TOWARDS A SEXUAL OFFENCES LAW: REAPPRAISING THE LEGAL FRAMEWORK ON SEXUAL VIOLENCE IN KENYA

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I. INTRODUCTION

Sexual violence is a public health problem and a violation of human rights.\(^1\) Violence is defined as "the intentional use of physical force or power, threatened or actual, against oneself, another person or against a group or community, which either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development or deprivation".\(^2\) Sexual violence is an increasing decadence on the rise, the world over. Kenya is not an exception with respect to the rise in these incidences. Unfortunately it has received little attention from the government, policy-makers, researchers, academics, affected communities as well as NGOs. The upsurge however, can be attributed to poverty and the prevailing socio-economic conditions under which people live as well as the increased deterioration of the same. It is further enhanced by ignorance of the law, as well as the insufficient coverage of legal regulation and retribution to control incidences of sexual violence.

Sexual violence is a very wide concept which straddles such acts as rape, attempted rape, sexual assault, compelled or induced indecent acts, indecent acts perpetrated against mentally impaired persons, defilement, attempted defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, trafficking for sexual exploitation, prostitution of mentally impaired persons, incest, sexual harassment, trespass with intent to commit a sexual offence, sexual aggression during and after acts of war and inter-community conflict, exposure, deliberate transmission of HIV or any other life threatening disease, female circumcision and wife inheritance, and even forced marriage.\(^3\) It is not gender specific; women, men and children, are all potential victims. All in all it must not be lost that women are the most prone group in society to abuse. Abuse of children is also on the rise at an alarming rate. In the family, it is a product of domestic

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\(^1\) See [http://www.who.int/svri/en].


\(^3\) See generally, the Sexual Offences Bill, 2005 [Hereinafter, Sexual Offences Bill]. Note however, that this write-up includes sexual offences not found in the Bill.
violence, and is an act intended to humiliate and express domination of (usually) one spouse over another.

Sexual violence infringes on many human rights, including the right to health. Although most of the evidence on the nature and extent of sexual violence is only anecdotal, there is a general concurrence that sexual violence in the country has reached alarming levels.

II. RISK FACTORS FOR PERPETRATION

There are numerous risk factors that cause or enhance the possibility of sexual violence. They can broadly be divided into four categories. These include: individual, relationship, community and societal factors. Individual factors are those that in an isolationist context affect and influence a specific individual and endear the person towards committing acts of sexual violence. Among these influences are alcohol and drug use, coercive sexual fantasies, impulsive and antisocial tendencies, preference for impersonal sex, hostility towards women, hyper masculinity, childhood history of sexual and physical abuse and witnessing family violence as a child.

Relationship factors are those that influence a persons inter-personal relations with people one has a direct knowledge of, and general association. These factors include; association with sexually aggressive and delinquent peers, family environment characterized by physical violence and few resources, strong patriarchal relationship or familial environment and an emotionally unsupportive familial environment. Community factors comprise matters that affect a group of people by dint of the circumstances of their immediate communal interactions and developmental levels. They include, lack of employment opportunities, lack of institutional support from police and judicial system, general tolerance of sexual assault within the community, settings that support sexual violence and weak community sanctions against sexual violence perpetrators.

Societal factors affect a wider group of people such as a nation or entire culturally identifiable entity. These concerns are informed by the specific people’s economic and socio-cultural environment. They include; poverty, societal norms that support sexual violence, societal norms that support male superiority and sexual entitlement, societal norms that maintain women’s inferiority and sexual submissiveness, weak laws and policies related to gender equity and high tolerance levels of crime and other forms of violence.
III. THE CULTURAL BAGGAGE FROM THE PAST: TRADITIONAL PERCEPTIONS AND SEXUAL VIOLENCE

In Africa in general- Kenya in particular, culture is the key sanctum that influences trends and perspectives on sexual violence. It has proved to be a boon in so far as it broadly forbids sexual perversion, defilement and rape. But in so far as African culture allows patriarchal domination over women in certain spheres such as marriage, it becomes a catalyst for domestic sexual violence under the guise of the doctrine of irrevocable sexual consent. Further, sexual violence in the Kenyan context, is mirrored in a study on the same issue conducted in Lesotho in which it was stated that:

"[t]he sensitivity of the topic derives from the fact that culturally, there is reluctance to talk openly about sex and sex related issues. Compounding this, is the stigma attached to victims of sexual violence".  

