Treaty for the Establishment of the EAC mandates partner states to undertake, among other activities, harmonisation of national health policies and regulations and the promotion of exchange of information on health issues in order to achieve quality health within the Community.⁵⁶ The EAC HIV/AIDS Act is

⁵⁵ Uganda AIDS Commission 'The HIV and AIDS Uganda Country Progress Report 2014' (2015) p.22.

⁵⁶ UNDP 'A comprehensive analysis of the HIV/AIDS legislations, bills, policies and strategies in the

specifically lauded for adopting a human rights approach, omitting criminalisation clauses and generally imposing obligations on member States to protect people living with or affected by HIV and AIDS from discrimination and abuse and provide appropriate prevention, treatment, care and support including protection of the rights of people living with or affected by HIV to non-discrimination including in relation to access to health care services; the right to freedom of movement; the right to privacy and confidentiality and non-disclosure of HIV status, provision for voluntary and confidential HIV testing among others.⁵⁷

Community Service Laws

All offences highlighted above are punishable by imprisonment or payment of prescribed fines. Section 3 of the Community Service Act empowers courts of law to substitute an imprisonment sentence with an order for community service. The Act has been used by magistrates at Makindye Magistrates' Court to sentence convicted sex workers to community service instead of imprisonment. Section 2 defines community service to mean 'noncustodial punishment by which after conviction the court, with the consent of the offender, makes an order for the offender to serve the community rather than undergo imprisonment'. Thus consent of the convicted person is key in the imposition of sentences under the Act.

Section 4 restricts community service orders to a maximum of six months with the offender working not more than eight hours per day. Application of the Act presents a relief from custodial sentences and extortion fines, which potentially reduces the abuse and agony of imprisonment. Community service sentences are usually awarded in cases that are not considered too serious to want heavy fines or incarceration. The offences relating to sex work carry heavy sentences of imprisonment, which would imply that prostitution and its related activities are considered grave offences. However, most sex workers are arrested under idle and disorderly offences and sentenced to community service. This is despite knowledge by law enforcement agencies that they are sex workers. This goes to show the redundancy of provisions criminalising sex work and proves the point that in criminalising sex work, not much harm is being deterred as the practice itself is not even taken that seriously by law enforcement agencies.

2.3.3 Bills

Proposed laws (bills) are important for they show the direction in which the law is evolving. The Sexual Offences Bill 2015 concerns sex work as it is regarded as one of the sexual offences. The Bill seeks to consolidate laws concerning sexual offences and sexual violence. The Bill does not go far in creating new sexual offences or redefining existing offences; it simply repeals Chapter Fourteen of the Penal Code and regurgitates almost all of the offences against morality in their original form

East African Community, a summary report' October 2014.

⁵⁷ As above.

and also reproduces some sections of the Anti-Pornography Act.

Clause 1 repeats the Penal Code definition of prostitution by defining a prostitute to mean ‘a person who in public or elsewhere regularly or habitually holds himself or herself out as available for sexual intercourse or other gratification for monetary or other material gain.’ Prostitution is prohibited under clause 12, which also retains the maximum punishment of seven years. Clause 13 creates an independent offence of soliciting in vehicles, streets or public places for purposes of sexual services. Clause 14 criminalises what is described as exploitation of prostitution including encouraging a person to engage in prostitution and controlling and managing activities of prostitutes. Under Clause 15, operating a brothel is prohibited. Clause 29 outlaws various practices in respect of child prostitution including causing, procuring, permitting or inducing a child to take part in prostitution.

Clause 21 provides for mandatory disclosure of a previous sexual offence by a prospective employee to a prospective employer when applying for a job relating to children by a former sexual offender and failure to disclose amounts to an offence, which may result into termination of employment or imprisonment for a term not less than three years. Lastly, clause 36 provides for a sex offenders’ data bank to contain the DNA samples of convicted sexual offenders.

Clause 30, which prohibits and extensively defines child pornography re-introduces and expands on section 14 of the Anti-Pornography Act. To this extent this clause does not introduce anything new except the part on punishment, which introduces a peculiar concept of a minimum sentence of six years. Providing for minimum sentences as opposed to maximum sentences reduces the discretion of courts and the right to a fair trial.

By re-enacting the criminalisation of prostitution and categorising it alongside such egregious acts as defilement, rape and the like, the Bill constitutes discrimination against sex workers, violates their right to work; freedom of assembly and association; the right to liberty and the freedom of movement as well as the right to dignity and freedom from torture and degrading treatment.

2.4 Conclusion

The existing civil and criminal laws are adverse to sex work activities in Uganda. As highlighted, the Penal Code Act remains the hallmark of these anti-sex work legislations with Chapter Fourteen’s ‘offences against morality’ at the forefront. While the Penal Code is from the 1950s and has been criticised as belonging to that era, there are new and proposed laws which not only re-iterate the fact that sex work is not accepted in Uganda but also impose further restrictions on access to justice, medical care and other fundamental rights and freedoms.

SECTION III:

THE CURRENT TRENDS IN THE LEGAL REGULATION OF SEX WORK IN UGANDA

3.0 Introduction

This chapter presents the findings of this study on the trends obtaining in the enforcement of laws affecting sex workers in Uganda. The findings are divided into trends in the use of the criminal provisions under the Penal Code and the use of criminal and other provisions under the much newer laws like the Anti-Pornography Act and the HIV/AIDS Prevention and Control Act.

3.1 Use of the criminal provisions under the Penal Code

The following trends were identified in respect of the use of the Penal Code provisions to regulate sex work:

3.1.1 Trends in arrests: Police swoops and targeted arrests

Female sex workers reported being arrested *en masse* during police operations though the motive for such arrests was generally believed to be money.¹

A routine operation involves the rounding up of female sex workers and loading them onto a police truck/patrol car until it is full. They are then taken to a police station/post, usually Katwe, Kibuye, Clock Tower, Nabisalu, or City Hall, where they are forced to surrender all the money they have on them to the police in order to secure their release.² Those detained are charged and released on police bond or presented before court. Sometimes, female sex workers are raped by the arresting officers and then released or simply offer sex in return for release before being taken to a police station/post.³

A respondent identified as FSW5 described what happens at the police station:

After arrest, we are thrown onto police vans and taken to a police station where we find TV and other media cameras waiting. We are forced to be filmed and pictured by the press. All the money one has is confiscated and she is left penniless. We are then crowded in a police cell and can only be released on payment of an amount of money. All the time, the police officers would be shouting at us that we are prostitutes who sell our bodies.⁴

¹ Interview with FSW1, FSW2 and FSW3 on 1st July, 2016.

