

EGM/GPLHP/2009/EP.10

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1. INTRODUCTION

Harmful practices against women are forms of violence which include Female Genital Mutilation (FGM), female infanticide and prenatal sex selection, early marriage, forced marriage, dowry related violence, acid attack

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“Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;*
- (b) freedom from slavery or servitude;*
- (c) the right to fair hearing;*
- (d) the right to an order of habeas corpus.”*

Article 45 states that –*“Rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms provided for in the Constitution shall not be regarded as excluding others not specifically mentioned.”* Article 24 fortifies Article 43; it states that *“No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment.”*

Some other Constitutional rights which prohibit harmful practices against women include:

Article 2 on supremacy of the Constitution, which stipulates that;

- (1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.*
- (2) If any other law or any custom is inconsistent with any of the provisions of [the] Constitution, the Constitution shall prevail, and that other law or custom, to the extent of the inconsistency, be void.*

Article 32 on affirmative action in favour of marginalized groups, which provides that;

- (1) Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalized 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.*
- (2) Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalized group...or which undermine their status, are prohibited by [the] Constitution.”*

Harmful traditional practices are exercised at mostly the family level of society; they therefore, heavily infringe on rights of the family. Article 31 on Rights of family is significant in this context; it provides as follows:

“(1) A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age-

- (a) to found a family; and*
- (b) to equal rights at and in marriage, during marriage and at its dissolution.*
- (2) Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit property of their deceased spouses and to enjoy parental rights over their children.*

(3) Marriage shall be entered into with the free consent of the man and woman intending to marry.”

Article 33 on Rights of women further provides that:

- (1) Women shall be accorded full and equal dignity of the person with men;*

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(3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

(4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

(5) Women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.

Article 247 of the Constitution of Uganda provides specifically for the Administration of Estates. This provision states that: “Parliament shall –

(a) by law establish an efficient, fair and expeditious machinery for the administration and management of the estates of deceased persons; and

(b) under the law referred to in paragraph (a) of this article, ensure that the services of the department or organization established for the purpose are decentralized and accessible to all persons who may reasonably require those services and that the interests of all beneficiaries are adequately protected.”

Enforcement of Constitutional rights and freedoms is done by Courts; this is premised on Article 50 of the Constitution, which states that;

“(1) Any person who claims that a fundamental or other right or freedom guaranteed by the Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

Enforcement of Constitutional rights and freedoms is reinforced by the establishment of the Uganda Human Rights Commission, which Commission investigates, educates, creates awareness, recommends measures to promote human rights, provides compensation to victims and monitors Government’s compliance with international Treaties and Conventions obligations on human rights. The rights are also enforced by National Machinery, such as the Ministry of Gender, Labour and Social Development; the Equal Opportunities Commission which is yet to be operationalized.

Analysis of legal approach to women’s rights on harmful practices will be done in this existing legal regime context.

2. ANALYSIS OF THE LEGAL APPROACH TO WOMEN’S RIGHTS IN RESPECT TO MALTREATMENT OF WIDOWS AND FEMALE GENITAL MUTILATION

a) MALTREATMENT OF WIDOWS’ RIGHTS

Widows’ rights are specifically provided for under the Succession Act of 1906. Apart from The Succession (Amendment) Decree of 1972; no other amendments have been made to make this law to make it conform to the 1995 Constitution. Most widows continue to be deprived of property by family members notwithstanding Constitutional provisions. Upon realization that the Succession Act was, even after the 1995 Constitution, being applied in a manner that resulted in maltreatment of widows, Law and Advocacy for Women in Uganda (LAW-Uganda) embarked on strategic litigation in order to get discriminatory sections of the Succession Act declared unconstitutional and thus void. It was also envisaged that this

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would create a lacuna in the law, which lacuna would oblige Parliament to expeditiously review the law.