The *ex post facto* cultural framework facing women, men and children, who have been subjected to sexual violence, is daunting. In the case of women (who essentially comprise the majority of victims), the idea that they have had sexual intercourse or have engaged in sexual intimacies, whether consensually or not, is deemed to lower their comparative status in the societal psyche. Where unmarried at the time, their value as potential brides is largely contemplated as having diminished. Where married but violated by a third party, the woman is viewed with suspicion by her husband, relatives and immediate community. Where married yet violated by her husband or another family member, the stigma associated with the act clouds the woman's propensity to report the matter, fearing the potential backlash and embarrassment in the public sphere that could accompany her bold move. There is usually also a wanton feeling of self-blame and guilt by the victim.

For children, the situation is grimmer. Firstly, they can only bring suits (unless criminal), through a next friend. Secondly, their guardians approach seeking justice for their children cautiously, especially if a close relation perpetrates the act of sexual violence. Many would prefer to drop charges, so as to protect their children from the public interest and further trauma, in the name of preserving whatever childhood innocence they still have. Men are, from a customary perspective, prone to ridicule and derision in situations where they step forth and report the act of abuse. This, more so where the perpetrator is a woman or in cases of sodomy.

The police reflect these prejudices; they are slow to act upon complaints of sexual violence in marriage, or against males. They are also lethargic in their reaction to emerging trends of sexual violence in Kenya that come in the wake of *inter alia* trafficking of persons and prostitution. Be that as it may, the plight of women in respect of sexual violence, must occupy centre stage, in the

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examination of the attendant legal framework. In view of the foregoing, it is important that Kenyan legislation on sexual violence be examined.

IV EXISTING KENYAN LEGAL FRAMEWORK ON SEXUAL VIOLENCE

There is currently no specific legislation on sexual violence. There is however, a published Bill on the same entitled "The Sexual Offences Bill". The existing legislation as well as the Sexual Offences Bill, shall be analysed under this section with a view to establish its efficacy in dealing with sexual violence.

As the supreme law in the land, the Constitution is the starting point for the examination of legislation on sexual violence. The current Constitution makes no express mention of the concept of sexual violence. This is as it should be expected. What it does however do, is identify key general principles that negate and condemn sexual violence. These include the recognition of the right to life, liberty, protection against inhuman and degrading treatment and the right not to be discriminated against.

However, Constitution has insufficient provision to protect the abuse of the rights of women, and given the social circumstances in which we still live, does not provide incentive to enhance the status of women and help them fend for their collective progress. Indeed there are provisions within the Constitution that could prejudice the rights of women in respect of the war on sexual violence. The problem emanates from the potential contradictory interpretations they can evoke, and thereby generate misguided deductions that could be detrimental. For instance Section 82 (1) forbids discrimination on the basis of inter alia sex. However, Section 82 (4) provides leeway for discrimination through its recognition of discrimination in matters of marriage, succession and personal law.

The Judicature Act highlights the hierarchy of Kenyan laws. It acknowledges the place of customary law as an aspect of law that is applicable to the people of Kenya, albeit at the lowest tier of the chain. The major problem with the Act is, it only provides the list of the laws of Kenya but does not facilitate the dynamic change of customary laws that are obsolete. In sexual violence speak, the consequence of this is it leaves women to the mercy of the ignorant, adamant and chauvinist patriarchal psyche.

6 The identification of the Constitution as either being "current" or "the proposed draft", is done in view of the ongoing Constitution Review Process, even though the latter has been rejected in the referendum conducted on 21st November 2005.