² Revelation during FGD with female sex workers (FSWs) on 1st July, 2016.

³ Revelation during FGD with FSWS on 1st July, 2016.

⁴ Interview with FSW5 at Makindye on 1st July, 2016.

It was reported that this practice was prevalent up to around 2008 but then started decreasing due to increased sex work sensitisation, and engagement with police and local authorities.⁵ In fact the current trend in Makindye is towards close cooperation between the Police and sex workers. It was reported that nowadays operations, when they do happen, start after midnight as opposed to previously when they used to start as early as 7pm. In some places, police officers offer security to sex workers in collaboration with the venue managers and brothel operators. This however does not prevent police officers from other stations from rounding up the sex workers. Another approach which was alluded to by Diana Natukunda is that when a mass arrest is to be conducted, it has to be carried out in the presence of the area Local Council I Chairperson.⁶

In some cases, the arrests are instigated by relatives or parents who liaise with the police to have sex workers arrested. According to Amber, a trans-sex worker, her father had her arrested and detained by the Police. She was only released after four days.⁷

MSWs on the other hand do not suffer mass arrests but rather targeted arrests whereby one is trailed and followed for days, weeks or even months by neighbors, landlords, police officers etc.⁸ MSW2 reported being trailed for a long time by ASP Kirumira⁹ before his arrest in 2011. The same experiences were shared by Rose, Amber and Amelia (not real names) who are all transgender female sex workers.¹⁰ Transgender participants in the study reported a more precarious situation on their hands. Because of the way they look and dress, usually appearing to the public to be of the opposite gender, they have become the public image of homosexuality and of men who sell sex to other men and are thus easily targeted for arrest.¹¹ This finding is in keeping with the earlier study by HRAPF and CSCHRCL (2013), which found that transgender persons are highly susceptible to arrests due to their appearance, cross-dressing and acting like members of the opposite sex.¹² Specifically, the HRAPF and CSCHRCL (2013) study states:

⁵ FGD with (FSWs) on 1st July, 2016.

⁶ Interview with Diana Natukunda (Peer Educator) on 1st July, 2016.

⁷ Interview with Amber (not real names) conducted on 17th October, 2016.

⁸ Revelation during FGD with male sex workers on 17th October, 2016.

⁹ Assistant Superintendent of Police, Mohammed Kirumira, who at the time of publication was the District Police Commander in Buyende District, has served in leadership positions in the Police in metropolitan Kampala, and sex workers point him out as a key figure in their arrests and harassment.

¹⁰ All three were interviewed on 17th October, 2016.

¹¹ Interview with Rose and Amelia on 17th October, 2016.

¹² Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) and Human Rights Awareness and Promotion Forum (HRAPF) *Protecting 'morals' by dehumanising suspected LGBTI persons: A critique of the enforcement of the laws criminalising same sex conduct in Uganda* 13.

*'Usually the arrests are not premised on a reasonable suspicion as to the commission of an offence; rather, they are due to the external appearance of the person, or a tip off by a third party, or an attempt at mob justice by the community, or by entrapment by the police.'*¹³

Because of this, the public usually identifies them and calls the police. Rose illustrated how this happened in her case:

One day I had spent a night at a friend's place somewhere in Kampala. Early in the morning, before 6am, a mob knocked and then banged the door. When we opened we found the area chairperson, a couple of police officers and a large group of neighbors who began hurling insults at us and throwing stones. We were badly beaten while the police looked on. When my friend escaped, I was beaten even more severely until I lost consciousness. When I regained my conscious I was at the Police Station.

Also, the arrested male sex workers usually spend more than 48 hours in detention in case they cannot pay for their freedom or in case someone is 'fuelling' the detention, and they are also denied access to lawyers. They are put in male cells and subjected to abuses and humiliation. According to Amber:

I was picked from home and taken to a Police Station. While at the station, I was put in a male cell where I was fondled and molested by the inmates. During morning parades of inmates, the presiding police officers would point at me and loudly announce that I was going to Europe to do homosexuality with sugar daddies which would incite ridicule from the other inmates and police officers. When lawyers from HRAPF came to see me, they were denied access because of my father's influence. I spent four days at the police station and I was never produced in any court. I think I was charged with something to do with human trafficking.

The sex workers who are arrested are usually paraded before the media. In Makindye Division, the media has replaced the law and the police as the most fearsome weapon against sex workers. Respondents repeatedly narrated stories of sex workers who were arrested by patrol police, paraded before the media, mainly television and print media, forced to look into the cameras and then released without charge.¹⁴ It was reported that nowadays whenever the police is carrying out operations to arrest sex workers, they move with members of the media or ordinary members of the public carrying phone cameras.¹⁵ Most of the

¹³ As above at 13.

¹⁴ During FGDs with FSWs and MSWs on 1st July, 2016 and 17th October, 2016 respectively.

¹⁵ As above.

sex workers who were part of the study do not do so openly and have jobs and responsibilities during day time and exposure has not only cost them family ties but also led to scorn and harassment, rejection and loneliness.¹⁶ Some of the cited media outlets include Bukedde TV whose flagship daily bulletin ‘*Agataliiko Nfuufu*’ featured prominently, as well as NBS TV and Bukedde newspaper.

3.1.2 Trends in charges: Limited / no use of ‘prostitution’ offences as charges

The Penal Code contains several offences criminalising sex work including prostitution, living on the earnings of prostitution, and operating a brothel, but in practice these offences are rarely used against sex workers.

At Katwe Police Station, the investigating police officers interviewed had never investigated any of the prostitution offences¹⁷ and no-one was in Luzira Prison over these offences.¹⁸ There were even doubts on whether prostitution is still an offence with one police officer stating that ‘*I don’t think sex work is an offence in Uganda. In fact those laws have been repealed by a certain case in the constitutional court.*’¹⁹

The enforcement of the provisions prohibiting the operating of a brothel could have serious human rights implications for sex workers, who could easily lose their basis of security and organisation, as well as be made vulnerable to arrest and exposure in the media along with the owner of the brothel involved. The study found, however, that not even this provision is enforced in practice. The Executive Director of a sex workers’ organisation based in Kampala explained that brothel owners are never arrested, despite the existence of this provision.²⁰ She explains that the only time when brothel owners would have runs-ins with the law is when a person with a personal agenda tips off the police.²¹

At the Chief Magistrate’s Court at Makindye, not a single charge relating to any of the prostitution offences in the recent past was found. Likewise, none of the sex workers who took part in the study reported being charged with these offences.²² FSW10 summed this up in the following terms: ‘*[A]fter we were arrested, we were*

¹⁶ As above.

