

THE CASE FOR CLARIFYING THE LAW ON TERMINATION OF PREGNANCY IN THE REVISION OF THE PENAL CODE

The Constitution of Uganda provides in Article 22(2) that “No person has the right to terminate the life of an unborn child except as may be authorized by law”. Twenty years later, the said law is yet to be enacted to operationalize this Constitutional provision. Instead, the country continues to rely on the colonial-era Penal Code Act, whose provisions on the legally permissible grounds for termination of pregnancy are vague and poorly understood, severely limiting access to safe, legal abortion and post-abortion care services and contributing to a high number of deaths and injuries from unsafe abortion

UNSAFE ABORTION AS A PUBLIC HEALTH PROBLEM

National estimates indicate that at least 6,000 Ugandan women die from pregnancy-related conditions every year, which translates to 16 deaths each day (MOH 2015).² In 2008, Ministry of Health estimated that unsafe abortion-related mortality constituted 26% of maternal mortality and that for every woman who died from unsafe abortion, many more women suffered severe and permanent injuries (Guttmacher Institute, 2013). In terms of numbers, there are an estimated 400,000 unsafe abortions each year in Uganda, directly leading to the death of 1,500 women and girls and leaving another 90,000 of them with severe health complications (MOH 2015).

Unsafe abortions are a major burden to the health system and the national economy. It is estimated that, in 2010, the health system spent Ushs 35 billion on treating post-abortion complications. This amount is equivalent to 4.7% of total government spending on healthcare in Uganda (MOH 2015). This is a large economic and social cost to Uganda’s already overwhelmed health care system (MOH 2015). These statistics demonstrate that abortion-related mortality and morbidity is not only a major public health problem in Uganda but also an economic one.

LEGAL FRAMEWORK ON ABORTION

There is a persistent and widespread perception in Uganda that abortion is completely illegal and that therefore it is criminal to have one except only when done to save a woman’s life (CRR et al., 2013). This perception has scared not only health providers from the provision of safe abortion and post-abortion care services, but also the women who are resorting to unsafe methods and unskilled providers to end unwanted pregnancies.

However, contrary to this perception, legal analysts have suggested that Uganda’s abortion laws and policies are accommodative of abortion in some circumstances. The problem is that these circumstances are not clearly stated in the law and are well understood even by law enforcers, who have not had any successful prosecution on record.

Constitutional provision on abortion

The Constitution provides in Article 22(2) that “[no] person has the right to terminate the life of an unborn child except as may be authorized by law.”³

The Odoki Commission⁴, in its report, recommended in accordance with the majority view that illegal abortion should be punished. Secondly – and perhaps more significantly – the Commission noted that most societies in Uganda practice abortion if the pregnancy is a danger to the mother’s life, or if it is from rape or incest. The Commission also recognized Uganda’s human rights obligations under international law.

This explains why Article 22(2) was inserted in Chapter 4 of the Constitution, which deals with fundamental rights and freedoms. So, Article 22(2) is an attempt to strike a balance between outlawing abortion on one hand, and respecting existing practices and human rights obligations of the state, on the other.

The Constitution (Article 22(2)) envisages a law authorizing the termination of the life of an unborn child in the circumstances which should be specified in that law. However, since 1995 that law has not been enacted. Instead, the country continues to depend on the Penal Code Act.

Abortion-related provisions in the Penal Code Act

The Penal Code Act provisions on abortion are contained in Sections 141-143, Section 212, and in Section 214. Under Section 141, a person commits the offence of “attempted abortion” where they “...with intent to procure the miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means, commits a felony and is liable to imprisonment for fourteen years.” This offence essentially targets people who facilitate the process of abortion and majorly targets medical professionals who carry out abortions.

Section 142 makes it an offence for a woman to procure her own abortion. Under this section a “...woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means, or permits any such things or means to be administered to or used on her; commits a felony and is liable to imprisonment for seven years.” A woman suspected to have aborted is charged under this provision.

Section 143 targets people who supply or procure drugs or anything knowing it is to be used to carry out an abortion. The offence is stated as follows: “[A]ny person who unlawfully supplies to or procures for any person anything, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, commits a felony and is liable to imprisonment for three years”.