7 Sexual Offences Bill, s 71.
8 Ibid, s 72.
9 Ibid, s 73.
10 S 82.
12 S 3 of the Sexual Offences Bill.
The major legislation that has covered sexual offences has been the Penal Code.\(^{13}\) Dependent on the actual form of sexual violence referred to, the allusion to the same is implicit. Put differently, there is no express mention of the term (or concept) of "sexual violence" within the ambit of the code. Crimes such as rape,\(^ {14}\) indecent assaults,\(^ {15}\) assault,\(^ {16}\) defilement of girls under fourteen years of age,\(^ {17}\) unnatural offences,\(^ {18}\) indecent practices between males, incest and even extremes such as murder\(^ {19}\) and manslaughter,\(^ {20}\) are the main transgressions in which sexual violence can be signified to have been clothed. Two legal issues impede the prosecution of sexual violence offenders under the current legal regime. The first is the threshold of proof. The burden is not only upon the complainant, but the standard of proof is beyond reasonable doubt. Many rape and indecent assault cases for instance, have been terminated on grounds that the standard of proof had not been achieved. This is even more difficult to prove in the family context. An act of rape has three fundamental elements that must be proved; (i) that there was sexual intercourse; (ii) that the act of sexual intercourse was unlawful; and (iii) that the act of sexual intercourse was without the consent.\(^ {21}\)

Unlike other cases, it is easy to prove the identification of the alleged perpetrator\(^ {22}\) in marital rape. However, the barrier to broach in this regard, is the thin line between the right of a spouse to be granted conjugal rights, the duty of the other to provide the same, as well as the individual right not to be forced into sexual intercourse against one’s will. It would also be difficult to corroborate\(^ {23}\) rape as a form of domestic sexual violence, as this would usually mean bringing family members in to testify, and this could drive a wedge between them.

The second, is the stipulation within the Evidence Act\(^ {24}\) that spouses as of privilege are not mandated to testify against each other. The general effect of this is that victims willing to testify can either be convinced or coerced into not giving evidence, effectively halting the proceedings. Further indictment on the code, is on account of the fact that its definitions on these offences is not whole encompassing, while the penalties it imposes are not stringent enough. Hence

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13 Chapter 63, Laws of Kenya.
14 See ibid, ss.139-141; “At common laws, rape is defined as unlawful, intentional sexual intercourse with a woman without her consent” per Milton, J South African Criminal Law and Procedure Vol. 2 (Juta: Cape Town, 1996), p. 439.
15 See Penal Code, supra note 13, at s 144 (for indecent assault of females) and section 164 (for indecent assault of boys under fourteen years of age).
16 See ibid, s 250 (common assault), and s 251 (assaults causing actual bodily harm).
17 See ibid, s 145.
18 See ibid, ss 162-163.
19 See ibid, ss 203-204.
20 See ibid, s 202.
23 On the need for corroboration in cases of rape, see Chilla and another v Republic [1967] EA 722 and R v Cherop arap Kinel & another, [1936] 3 EACA 124.
24 Chapter 80, Laws of Kenya.
there has been a *lacuna* in the law regarding the overall cause of combating sexual violence. The *Children Act* also touches on sexual violence. It outlaws early marriages and female circumcision, both which have been used to perpetuate sexual violence.

**A. Conceptual thinking that inform Legal Interpretations under the Penal Code**

There are a couple of myths (sometimes supported by legislative formulation), which in some cases, have fossilized into legal principles regarding interpretations of relevant provisions of the Penal Code. These are highlighted as follows.

**i. The Conceptualization of Rape**

It is believed that rape can only be committed by a man, and to a woman. It imputes (as far as human beings go), penile penetration—within only the capacity of a man, into the vagina—the preserve of only a female. The Penal Code refers to the perpetrator as “any person”, rather than “any man”. However, the key concept that tilts the interpretation, is the definition of “carnal knowledge”. Carnal knowledge means sexual intercourse.\(^{25}\) However the interpretations of rape by the courts, relegate “carnal knowledge” to sexual intercourse purely between a man and a woman.

The consequence is that acts of sexual violence, such as forced sodomy, anal penetration of a woman or use of any other part of the body or objects as instruments of penetration on victims of either sex by perpetrators of whichever sex, would not constitute rape.