¹⁷ Interview with IO1 and IO2 at Katwe Police Station on 13th June, 2016.

¹⁸ Interview with the OC Reception Women’s Prison Luzira held on 13th June, 2016.

¹⁹ Interview with a Crime Investigations Officer at Katwe Police Station designated for purposes of this report as IO1.

²⁰ Interview with Kyomya Macklean, Executive Director of AWAC, 12 November 2016.

²¹ As above.

²² It should be noted that there was a challenge with sex workers’ responses to questions relating to the specifics of offences charged because most of them expressed ignorance of the legal paper work and procedures beyond arrest, incarceration and release.

taken to court where papers were read to us. We were then asked to pay Uganda Shillings 200,000 and released'.²³

The reasons for the infrequency of charges of prostitution and related offences are varied. Members of the police pointed to the fact that prostitution and related offences are difficult to prove beyond reasonable doubt during a criminal trial.²⁴ Police respondents further explained that the problem is exacerbated by the difficulties in gathering evidence and getting witnesses. In his explanation IO2 had this to say:

*'Prostitution is committed by sex workers under the cover of darkness and in hotels, brothels and lodges where the only potential witnesses are their clients and fellow sex workers who are usually unwilling to testify against the sex worker. Testimonies by Police Officers alone cannot secure a conviction.'*²⁵

A number of respondents also referred to a presidential directive prohibiting the police from carrying out arrests of sex workers as the reason why prostitution and related charges are not preferred. However, the existence of such a directive could not be verified during the study.²⁶ What exists is a presidential pronouncement that the police should not arrest people under the idle and disorderly laws, which are actually used against sex workers very often.²⁷ Also, the Inspector General of Police, Edward Kale Kayihura is said to have issued an order stopping the Police from arresting sex workers in 2014.²⁸

To conclude with the explanation of one police officer, the police find it easier to arrest those sex workers who are on 'roadside display' and charge them with offences like being rogue and vagabond rather than the provisions which actually criminalise sex work.²⁹ That said, although the prostitution laws are themselves lying idle, the arrests of sex workers under general provisions of law is largely

²³ Interview with FSW10 on 1st July 2016.

²⁴ Interview with Police Crime Investigations Officers IO1 and IO2 at Katwe Police Station held on 13th June, 2016.

²⁵ Interview with IO2 at Katwe Police Station on 13th June, 2016.

²⁶ Interview with FSW1, FSW2 and FSW5. IO1 also alluded to the existence of a Presidential Directive.

²⁷ 'Museveni vows to scrap idle and disorderly law' *Daily Monitor* 11 February 2016.

²⁸ Interview with HRAPF's head of the Access to Justice Unit, Patricia Kimera, 7th October 2016. Also see WONETHA 'The law enforcement officer is now the offender' 9 August 2016 <http://wonethauganda.org/the-law-enforcement-officer-is-now-the-offender/> (accessed 14 October 2016) and 'Police Officers using idle and disorderly law for extortion - Gen Kayihura' *Uganda Radio Network* 9 December 2015.

²⁹ Interview with IO2.

fueled by the knowledge that sex work is illegal in Uganda.

For male sex workers, offences on having carnal knowledge against the order of nature (section 145) and attempts to commit unnatural offences (section 146) are also used as charges. Although these provisions are generally considered to be anti-sodomy mainly targeting those practicing homosexuality, the study finds that the two provisions are used to curtail sex work activity of male sex workers who provide sex services to male clients.

Firstly, because of the existence of these provisions and the eagerness of law enforcement agencies to implement them, MSWs cannot come out openly to provide sexual services to the public. This is a different situation compared to female sex workers who, although generally despised, are readily available on the streets. Thus, male sex work activity is completely discreet. MSW1 narrated that they rely on referrals from their social contacts, phone calls and subtle clues on one's dressing, facial and other bodily expressions, conduct and demeanor to identify clients or to be identified as MSW.³⁰

Secondly, MSW1, MSW2, MSW3, Rose, and Amelia all reported incidents of abuse and exploitation by clients who refuse to use condoms or default on payment because of the knowledge that the MSWs have no recourse to the justice system thanks to criminalisation of '*carnal knowledge against the order of nature*'.³¹

The fact that the specific provisions criminalising sex work are virtually redundant does not mean that the strong arm of the law is not used against sex workers. The study has found that sex workers are often charged under the Penal Code offences of 'being idle and disorderly' or 'being a rogue and vagabond'. Due to the broadness of these offences, they can easily be used by the police and prosecutors to find sufficient grounds to justify an arrest and the commencement of a charge.

Theft is another offence under the Penal Code, though not an offence against morality, which featured prominently. Sex workers are usually charged with theft under sections 253 and 254 on allegations of stealing property from their clients.³² Diana Natukunda, Peer Educator at WONETHA, admitted that in some rare cases sex workers, especially those who are not yet sensitised, do steal clients' property but was quick to add that misconduct has generally reduced due to sensitisation.³³ That said, respondents insisted that charges and accusations of theft against sex workers are usually unfounded.³⁴

³⁰ Interview with MSW1 on 18th October, 2016.

³¹ Information revealed during an FGD held with MSWs on 18th October, 2016.

³² FGD with FSWs on 1st July, 2016.

³³ Interview with Diana Natukunda, peer educator at WONETHA, on 1st July, 2016.

³⁴ Interview with FSW1, FSW2 and FSW5 on 1st August, 2016.

Offences under the NDA Act have also become popular. Sex workers are rounded up from bars, nightclubs and other work places and charged with smoking opium or frequenting a place used for smoking opium under section 48(a). The offence of possession of narcotic drugs without lawful excuse is also preferred in some cases. Katwe Police Division recorded receiving 282 cases under frequenting a place used for smoking opium for the period 2011-2015. As IO1 and IO2 observed, proof of offences under the NDA Act would not be as difficult as those under the Penal Code as NDA offences are most likely committed in public.³⁵ In fact section 47(1) places the burden of proving a lawful excuse of possessing narcotics on the accused person, which makes it a rather easy resort.

The impact of the newly enacted NDPSA cannot be felt until the Act commences its application and operation. Nonetheless, the new legislation introduces a number of penal provisions against possession, use and any form of engaging in narcotic drugs, which could have adverse effects for sex workers once in full force.