Issues raised on Sections of the Succession Act were;

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successfully challenged some Sections of the Divorce Act in 2004. These Sections, inter alia, permitted men to seek for divorce on one ground of adultery; while married women had to combine adultery with say cruelty. To-date, there is lack of certainty as to when marriage and divorce that conform to the Constitution will be enacted.

b) FEMALE GENITAL MUTILATION

Religious and Cultural belief underpin the practice of FGM. In most cases, religious doctrines are interpreted by some believers as divine and therefore not subject to challenge or change. It should be noted that most countries are secular, for example, the Constitution of Uganda provides for this principle in its Article 7 on Non-adoption of State religion where it states that “*Uganda shall not adopt a State religion*”. In addition to this, the right to protection of freedom of religion is not absolute; it is not among those rights from which there is no derogation under Article 44. On the right to religion, Article 29 (1) (c) provides that-

“freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organization in a manner consistent with [the] Constitution.”

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Section 216(a) – “Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person.....unlawfully wounds or does any grievous harm to any person by any means; commits a felony and is liable to imprisonment for life.”

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Bill introduced in the Parliament of Uganda was drafted by LAW-Uganda; it incorporated all the principles enshrined in the African Charter on Women's Rights. LAW-Uganda took the initiative to draft the Prohibition of FGM Bill after working for more than a decade on the issue in conjunction with several partners such as Reproductive, Education and Community Health (REACH) Program. REACH is a community based organization which was supported by UNFPA, inter alia, to create awareness; and to sensitize the community, where it is practiced, about the negative effects of FGM.

c) EARLY MARRIAGE/DEFILEMENT

In some instances, FGM leads defilement. Defilement is a criminal offence; Section 129 of the Penal Code Act states that:

- 1) *Any person, who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment.*
- 3) *Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court liable to suffer death.*
- 4) *The circumstances referred to in subsection (3) are as follows-*
 - (a) *Where the persons against whom the offence is committed is below the age of fourteen years;*
 - (b) *Where the offender is infected with the Human Immunodeficiency Virus (HIV);*
 - (c) *Where the offender is a parent or guardian of or a person in authority over, the person whom the offence is committed;*
 - (d) *Where the victim of the offence is a person with disability; or*
 - (e) *Where the offender is a serial offender.*

There is also provision for compensation to victims of defilement; Section 129B of the Penal Code Act states that:

- (1) *Where a person is convicted of defilement or aggravated defilement under section 129, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual and psychological harm caused to the victim by the offence.*
- (2) *The amount of compensation shall be determined by the court and the court shall take into account the extent of harm suffered by the victim of the offence, the degree of force used by the offender and the medical and other expenses incurred by the victim as a result of the offence."*

3. REFORMS

- i. The revolution that ushered the National Resistance Movement (NRM) into power in 1986 was fought by both men and women. This enabled women who had hitherto been marginalized to take their rightful place in decision-making. Promulgation of a progressive constitution was done with the support of gender sensitive men and women of the Constituent Assembly and with the support and initiative of the NRM Government.
- ii. The Uganda Constitution which was promulgated in 1995 was done on the heels of the 1995 Beijing Conference. The Beijing Conference created support which gave the government further justification to enact laws that promote women's rights and gender sensitive Constitution. Constitutional provisions give a sound basis and impetus for reforms to be undertaken to ensure that women's rights are fully respected in all spheres.
- iii. Uganda is signatory to several International Treaties and Conventions which recognize women's rights; these include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms Discrimination Against Women (CEDAW). Uganda's signing onto CEDAW, for example, obliges it to meet specific obligations; these include submission of periodic reports on efforts made to adhere to the commitments. This monitoring and evaluation mechanism to ensure adherence is keeps governments in check and helps in facilitating reforms that prohibit harmful practices against women.
- iv. Regional acknowledgement of women's rights and the need to address them for their own sake. Over the years, women have been undertaken. The Maputo Protocol adopted in 2000 and the commitment to implement a plan of action and take concrete steps to draw attention to human rights of women in order to eliminate all forms of violence and gender – based violence against women. The Protocol is based on the International human rights instruments, UN Security Resolutions, the Platform for Action, and the Dakar Declaration of 1994, the Beijing Declaration and Action of 1995, inter alia.
- v. The reform process is catalyzed by the Information Age. This the Information Age has made it possible, more than ever, to create harmful practices against women by using the internet. Exchange of information on who is doing what is not only of best practices but on the internet to mobilize shame on States to protect women's rights. The world has indeed become one global village. The internet catalyzes reform process in order for States to keep pace with the new world.