Rape is also deemed not to be possible in marriage. From the foregoing definition, and noting the standard sex of a-would be perpetrator, it is safe therefore to conclude that “[a] husband cannot rape his wife as consent is implied”.\(^{26}\) The doctrine of irrevocable consent appears to apply in marriage, meaning that an act of rape would perhaps be deemed to be actual or grievous bodily harm, or indecent assault, where particular signs of sexual violence are evident. However in such situations where there are no overt scars that could impute violence, it becomes exceedingly difficult to prove in this regard.

**ii. The Burden and Standard of Proof**

The Burden of Proof always rests on the person who makes the allegation. The standard of proof for these acts in so far as they fall within the ambit of criminal law, is always beyond reasonable doubt. Naturally, this becomes an impediment to the incarceration of perpetrators of acts of sexual violence. But it

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\(^{26}\) Ibid. Cf. *R. v. Miller* [1954] 2 All ER 529, where it was held that a husband can rape a wife where they have a separation agreement coupled with a non-molestation clause.
is a necessary impediment grounded in the strong legal dictum that one is innocent until proven guilty, and due process must safeguard at all costs, the internment of one who is innocent. Despite this fact, there appears to be a legal myth that when proving non-consensual sexual intercourse or intimacy of a sexual nature, that the whole burden rests with the victim. In English case law, part of the burden to prove that the same was consensual, falls on the alleged perpetrator.

iii. The Conceptualization of Sexual Offences as not being crimes of violence

Most sexual offences, although injurious, are not necessarily conducted with inanimate exterior objects. Therefore, most involve the use of organs of the body to occasion violation. This has led to the non-willingness to classify such acts as crimes of violence. For instance in the case of rape, it is deemed that “a penis cannot be capable of doing a degree of damage that an inanimate object would”. In response it is argued that “[t]his failure of recognition or non-acceptance of the equally lethal effect of the penis—especially in rapes of children and virgins—distorts the real nature of rape as a crime of violence”.

 Whereas a single inappropriate touch can be classified as indecent assault, the questions of intent and degree make it difficult to prove, creating a sufficient buffer for perpetrators to engage in ‘minimal’ levels of sexual violence. This is especially true with respect to children whom perpetrators know, might be unaware of the fact they are being violated. Hence, legal jurisprudence lives totally oblivious of the fact that a touch can amount to a crime of violence.

B. International Law Relevant to Kenya

The basic platform for launching the war against sexual violence is the Universal Declaration of Human Rights. Under Article 3 [of the International Covenant on Civil and Political Rights (ICCPR)], States undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights as set out in the Covenant. In respect of the protection of the rights of women, the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) is the key document of reference. Although Kenya has long ratified CEDAW, it is yet to take concrete measures to secure gains in uplifting women. However, the Country’s ratification in 2005 of the African

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28 Women and Law in Southern Africa Research and Education Trust, supra note 5 at p. 15.
29 Ibid.
30 Adopted by the U.N.G.A A/RES/217, on 10 December, 1948; see specifically, the Preamble, Articles 1-5, 7, 8, 12, 16 (3) and 28.
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Union Protocol on the Rights of Women in Africa is commendable. The strengths of the Protocol, which is a more African specific version of CEDAW is its “recognition of specific violations of the rights of women and the need for a legal framework that addresses such violations”. Indeed it has been described as “a significant step in the efforts to promote and ensure respect for the rights of African women”. For the first time in international law, it explicitly sets forth the reproductive right of women to medical abortion when pregnancy results from rape or incest or when the continuation of pregnancy endangers the health or life of the mother. In another first, the Protocol explicitly calls for the legal prohibition of female genital mutilation.

An important barrier to the internal recognition of the legal effect of Conventions that it ratifies is the fact that Kenya is a dualist state. This means that treaties ratified by Kenya have to be domesticated through an Act of Parliament for them to have legal effect and authority within the Country. The process of domesticating such Conventions, is usually lengthy, and is punctuated by general government and legislative lethargy. At present, Kenya has not domesticated the provisions of CEDAW or the recently ratified AU Protocol.