3.1.3 Trends in Prosecuting Cases in courts of law

A few cases involving sex workers make it to the courts of law. To study this trend, the researchers perused the Minor Contravention Book (MCB) record, had access to some criminal case files and interviewed the Chief Magistrate and State Attorney at Makindye Chief Magistrate's Court. The MCB record covered two years from the period 2014 – 2016. The selection of the period 2014 -2016 was in line with the overall scope of the study which sought to analyse impact of new laws on sex workers. Thus, it was estimated that the 2014 – 2016 period would be the period of impact. The MCB records at Chief Magistrate's Court at Makindye showed that between 2014 and 2016, 12 cases of possession of drugs, 1 case under the Anti-Pornography Act; and 1 case of being rogue and vagabond were prosecuted in the court.

This shows that some of the cases more especially those that are drug related and those concerning being rogue and vagabond find their way to court. Also one case under the Anti-Pornography Act made it to the court.

The findings also show that sex workers largely lack legal representation. The Resident State Attorney's office at Makindye Court revealed that most cases involving sex workers are not defended by counsel since most of them are indigent and cannot afford legal fees. It was however emphasised that despite the usual lack of legal representation, sex workers receive a trial before a court that is impartial citing the case of *Panadol w'abasajja* where the suspect was granted bail despite appearing before court dressed in her *work clothes* and with coloured hair.³⁶

³⁵ Interview with IO1 and IO2 at Katwe Police Station on 13th June, 2016.

³⁶ Interview with the Resident State Attorney Ms. Happiness Ainebyona, Makindye on 16th June, 2016.

Another finding was the fact that in criminal cases, most legal aid service providers provide legal support to complainants as opposed to accused persons.³⁷ On their part, sex workers highlighted their inability to pay lawyers but a number of them talked confidently about the legal aid services provided by Human Rights Awareness and Promotion Forum (HRAPF) in partnership with WONETHA.³⁸ Susan Baluka, a lawyer with HRAPF, stated that the organisation tries within the limited resources to provide legal services in all cases reported. She noted that the biggest challenge in handling these cases is the absence of ready and competent sureties and the large sums of money required to secure bail. This money is not easily recoverable as the sex workers usually have no bank accounts registered in their names in which the money recovered from the state can be deposited. This makes the organisation's capacity to handle all cases to be limited and also in some cases the sex workers and/or their managers prefer to pay bribes to the police and get released.³⁹

The lack of legal representation was cited as one of the main reasons why sex workers are readily willing to plead guilty and serve lesser punishments such as fines of Uganda Shillings 200,000, cautions and community service rather than risk the uncertainty of a full criminal trial.⁴⁰

3.1.4 Trends in conclusion of cases: dismissal for want of prosecution, skipping bail or convictions on pleas of guilt

The study revealed that the majority, if not all of the cases, end in one of three ways: dismissal for want of prosecution; skipping bail; and pleas of guilt. On dismissal for want of prosecution, this is usually under section 119 of the Magistrates Courts Act, and it occurs when the prosecution consistently fails to present evidence in court. Also in most cases where the accused persons are granted bail, they skip bail and are not seen again in court. As for pleas of guilt, people are usually advised to plead guilty so as to get lighter and usually non-custodial sentences, such as cautions, fines between UGX 100,000 (USD 30) and UGX 200,000 (USD 60). It is also worth stressing that most of the time suspects plead guilty to the offences with which they are charged due to pressure from managers and their handlers, fear of imprisonment and ignorance.⁴¹ It is the sex workers' version of buying one's freedom.⁴² Lack of adequate legal representation for sex workers was highlighted as another possible explanation for this trend by the State Attorney at Makindye Court when she stated: '*Sex workers do not have legal representation and most of*

³⁷ As above.

³⁸ Revelation made during the FGD with FSWs on 1st July, 2016.

³⁹ Interview with Susan Baluka, Legal Associate, Sexual Minorities Unit at Human Rights Awareness and Promotion Forum conducted on 4 July 2016.

⁴⁰ Revelation during FGD with FSW on 1st July, 2016.

⁴¹ Susan Baluka (n 39 above).

⁴² As above.

*them end up pleading guilty.*⁴³

Carrying out arrests and preferring charges with no serious intention of prosecuting the accused persons violates the right to a fair trial, the right to liberty, the right to dignity and the right to equality among others. Sex workers who jump bail also live in hiding fearing re-arrest, which violates their dignity, freedom of liberty and the right to work.

3.1.5 Trends in sentencing: Punishments are usually ‘minor’

Where convicted, usually on the accused’s own plea of guilt, sex workers are sentenced to pay a fine ranging between UGX 200,000 (USD 60) and UGX 500,000 (USD 150), to perform community service under the Community Service Act or, in rare cases, to a short period of imprisonment.⁴⁴ The OC of Reception at Luzira Women’s Prison (POC1) stated that the majority of suspects upon remand are usually released after a few weeks.⁴⁵ The OC also stated that the only prisoner who is known to be a sex worker has been convicted of theft from a client. The Chief Magistrate at Makindye Magistrates Court also noted that the few cases the court receives involving sex workers are rarely prosecuted and die a natural death due to the lack of evidence and witnesses.⁴⁶ The only convict he handled pleaded guilty under the Anti-Pornography Act and was given a sentence of UGX 200,000 (USD 60) or one year imprisonment upon default while the co-accused was released on bail.⁴⁷

Suffice to note, these punishments appear minor but when considered in the broader context they are actually quite punishing. For example, the fine amounts of UGX 200,000 (USD 60) to UGX 500,000 (USD 150) might appear little but for some sex workers it is a fortune amounting to one’s earnings for months. There are those who have failed to raise the money and ended up serving prison sentences.⁴⁸ Case in point is FSW5 who testified to serving a six months’ sentence for failing to raise UGX 450,000 (USD 135).⁴⁹ More so, these lighter sentences are also on the backdrop of long remand periods extending sometimes to six months.⁵⁰

⁴³ Happiness Ainebyona (n 36 above).

⁴⁴ From Court records at the Chief Magistrate’s Court which were perused by the researcher on 14th June, 2016.

⁴⁵ Interview with POC1 at Luzira Women’s Prisons on 13th June, 2016.

⁴⁶ Interview with His Worship Richard Mafabi (RIP) at Makindye Chief Magistrate’s Court on 14th June, 2016.

⁴⁷ As above.

⁴⁸ Interview with FSW5 on 1st July, 2016.

⁴⁹ As above.

⁵⁰ For example in her case Rose and a friend spent up to six months in prison.