Section 212 creates what is at times referred to as “child destruction” offence to protect the child during the process of child birth⁵: “[a]ny person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that if the child had been born alive and had then died, he or she would be deemed to have unlawfully killed the child, commits a felony and is liable to imprisonment for life.”

In the revision of the Penal Code Act, these offences will need to be clarified further or even reviewed altogether, and also to clarify and elaborate the circumstances for legal abortion provided for in Section 224. Section 224 of the Penal Code provides that;

“A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his or her benefit, or upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time, and to all the circumstances of the case”.

However, this Section (224) and the rest of the Penal Code Act do not clarify what would amount to “good faith”, the limits of the “patient’s state”; and the “circumstances of the case” that it refers to. This has left the law, particularly this provision, vague and open to different interpretations.

By restricting itself to “surgical operation”, this Section ignores advances in technology, which have made it possible to terminate a pregnancy using other means other than by surgery.

In addition, the Penal Code Act does not define abortion and uses the words “abortion”, “termination of pregnancy” and “miscarriage” interchangeably to mean the same thing.⁶ “Abortion” as used by the medical profession, denotes the termination of pregnancy before the fetus has attained viability⁷. Viability means the point at which a fetus is capable of independent extra-uterine life⁸. There is considerable divergence of opinion in the medical profession as to what point in time of the gestation period a fetus attains “viability”⁹. As a result there is no universally accepted definition of abortion in the medical profession, hence the need for a precise, clear legal definition in the revised Penal Code Act.

Case law on abortion

To try to understand the Penal Code provisions on circumstances for legal abortion, references have been made to the case of ***Mehar Singh Bansel v. R (1959)*** in the East African Court of Appeal, which at the time had jurisdiction in Uganda. In this case, Court received into Kenyan law (and by extension East Africa) the judicially expanded defense of therapeutic benefit that was laid down under English common law in *R v. Bourne*¹⁰. In *R v. Bourne*, Justice MacNaughten observed that abortion under the provisions of the English Offences Against the Person Act (then equivalent to Uganda’s provisions on abortion) was not unlawful if, in the opinion of the doctor, “*the probable consequence of continuance with the pregnancy will be to make the woman a physical or mental wreck*”.

In the case of ***Center for Health, Human Rights and Development (CEHURD) and 4 others versus Nakaseke District Local Administration*** (civil suit 111 of 2012), the Hon. Justice Benjamin Kabiito, while resolving the issue as to whether the deceased received the appropriate obstetric care and management, found that the deceased’s rights to basic medical care were violated.

IMPLICATIONS FOR HUMAN RIGHTS

The human rights system creates three major obligations on the government. These include the obligations to: respect; protect and fulfil. The obligation to respect requires government to refrain from interfering directly or indirectly with the enjoyment of human rights through laws, policies, programs. In the case of termination of pregnancy, it means that law enforcers who arrest health providers who provide post-abortion care and care for women who report with incomplete abortion, which is not illegal, make Government fail on this obligation and thus violate the rights of women to emergency care.

The Obligation to protect calls upon Government to prevent third parties from interfering with the enjoyment of the human rights. Failure on the part of Government to enact a clear law on termination of pregnancy, thereby leading women to resort to unskilled service providers who conduct unsafe abortions causing the death of the women is also a failure on the part of Government to protect women's rights to life and health.

The obligation to fulfill requires Government to adopt appropriate measures towards full realization of the rights such as appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of human right. This obligation requires Government to enact a law to operationalize the Constitutional provision on termination of pregnancy. Until this law is enacted, Government has failed on its obligation to fulfill the women's right to health, right to life, as well as reproductive health rights.

Policy framework

While the legal framework has been conservative, the policy framework has been more progressive on termination of pregnancy. In 2006, Ministry of Health issued the "National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights," specifying that pregnancy termination is permissible in cases of fetal anomaly, rape and incest, or if the woman has HIV. However, the Ministry added that this policy provision was subject to legal interpretation, which has not happened to date.

In recognition of the fact that unsafe abortion is one of the leading causes of maternal morbidity and mortality in Uganda, Ministry of Health has followed this up with the recently published "Standards and Guidelines for Reducing Maternal Morbidity and Mortality from Unsafe Abortion in Uganda". These Standards and Guidelines bring together aspects of prevention and care required to reduce death and disability resulting from unsafe abortion, and to promote the health of women.