C. Proposed Legislation: Overview of the Sexual Offences Bill

The Sexual Offences Bill intends to breathe a breath of fresh air in the legal province of sexual violence. It covers the breadth of sexual violence acts. It is current is so far as it covers such crimes as deliberate spread of the HIV virus. Notably absent in its tally of definitions is the express concept of sexual violence. It however does define the term “sexual offence”, which appears to cover the purview of sexual violence. The Bill maintains generally the jurisprudential status quo in its definition of rape. It imputes penetration by a male. This holds onto the traditional assertion that rape can only be committed by a man. It however does seem to imply that it is possible for a man to rape someone of the same sex. The implication seems to mean that acts such as sodomy (of either sex) or forced fellatio, can constitute rape. The defilement of a child, is also deemed to fall under the ambit of rape. For the sake of clarity, this provision needs to be properly defined, and especially the definition of the term “penetration”.

38 See the list of sexual violence acts that are listed in the introduction.
39 Sexual Offences Bill, s 28.
40 Ibid, s 2(1).
41 Ibid, s 3(1).
42 Ibid, s 3(5)(f).
The Bill makes provision for the definition of sexual assault, which is the penetration of the genital organs in forms other than penile.\textsuperscript{43} It could be done with other body parts of the body or by an object.

The Bill seeks to outlaw acts committed against children. It is resolute in this endeavour. It forbids compelled or induced indecent acts, acts which cause penetration or indecent acts committed within the view of a child or mentally impaired person, defilement, indecent acts with a child below 18, indecent acts with a child below 16, indecent acts with a child below 9, Promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution and child pornography.\textsuperscript{44} There is a caveat to defilement, where the perpetrator has the burden of proving that the child used deception by representing adulthood.\textsuperscript{45} This caveat is only allowed for instances where the child is below 18 but not under 9 years of age.\textsuperscript{46}

The penalty for rape and attempted rape, is 20 years, but may be "enhanced to imprisonment for life".\textsuperscript{47} The penalty for defilement and attempted defilement however is life imprisonment.\textsuperscript{48} This is welcome, because it would be an important deterrent if not a statement of intent in the fight against sexual violence in these forms. Moreover, the increased incidences of defilement have left children vulnerable without adequate legislative cover.

The Bill claims extra-territorial jurisdiction over Kenyan citizens in instances where perpetrators engage in cross-border acts of trafficking for sexual exploitation.\textsuperscript{49} The proviso is sound, and is meant to guard against Kenyan citizens trying to elude the dictates of the law, merely on the basis that there acts were committed outside the country. There is an important issue that the Bill fails to provide direction. This is the commission of acts that are lawful in other countries, for instance sexual contact with persons who are between sixteen and eighteen years of age, yet this is forbidden in the country.

Incest committed by both male and female relations is not permitted under the Bill.\textsuperscript{50} There is also an important inclusion of the prohibition of sexual harassment.\textsuperscript{51} It also covers other sexual offences relating to positions of authority.\textsuperscript{52} These provisions are strong arsenals in preventing sexual violence. This truism is premised on the fact that sexual harassment is usually covert and latent. In is manifest in the form of coercion and blackmail.

\textsuperscript{43} Ibid, s 5(1).
\textsuperscript{44} Ibid, ss 6-17.
\textsuperscript{45} Ibid, s 8(2).
\textsuperscript{46} Ibid, ss 10(2) and 11(2).
\textsuperscript{47} Ibid, ss 3(6) and 4, respectively.
\textsuperscript{48} Ibid, ss 8(1) and 9(1).
\textsuperscript{49} Ibid, ss 18 (1) and 42.
\textsuperscript{50} Ibid, ss 20 and 21.
\textsuperscript{51} Ibid, s 23(1).
\textsuperscript{52} Ibid, s 24(1).
The nexus between sexual offences and drug abuse in realized within the provisions of the Bill. Article 29 (1) outlaws the administering of a substance with the intent of stupefying or overpowering a person so as to enable the person to engage in sexual activity. This seeks to protect vulnerable, naive and unknowing persons from being taken advantage of and violated. The Bill recognizes the complainant, children and mentally impaired persons as vulnerable persons, and seeks to protect them. It prohibits marriage of persons below eighteen years of age, terming it an offence "liable for conviction to imprisonment for a term of not less [than] ten years". This provision not only protects children who are supposedly married below the age of eighteen, but seeks to protect them from consequential legal trappings emanating from valid marriages, where certain acts of domestic sexual violence such as the doctrine of irrevocable presumption of consent, are presumed not to exist.