3.2 The use of other laws beyond the Penal Code to regulate sex work

Most respondents only thought of the idle and disorderly laws as having an impact on sex work. This study showed that the other laws too have an impact on sex work as they act to deter and change the way sex work is done. Each of these will be discussed in turn:

3.2.1 Anti-Pornography Laws

The Anti-Pornography Act generated initial excitement among the public and even law enforcement officials, but it has been subjected to a legal challenge. However, its definition of pornography is so wide that it would cover how women dress. This would inevitably restrict sex workers' means of marketing their services. The Luganda mantra '*Atunda ayolesa y'amazaawo amangu*' loosely translated to mean '*displaying products leads to quicker sales*' runs through the sex work business in Makindye. When the Act was passed it became difficult for sex workers to don appropriate wear or even operate their business due to fear of police arrests and attacks from vigilante youth groups.⁵¹ But since the initial excitement generated by the Act in its early days died down, the Act has remained largely ignored, but it nevertheless remains a real threat against sex workers.⁵²

At Makindye Magistrates Court the study found one case under the Anti-Pornography Act, *Uganda v Muchula Didi March Mugisa and Kansime Jemimah alias Panadol W'Abassajja*⁵³ which is ongoing. However the case has been stayed pending the determination by the Constitutional Court of *Centre for Domestic Violence Prevention and 8 others v Attorney General*.⁵⁴ The accused persons were charged with producing or promoting pornography under section 13 of the Anti-Pornography Act. The first Accused (A1) pleaded guilty and was sentenced to a fine of UGX 200,000 (USD 60) or imprisonment for one year upon default and he paid the fine while the second Accused (A2) was released on bail but has since jumped bail and a warrant of arrest was issued.⁵⁵

3.2.2 HIV/AIDS Laws

Like the Anti-Pornography Act, the HIV and AIDS Prevention and Control Act is not being fully enforced thus its practical impact is yet to be felt by sex workers operating in Makindye Division. Nonetheless, during an FGD with sex workers they demonstrated impressive knowledge of the HIV/AIDS Act which was attributed to

⁵¹ FSW1, FSW2, FSW3, FSW5 and FSW10 all testified to this during an FGD with them on 1st July, 2016.

⁵² As above.

⁵³ MAK/00/CO/1300/2014.

⁵⁴ Constitutional Petition No. 13 of 2014.

⁵⁵ Court record accessed by the researcher on 14th June, 2016.

sex worker empowerment programs by WONETHA, HRAPF and MARPS Network.⁵⁶ Respondents though had mixed feelings about the HIV/AIDS Act with both negative and positive comments about its provisions. Respondents expressed disappointment with the requirement for mandatory disclosure of HIV test results and mandatory testing.⁵⁷ It was also observed that criminalisation of willful transmission of HIV has discouraged sex workers from undertaking HIV tests since the offence requires knowledge of one's status.⁵⁸

On the positive side, three of the respondents FSW1, FSW3 and FSW6 reported invoking the HIV/AIDS Act to compel their clients to wear condoms.⁵⁹ In the sex work business male clients are notoriously averse to condom use,⁶⁰ but when sex workers threaten to report them to police for violating the HIV/AIDS Act, they oblige.⁶¹ In fact FSW2 quipped *'This tactic has worked for me very well. The HIV law is not that bad, it just has to be improved to make it work for us better.'*

In a way, sex workers have taken matters in their own hands and are enforcing the HIV/AIDS Act to their benefit. Provisions on counseling and care for HIV positive persons also received applause. No one ever reported having been arrested or faced threats under the HIV/AIDS Prevention and Control Act. Nevertheless, the silent implications on HIV testing remain real issues of concern.

3.2.3 Law governing Associations

None of the respondents had attempted to register a company limited by guarantee under the Companies Act. There is also no known case of an organisation providing services to sex workers which have attempted to register under the Companies Act but was refused registration. Instead, Ms. Macklean Kyomya, the Executive Director of Alliance of Women Advocating for Change (AWAC) informed the Researcher that she registered AWAC as a Company Limited by Guarantee without any problems.⁶² However, it should be noted that there is nothing in the words 'Alliance of Women Advocating for Change (AWAC)' which would, even with the widest possible interpretation, offend section 36(2) the Companies Act. Therefore this provision remains untested by sex worker-led organisations. Similarly, Susan Baluka, lawyer at HRAPF reports that organisations that are intended to provide sex worker services have successfully been registered at the Companies Registry without being rejected unlike those that work on LGBTI issues. She stated however,

⁵⁶ FGD with FSWs held on 1st July, 2016.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ Interview with FSW1, FSW3 and FSW6 held 1st July, 2016.

⁶⁰ As above.

⁶¹ As above.

⁶² Interview with Macklean Kyomya held on 21st October, 2016.

that usually the objectives are general and address issues of women or HIV and the names do not contain the words sex workers.

Considering that regulations to the new NGO Act are yet to be adopted, the Act's actual impact on existing organisations which provide services to sex workers as well as organisations which would attempt to register in terms of the Act remains to be seen.

3.2.4 Equal Opportunities Laws

None of the respondents reported attempting to access the EOC. The question as to whether or not the Commission would hear a case brought by a sex worker could thus not be answered from the study sample. The Chairperson of the EOC Ms. Sylvia Muwebwa Ntambi, noted that when receiving complaints the EOC does not investigate who the complainants are and what they do but rather receives complaints from all and sundry.⁶³ It seems that the EOC may not have been implementing section 15(6)(d) in the discriminatory manner as feared, even prior to the nullification of this section. Nevertheless, the fact that none of the respondents have attempted to access the EOC, despite the wide range of violations regularly suffered, speaks to the real and perceived accessibility of the Commission to this group.

3.2.5 Employment Laws

Sex workers are excluded from the Employment Act of 2006 and therefore they do not enjoy the benefits of employees under the Employment Act including the right to form or join a labour unions, protection from sexual harassment at workplace, the right to remuneration, right of access to complaint settlement mechanisms such as the labour officer and the Industrial Court. They also do not even bother accessing such bodies. This law therefore operates through exclusion.

3.2.6 Drug Laws

With the Chapter 14 offences of the Penal Code falling out of favour with the police and state prosecutors due to the difficulty encountered when attempting to prove them beyond reasonable doubt, sections 47 and 48(a) of the National Drug Policy and Authority Act have notoriously become the 'go to' offences for charging sex workers.

3.2.7 Laws providing for alternative punishments

The Community Service Act provides for alternative punishments to imprisonment in the form of community service. The decision by judicial officers to impose sentences under the Community Service Act as opposed to custodial sentences or fines generally received positive reviews among sex workers as illustrated by

⁶³ This view was expressed in her address at the HRAPF Annual General Meeting held on 30th July, 2016 at the HRAPF Secretariat in Namirembe, Kampala.