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- vi. Consistent activism by entities such as UNFPA and other Civil Society Organizations has led to change of attitude where FGM is practiced. There has culminated into serious demand by local communities for a law to prohibit cultural practices such as FGM in Uganda.

4. ASSESSMENT OF EFFECTIVENESS OF PARTICULAR LAWS INCLUDING REASONS FOR SUCH EFFECTIVENESS- “Justice must not only be do done; it must be seen to be done”

An assessment of effectiveness of particular legal provisions and reasons for such effectiveness must take into account several factors, including but not limited to- existence of the law and effective penalties there-under; awareness of the law; knowledge of the law; access to justice; law enforcement mechanisms; and dispensation of justice.

Using the example of early marriage under which defilement is committed, there are several practical challenges related to each of these factors.

- i. Existence of the law and effective penalties there-under is exemplified by existence of Constitutional provisions on the age marriage as eighteen years and above. Section 129 penalizes defilement of persons under the age of eighteen years of age and section 129B provides for payment of compensation to victims of defilement. An example of a challenge faced in the case of defilement faces is that of a death penalty. No case to date has attracted this penalty. Reasons for this are not clear. It may be worthwhile to investigate further why courts have not sentenced anyone to death and whether the stiff sentence of a death penalty inhibits prosecution of defilement cases.
- ii. Awareness of the law enables the community to seek for justice; however, this factor must be supported by other factors. For example, awareness of the crime of defilement may not lead to search for justice. In some instances, the prosecution is faced with challenges, such as when victims who are key witness turn into hostile witnesses. Victims do this because they fear the wrath of family members or because they are economically dependant on the defiler or because they lose interest in the case because of emotional ties; or prolonged, scary and complicated court processes. In such cases, the victims of defilement may opt not to press charges; the choice to settle out of court or to abandon the case may seem more attractive.
- iii. Limited knowledge of the law by law enforcement agents. In some cases, law enforcement agents may not be fully aware of the law. This obviously renders the law less effective. There is thus need for refresher courses for law enforcement agents. In some instances, Local Council officials, who are not aware of the law, may try cases of defilement and yet such cases are beyond their jurisdiction. This has the potential to cause miscarriage of justice.
- iv. Existence of Local Council officials and Local Council Courts within communities on the other hand, enables members of the community to access justice easily. Community members easily access justice because those who are in authority are neighbors, they do not have to travel long distances; they are not charged high court

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- fees; they do not have to be represented by expensive lawyers and the court atmosphere is not alien as when they have to use very formal procedures in the Judicial system. Local Council Officials assist in decentralization of legal services. They serve as critical referral centers, witnesses and provide critical information to victims since most cases are first reported to these offices.
- v. Structural challenges include offices, transport, infrastructure, staffing levels of law enforcement officers, communication and other facilities. Structural challenges must be addressed for laws to be effective. These can, to some limited extent, be mitigated by effective use of the media and communication systems.

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- i. The origin of some harmful practices against women is both religious and customary; whose doctrines are interpreted by some believers as divine; or sacred and therefore not subject to challenge or change. It should be noted that the right to religion and culture is not absolute; it is not among those rights from which there is no derogation under Article 44 of the Uganda Constitution. Religion and culture must be practiced in a manner consistent with the Constitution; as such if a religion or custom contradicts or is inconsistent with the principles of the Constitution, then that religion or custom is void and prohibited by the Constitution which is the Supreme law.
- ii. Identification of harmful practices' origin; gate keepers; and other stakeholders interested in preserving and perpetuating harmful practices. Such identification assists devising meaningful strategies for le