Female circumcision and forced wife inheritance are also prohibited. Within the annals of sexual violence, female circumcision imputes maturity of a person and thereby subjects them to matters such as forced marriages, which could be avenues for sexual violation. Forced wife inheritance, has the same possible consequence; where a woman who, inherited against her will, may be forced into sexual activity by her alleged suitor.

Convicted perpetrators are not allowed to conceal the nature of their interment, once released into the free world. Disclosure must be made where they apply for employment which places them "in a position of authority or care of children or any vulnerable person or when offering or agreeing to take care of or supervise children or any vulnerable person". This is important; as the general public are forewarned as to the character and nature of the person they are dealing with, and are therefore able to make independent choices on whether to trust them with children or vulnerable persons. Finally, the Bill proposes to repeal overlapping, yet weaker provisions of the Penal Code, in order that it may take effect.

D. The Strengths, Holes and Loopholes of the Bill

Supporters of the proposed legislation point at the following as its strengths. Firstly, the Bill offers a comprehensive statement of sexual offences. It seeks to address the prevailing problem of a scanty legal framework on sexual offences scattered in a few sections of the Penal Code. Secondly, it updates and re-energises Kenya’s outdated law on sexual offences. The current law is at best, an articulation of the wisdom and attitudes of a bygone era. The Penal Code

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53 Ibid, ss 30 and 31.
54 Ibid, s 35.
55 Ibid, s 36.
56 Ibid, s 43.
58 Sexual Offences Bill, ss 139-169.
was enacted in 1930, borrowing centuries old ideas and its provisions on sexual offences have undergone very minor changes or amendments.

The definitions of the sexual offences and concepts under the Penal Code are quite archaic. Rape, for instance, is defined as unlawful carnal knowledge of a woman or girl. This is an ambiguous definition, which the Sexual Offences Bill seeks to replace with a more precise and easily understood definition of rape. Another example is the criminalization, in the Penal Code, of "idiots and imbeciles.‖ These are outdated terms that demean the victims.

Thirdly, the regime of sexual offences under the Penal Code does not use the human rights paradigm as its philosophical underpinning. Instead of sexual offences being seen as human rights violations, they are portrayed as merely offences against morality. This approach is not surprising, considering that the idea of human rights, especially women’s rights was not entrenched by the time the Penal Code was enacted in 1930. The proposed Bill seeks to juxtapose sexual offences onto the optic of human rights and fundamental freedoms of the individual. The human rights-approach elevates sexual offences and donates to them the required seriousness.

Fifthly the Bill is seen as seeking to replace certain presumptions embodied in the Penal Code, which are clearly questionable on medical grounds. For instance, under the Penal Code, a male person under the age of 12 years is presumed to be incapable of having carnal knowledge. While some legal presumptions are rebuttable, this one is not; meaning that even in cases where such males are in fact capable of having sexual intercourse, they cannot be held liable for rape. This provisions has been abolished elsewhere, including in England in 1993.

Lastly, existing laws on sexual violence are biased against victims of sexual violence, an issue which the Bill seeks to address. The provisions of the law on trial of a sexual offence are quite insensitive and humiliating to the victim. Save for cases involving minors – courtesy of the Children Act – cases of sexual violence must be held in public.

Despite the above-mentioned strengths, the Sexual Offences Bill has been condemned for a number of reasons. One, under a standard procedure in criminal cases including rape, the credibility of a complainant is tested through his/her previous statement, and the time taken between the incident and when it was reported. A complainant’s credibility is put to question if he or she takes an inordinately long time to report the incident. In section 36 of the proposed Bill, it will not matter how long a complainant takes to report.