FSW5's testimony:

*'Previously, I was arrested and imprisoned for six months at Kigo Prison after failing to raise the fine of UGX450,000 (USD 135) for idle and disorderly (sic). I would have no problem with slashing or doing general cleaning at a hospital, court or sub-county headquarters.'*¹

This approach resonated with most of the other sex worker respondents as it saves times, is less costly and saves one the trauma of undergoing a prison sentence.²

3.3 Conclusion

As the foregoing discussion illustrates, there are numerous legislations both criminal and non-criminal, which affect sex workers. However, the enforcement trends show mixed signals with strict and overzealous enforcement of selected provisions and a general apathy towards others. It is however important to note that whether enforced or not, the presence of laws which affect sex work feeds into the stigma, oppression and violations of sex workers. It also makes them unapprehended criminals, and leads them to find challenges in accessing services including HIV services.

¹ Interview with FSW5 on 1st July, 2016.

² Revealed during FGD with FSWs held on 1st July, 2016.

SECTION IV:

THE IMPLICATIONS OF REGULATION OF SEX WORK ON THE HUMAN RIGHTS OF SEX WORKERS

4.0 Introduction

This section presents the findings on the lived realities and implications of Uganda's laws on the human rights of sex workers. The discussion identifies specific human rights and freedoms and uses the respondents' experiences and narrations to make a case of prevalent human rights violations.

4.1 Violations of sex workers' rights

The following are some of the rights violated by the regulation of sex work:

4.1.1 Right to equality and freedom from discrimination and the rights of women

Arresting someone simply because they are a sex worker would be a violation of the right to equality. Also female sex workers are usually the most affected by the enforcement of these laws, and this is largely due to their sex. By women being subjected to arrests on their status and by the state not taking positive steps to protect female sex workers, the state is in violation of the rights of women.

4.1.2 The right to liberty

Reasonable suspicion would imply that the circumstances should indicate that the person has committed an offence and that there is a likelihood of successfully prosecuting them. However, the outcomes of these arrests point to the fact that they are done without any real expectation of the cases succeeding. This results into the laws being used for persecution rather than prosecution. In spite of numerous arrests of sex workers, the Court record at Makindye Magistrates Court did not contain a case which had gone to full trial as most cases were terminated for lack of evidence by the prosecution or the accused persons pleaded guilty, were convicted and sentenced to minor punishments.³

During the FGD with sex workers, FSW1 hinted at the motivation behind this practise when she stated that *'The police carry out operations to arrest sex workers whenever they are broke and need some money.'*⁴ Arresting someone for the purposes of extorting money cannot be a justification for the deprivation of the right to liberty.

As shown in the last section, the police simply swoop down on sex workers and there is no time to inform them of the reasons of arrest, let alone of the right to a lawyer, and thus violating this right. Sex workers are usually held for longer than 48

³ The Court record was perused by the researcher on 16th June, 2016.

⁴ FSW1 during FGD with FSWs on 1st July, 2016.

hours after being arrested as stated during the FGDs.⁵

4.1.3 The right to freedom from inhuman and degrading treatment

Respondents reported widespread abuses of sex workers which are precipitated by criminalisation of sex work in Uganda.⁶ Sex workers are arrested in swoops where they are fondled, and beaten and sometimes have to give in to sex before being released. These are violations of the right to human dignity. The parading of sex workers before media after their arrest is also a violation of this right.

4.1.4 The right to property

Experiences of sex workers are at odds with the guarantee of the right to property. The most prevalent avenue for property deprivation is arrests. Upon arrests sex workers are forced to surrender to the arresting officers their hard earned money which is never seen again and on release they are simply told to go away without the money ever being refunded.⁷ In some instances sex workers are arrested, loaded on a truck, their money confiscated and then released.⁸ To this end FSW2 narrated *'One night we were arrested and the police started counting us to estimate how much money they would collect.'*⁹

To avoid this extortion, sex workers have adopted desperate and extreme measures to try and preserve their money including hiding the currency notes in the knickers (even though this does not guarantee safety as they are sometimes undressed), hiding the money in the mouth among others.¹⁰

4.1.5 The right to privacy

As narrated by FSW5, it has become an expected part of an arrest, especially during police swoops, that the media will either accompany the police during their operations or will be waiting with their cameras at the stations.¹¹ Rose, a transgender female sex worker, shared her experience of having her door broken down by a mob of community members and police officers:¹² *'Early in the morning, before 6am, a mob knocked and then banged the door. When we opened we found the area chairperson, a couple of police officers and a large group of neighbors who began hurling insults at us and throwing stones.'*

⁵ During FGDs with FSWs and MSWs on 1st July, 2016 and 17th October, 2016 respectively.

⁶ Revelation during FGD with FSWs on 1st July, 2016.

⁷ As above.

⁸ As above.

⁹ Interview with FSW2 on 1st July, 2016.

¹⁰ During FGD with female sex workers on 1st July, 2016.

¹¹ Interview with FSW5 at Makindye on 1st July, 2016.

¹² Interview with Rose, 18th October 2016.

The actions of the police in forcefully entering upon premises and arresting sex workers, undressing them, and exposing them to the media is a violation of the right to privacy.

4.1.6 The rights of children

When sex workers are arrested, their children are usually left with no-one to take care of them, and many miss out on education.

4.1.7 The right to work and practice one's profession

All the respondents who took part in the study, including those who are opposed to the idea of selling and buying sex did concede that sex work is a source of livelihood for those who take part in it. Some of the mantras in use among the sex worker community such as '*nekolera gyange*' (I am self-employed) and '*my ass is my capital*' underscored this reality. FSW1, FSW2, FSW3, FSW4, FSW5, FSW6, FSW7, FSW8, FSW9 and FSW10 all admitted earning school fees for their school going children, food, rent, clothing and other needs from sex work.¹³ In fact IO1 and IO2 of Katwe Police Station went a step further and described sex work as '*lucrative business*'.¹⁴ However, given the restrictions on sex work and violations highlighted in this report, practising sex work as an occupation remains prohibited and frowned upon.

4.2 Other violations

There are other violations that emerge out of the regulation of sex work, which may not be regarded as human rights violations, but they nevertheless affect sex workers immensely. These are:

Disruption of family and community life

The fact that sex workers can never know when they will be arrested and for how long they will be detained means that their families often have to face periods of unexplained and unexpected absence. This leaves families in a constant state of uncertainty and angst as they can always expect their loved ones not to return home.