At present, these policy guidelines are merely an expression of the policy of Government on abortion. They guidelines need to be grounded in law.

PROPOSALS FOR REFORM OF THE LAW ON TERMINATION OF PREGNANCY

- 1) The Penal Code Act provisions on abortion need to be reformed to give effect to Article 22(2) of the Constitution which foresees the need for a law to authorize abortion.
- 2) Grounds for abortion may include:
 - (i) If the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical and mental health.
 - (ii) If there is a risk that if the child was born, it would suffer physical or mental abnormalities as to be seriously handicapped.
 - (iii) where a pregnancy is the result of rape, incest, or child abuse;
- 3) There should be a requirement for informed consent of the person having a termination.
- 4) The law should provide for surgical abortion which should be carried out by a trained medical professional and use of termination services should be provided by trained medical professional.
- 5) There should be a requirement for confidentiality of client termination information.
- 6) The law should permit a medical practitioner to object to performing a termination for ethical or religious grounds however, the professional should be obligated by law to assist if it is required to save the life of mother.
- 7) Offences
 - performing an abortion otherwise than by or under the supervision of a registered medical practitioner.
 - a woman to perform or attempt to perform an abortion on herself.

CONCLUSION

The Penal Code Act in its current form has not helped women and health providers make informed decisions regarding the provision of, and access to safe, legal abortion and post-abortion care services, leading to many preventable deaths and injuries to vulnerable women and girls. Hence, in reviewing the Penal Code Act, law makers need to streamline public health and human rights into not only the spirit but also content of the provisions relating to abortion offences and permissible circumstances for legal abortion. Ministry of Health (2006)¹³ has published a policy position on the circumstances under which health providers may provide abortion services – in cases of danger to the mother's physical and mental health, fetal anomaly, rape and incest, or if the woman has HIV, among others. These and other circumstances should be considered and elaborated in the revised Penal Code Act to give effect to Article 22(2) of the Constitution .

SELECTED REFERENCES

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Guttmacher Institute, 2013: Abortion in Uganda. *Fact sheet*. <http://www.guttmacher.org/pubs/FB-Abortion-in-Uganda.html>

(ENDNOTES)

- 1 Center for Reproductive Rights Technical Guide to Understanding the Legal and Policy Framework on Termination of Pregnancy in Uganda 2012 at p. 6.
- 2 Ministry of Health; Reducing Morbidity and Mortality from Unsafe Abortion in Uganda: Standards and Guidelines. April 2015 pg 11
- 3 Article 22(2) of the Constitution
- 4 Constitutional Commission Report, 1994
- 5 See Crimes Act 1900 (ACT) s 42; Criminal Code (NT) s 170; Criminal Code (Qld) s 313(1); Criminal Code (WA) s 290 (all Australian pieces of legislation)
- 6 See the Penal Code Act, Cap. 120, sections 141, 142, 143 and article 22 (2) of the Constitution of 1995.
- 7 See the Report (1970) (1) of a World Health Organisation Scientific Group on Spontaneous and Induced Abortion. Accessed at [http://whqlibdoc.who.int/euro/phiie/EURO_PHIE_4_\(a-c\).pdf](http://whqlibdoc.who.int/euro/phiie/EURO_PHIE_4_(a-c).pdf) on 30th September, 2013
- 8 Ibid. Viability is viewed in terms of duration of pregnancy, weight of fetus or length of fetus. To some medical professionals viability occurs at 28 weeks while others prefer 20 weeks.
- 9 See note 3.
- 10 R v. Bourne, I Kings Bench 687 (1938)
- 11 CEHURD 2014
- 12 According to the World Health Organization (WHO), unsafe abortion is “a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards, or both” (WHO, 2003).
- 13 National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights (MoH, 2006)

For more information, contact:

CENTER FOR HEALTH, HUMAN RIGHTS & DEVELOPMENT (CEHURD)

Plot 833 Old Kira Road, Ntinda, P.O Box 16617 Kampala

Tel: +256 414 532283 web: www.cehurd.org