59 Ibid, s 146.
60 Ibid, s 14(3).
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Two, the accused may not, under the proposed legislation, adduce circumstantial evidence as mitigation, unless the magistrate so directs. Thirdly, the issue of collaboration. In criminal law, a court may not convict on the evidence of a single witness, i.e. without corroboration of the evidence. Under section 38, the Bill provides that corroboration is no longer necessary. The implication that once someone has been accused of rape, then the evidence of the accuser alone is enough. This begs the question whether conviction on uncorroborated evidence is able to assure a fair trial as enshrined under the Constitution.62

Fourthly and perhaps the most plausible critique, the Bill seeks to shift the burden of proof from the prosecution to the accused. This is quite unusual in criminal law. Section 28 of the Bill reads:

In proceedings of an offence under this section, it is for the accused person to prove that he or she did not distribute, administer, or cause to be taken any substance with a view to engaging into sexual activity with another person.

Ostensibly, the section shifts the burden of proof to the accused, contrary to section 77(2) (a) of the Constitution.

Fifthly, although the Bill is purportedly anchored on human rights philosophical framework, has been faulted for disregarding the human rights of the accused person. Its sections 40 and 41 provide for treatment of an accused person, access and custody of his medical records and taking of his DNA samples from his body without any apparent regard to the suspect’s rights. It appears oblivious that the accused person also has rights to choice of medical treatment; to privacy and confidentiality of medical records and to the dignity of the person.

Sixthly and finally, the Bill has been faulted for being insensitive to culture, especially the issue of courtship. Some argue that under African customs, courtship entails a man making a proposal for a relationship. The risk is that if the woman decides that such a suggestion is unwelcome, and then the good-intentioned act of courtship becomes a sexual offence of “making advances”. It has been suggested to carefully curve out courtship from the Bill, while retaining its tenor of fighting sexual violence and degradation, especially that of women and girls.

V. CONCLUSION: THE CASE FOR REFORM

The existing Kenyan legislation is inadequate in dealing with sexual violence. The Sexual Offences Bill is therefore a timely piece of legislation in the fight

against sexual violence. However, a couple of fundamental changes must be made to enhance the effect of such important proposed legislation. In view of the fact that sexual violence is a criminal act, then the burden and standard of proof cannot be changed. The burden of proof remains vested on the alleged complainant, whereas the standard is still above reasonable doubt. Nonetheless, there ought to be express recognition of an attendant burden of proof of consent, regarding situations where activities of a sexual nature are proved or not in issue. Due to the sheer severity of sexual violence and general negative consequences on the psyche of the wider social order, penalties accorded to perpetrators must be very harsh. Further, the concept of "sexual offences" should be expanded as to recognize sexual violence in its own right, as such.

Whereas it cannot be denied that Kenya has made big strides towards the emancipation of women and the minimization of the, at times, appalling social plight such as acts of sexual abuse, much more still needs to be done. In the wake of its rejection, any allusion to culture in subsequent Constitution making processes, should seek to entrench the dynamic nature of culture so as to easily overcome die-hard customs that are prejudicial to women and therefore the fight against sexual violence. The Sexual Offences Bill is a step in the right direction; although therein are faults and gaps that need to be addressed to streamline the Bill with general principles of criminal and constitutionals law. Anything short of that may lead to the Bill rejection by Parliament, or to its being declared unconstitutional by a court once enacted.

Therefore, much more must be done in translating legislation and policy into effective socio-economic components that bring about cultural change, and more importantly, the acceptance of the same.63 The change of attitude towards sexual violence must both be brought about through awareness campaigns as well as adopting radical legislation (as earlier mentioned) with equally drastic penalties and deterrent measures. That way, women, men and children can have the bounds of their relations sufficiently safeguarded in their particular interest and in interest of society as a whole.

63 Naggita, supra note 32 at p. 35 (Observing that "it is apparent that... the use of gender-neutral/non-sexist language [and law]... in practice... does not translate into gender sensitiveness or positive consideration for women's rights").