Exposure of a dual identity

The practice of parading sex workers before the media was found to be damaging to relations between sex workers and their communities. Many of them engage in the business without the knowledge of their family members and communities. They usually work a distance from where they stay. Exposing them and revealing their identities causes them to be known and then they have to move or face the stigma for the rest of their lives.

¹³ As above.

¹⁴ Interview with IO1 and IO2 on 13th June, 2016.

Vulnerability to infections with HIV and other Sexually Transmitted Infections

The criminalisation of sex work exposes sex workers to a greater risk of infection with HIV and other STIs. Apart from the vulnerable position they are placed in when it comes to insisting on safe sex, the criminalisation of sex work also places barriers in the way of sex workers' access to healthcare services. Sex workers tend to be wary of approaching healthcare service providers due to the fear of facing ostracism and ill-treatment, which means they are less likely to go for regular check-ups which will help identify, treat or even prevent certain STIs.

4.3 Sex worker empowerment: A panacea to arrests, abuses and violations?

There was a near consensus on the assertion that arrests and other human rights violations of sex workers in Makindye Division have been on the wane in the past 2-3 years. Even enforcement agencies including the police, prisons and state attorneys conceded that nowadays sex workers almost operate freely in Makindye Division and the rest of Kampala. Sex worker respondents attributed this trend to the empowerment of sex workers by WONETHA and HRAPF, which do not only offer legal aid services to sex workers during arrests, detention and trials but also organise sensitisation workshops and trainings about human rights as a result of which sex workers have become empowered and easily engage the police.¹⁵ HRAPF has trained many sex workers as paralegals who can represent others.

Similarly, members of the police force have been trained on the rights of sex workers hence reducing the confrontation between the two groups. Another reason forwarded was the introduction of community policing whereby sex workers work closely with the police to identify and weed out criminals from amongst themselves and also train members to desist from practices and conduct that violate the law¹⁶. The introduction of police uniforms which bear name tags has also contributed to reducing abuses by making perpetrators clearly identifiable.¹⁷

One shining example of sex worker empowerment and their attempts to resist abuse concerned a case of *Uganda vs. Musoby Saphain*.¹⁸ The case arose out of 2013 incident where a peer educator from WONETHA was slapped by a police officer. She reported assault complaint no MCB95//2013 at the Police Division at Katwe. The police officer was interdicted and arrested on charges of assault.

¹⁵ As above.

¹⁶ Interview with IO1 and IO2 on 13th June, 2016.

¹⁷ FGD with sex workers on 1st July, 2016 and the researcher had first-hand observation of police uniforms at Katwe Police Stations.

¹⁸ Makindye Chief Magistrate's Court Criminal Case No. 227 of 2016.

Hearing of the matter is ongoing at Makindye Court.¹⁹ The case and its progress illustrates a positive point that officers of state, or indeed anyone else, are not at liberty to abuse and assault sex workers with impunity.

Another instance to note in this regard is the case where Daisy, now the Executive Director of WONETHA, was hit twice on the shoulder with a gun butt and slapped twice by a police officer when carrying out an outreach activity in Kabalagala. She filed a case before the Uganda Human Rights Commission and the Commission found that she was subjected to cruel, inhuman and degrading treatment and directed the Police to discipline the police officer²⁰, which was done.²¹ This case was cited as an important example in the struggle for sex worker equality.

In another incident, sex workers reported the then Officer in Charge of Kawempe Police Station, ASP Mohammed Kirumira to the Police Professional Standards Unit, for harassing and beating them.²²

If this empowerment continues, there is a likelihood that police violation of sex workers' rights will greatly reduce.

4.4 Decriminalisation: the future for the protection of the rights of sex workers

Generally, it was a common view that sex workers are human beings who are entitled to enjoyment of human rights including being left to work without any interference like other people in Uganda. Equally prevalent was the view that sex work should be decriminalised in Uganda like it has been done in many other countries. This was among others premised on the argument that decriminalisation of sex work will be advantageous to both the government as a source of revenue from taxing the growing number of sex workers and also to the sex workers since in this way, they will have the full protection of the law.

Decriminalisation will thus ensure that the rights of sex workers are respected and that sex workers are treated as deserving members of the society who are entitled to enjoy their rights just like everyone else. Decriminalisation is also viewed as key in the fight against HIV/AIDS as sex workers will be able to access HIV services freely, and thereby stem the transmission of HIV.

¹⁹ Interview with Diana Natukunda, peer educator at WONETHA, on 1st July, 2016 and Susan Baluka on 4th July, 2016.

²⁰ *Daisy Nakato v Kabalagala Police Station*, Complaint No. UHRC/184/2010.

²¹ Interview with Daisy Nakato, Executive Director of WONETHA on 1st July, 2016.

²² Interview with Patricia Kimera, Head of Access to Justice for Sexual Minorities Unit, HRAPF, 7th October 2016. Case number PSU/KMP/GEF/676/2016.

Respondents also argued that the majority of the sex workers are adults of sound mind who are free to use their bodies in any desired manner. Citing examples from developed countries such as Denmark²³ where sex work is legal, it was advocated that sex work should be legalised so as to stop human rights violations of sex workers and reduce the HIV prevalence rates.

On the other hand, respondents in favour of the criminalisation of sex work blamed the current criminal laws for increased sex work activity. Respondents who subscribed to this view argued that the laws are too lenient to have any deterrent effect on sex work while most of the offences associated with sex work are too difficult to prove. This was the frustration shared by the Police, State Attorneys and the Women's Prisons at Luzira. Even interim measures such as court bail and police bond were faulted. One respondent, a police officer, observed '...putting in place of legislations banning prostitution is not helping since the courts grant bail to the offenders who upon release go back to their old ways especially because the business is lucrative'. This phenomenon was termed as 'recycling of prostitution'. Some of the suggestions made by respondents in this category included job creation to avail jobs to sex workers, counseling and rehabilitation of the arrested sex workers and school enrollment for girls of school going age.

Interestingly, all the different strands of arguments arrived at the same conclusion; that laws against sex work and related practices in their current state are not yielding the desired effect of curbing prostitution. Thus, all the respondents were of the view that criminalisation of sex work is not a solution to the growing number of sex workers especially owing to the lucrative nature of the practice which to many women and brothel owners is a business and source of livelihood.

Since the study observed that criminalisation has not deterred sex work activity but only increases human rights violations, it is recommended that laws criminalising sex work in Uganda should be repealed so as to decriminalise sex work. This will in the long run enable sex workers to enjoy the right of all persons to practice their profession and conduct lawful occupation, trade or business as provided for under article 40(2) and (3).

4.5 Conclusion

Criminalisation of sex work greatly affects sex workers in the enjoyment of their human rights. The key rights that are violated are the right to liberty due to arbitrary arrests and the rights to dignity of the person. Empowerment of sex workers and decriminalisation are the next steps that will ensure that sex workers are accorded full protection of the law. This will also curb the HIV scourge.

²³ Sex work is legal under the Danish Penal Code since 17th March 1999, see <http://prostitution.procon.org/view.resource.php?resourceID=000772> (accessed 19 August 2016).

SECTION V:

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The study has found that the laws criminalising sex work are not enforced because they are difficult to prove, and instead those that are wide and vague being rogue and vagabond are used. The new laws like the Anti-Pornography Act and the HIV Prevention and Control Act have also largely not been used. Sex workers, both male and female, get arrested by police officers in swoops and detained usually in violation of the guarantees of the right to liberty. They are charged and taken before courts, where usually the cases end up either being dismissed for want of prosecution, accused persons skipping bail and convictions usually arising out of pleas of guilt. This enforcement of the laws has led to the violation of basic rights of sex workers including the right to equality and non-discrimination, the right to liberty and the right to freedom from inhuman and degrading treatment among others.

5.2 Recommendations

5.2.1 To the Uganda Law Reform Commission

The Uganda Law Reform Commission should review sections 136, 137, 138 and 139 of the Penal Code Act and carefully reconsider the current inclusion of these provisions in the Sexual Offences Bill, 2015.

There is also need for the Employment Act to be reviewed to recognise sex work as work in order for sex workers to access and enjoy the various rights and protections under the Act.

5.2.2 To Parliament

Parliament should repeal the redundant sections 136, 137, 138, 139 of the Penal Code Act. Parliament is recommended not to include these provisions in the new Sexual Offences Act.

It is further recommended that sections 167 and 168 of the Penal Code Act be repealed. These two provisions have resulted in more arrests of sex workers and other innocent people than perhaps all the other Ugandan laws combined.

The Employment Act needs to be amended in order to recognise sex work as work and to thereby enable sex workers to access and enjoy the various rights and protections under the Act.

The Non-Government Organisations Act, 2016 should be reviewed so as to bring it in line with human rights standards by repealing section 30 thereof which seemingly denies sex workers the right to form and register NGOs owing to the supposed illegal nature of their activities. The corresponding section 36(2) of the

Companies Act denies sex workers and others who are considered unacceptable the right to form business associations and should be revised accordingly.

There is also need to review certain provisions of the HIV/AIDS (Prevention and Control) Act 2014 such as section 41 on attempted transmission of HIV and section 43(1) which criminalises willful and intentional transmission of HIV which places sex workers at the risk of criminalisation. Align the HIV Prevention and Control Act with the HIV/AIDS Prevention and Management Act 2012. This can be done by abolishing the criminalisation clauses and adopting a more human rights based approach.

The Anti-Pornography Act should also be reviewed especially sections 2 and 13 in their definition of pornography which have been criticised for being vague and subjective and thus unconstitutional.

5.2.3 To the Judiciary

The courts should also bear in mind that in cases where sex workers had been accused of petty offences such as theft or 'being idle or disorderly' that the origin of the arrest could likely have been a personal agenda or the prospect of a bribe. Courts are also encouraged to dismiss cases brought under section 167 and 168 of the Penal Code Act or section 47 and 48 of the National Drug Policy and Authority Act 2006 which are clear attempts to use these provisions to harass, expose or extort money from sex workers, especially where the accused is unrepresented. In cases where sex workers are accused under Penal Code offences, courts are recommended to consider carefully whether all the elements of the crime had been proven, prior to making a conviction.

In cases where the courts are minded to convict sex workers under criminal provisions, it is recommended that they opt for non-custodial sentences and small fines, taking into account that sex workers are often the breadwinners of their homes and that their prolonged absence from home has a profound impact on their families.

5.2.4 To the DPP

The Directorate of Public Prosecutions are in a position to put an end to the cycle of arrest, abuse and conviction in which many sex workers find themselves. The DPP should refuse to sanction vague charges which are clearly aimed at using overbroad offences to expose, intimidate or extort sex workers.

5.2.5 To the Uganda Police Force

As the main perpetrator of human rights violations against sex workers, the Uganda Police Force is the first port of call for an intervention in their current situation.

The UPF should refrain from arresting persons in the absence of the availability of

evidence to prove that the alleged offence had been committed.

They should also refrain from parading sex workers before the media during and after arrests since it is not clear what purpose this serves beyond sensationalism.

The UPF should put strong sanctions in place against police officers who torture and solicit for bribes from sex workers upon arrest. The Police Professional Standards Unit is recommended to provide strong and tangible remedies to sex workers who have suffered the violation of their rights at the hands of the police.

The police should continue to work with sex workers to weed out wrong elements amongst themselves and vice versa.

5.2.6 To the President and Cabinet

The President and Cabinet ought to take cognisance of the human rights violations which sex workers suffer due to the criminalisation of sex work and the indirect, harmful and arbitrary way in these laws are enforced. In light of these abuses, and pending the decriminalisation of sex work, the Presidency is recommended to issue a directive which would stay the enforcement of the laws criminalising sex work. A further directive should be issued indicated that the nuisance and vagrancy provisions of the Penal Code Act should not be used to arrest sex workers, simply for the reason that they engage in sex work.

5.2.7 To Civil Society

While Parliament may be slow or even unwilling to trigger the process of revising the highlighted provisions of the law, it is recommended that HRAPF, WONETHA and other civil society organisations and persons with similar vision adopt a proactive approach including petitioning the Constitutional Court, the High Court and other competent courts to make judicial pronouncements on the constitutionality and human rights implications of these laws.

5.2.8 To the sex workers

Sex workers should embrace positive and proactive engagement with the Police and other law enforcement agencies. Such efforts were credited for decreased police brutality towards sex workers.

Sex workers should seek to study, understand and enforce their rights as guaranteed under the Constitution and the various human rights instruments and legislations. Past and recent successes in challenging discriminatory provisions of laws before the Constitutional Court should serve as guidance and motivation in this regard.¹ Efforts should be made to test and where possible challenge the provisions of restrictive laws such as the new NGO Act, the Companies Act and the Employment Act.

¹ See *Adrian Jjuuko v Attorney General* Constitutional Petition 1 of 2009.

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