
Reproductive Health

Social and Behavioral Science Research (SBSR)

2009

The making of the Kenya sexual offenses act, 2006: Behind the scenes

Washington Onyango-Ouma

Njoki Ndung'u

Nancy Baraza

Harriet Birungi

Population Council

Follow this and additional works at: https://knowledgecommons.popcouncil.org/departments_sbsr-rh



Part of the [Demography, Population, and Ecology Commons](#), [Domestic and Intimate Partner Violence Commons](#), [Family, Life Course, and Society Commons](#), [Gender and Sexuality Commons](#), [International Public Health Commons](#), [Medicine and Health Commons](#), [Sexuality and the Law Commons](#), and the [Women's Health Commons](#)

Recommended Citation

Onyango-Ouma, Washington, Njoki Ndung'u, Nancy Baraza, and Harriet Birungi. 2009. "The making of the Kenya sexual offenses act, 2006: Behind the scenes." Nairobi: Kwani Trust.

This Report is brought to you for free and open access by the Population Council.



The making of
the Kenya sexual
offenses act, 2006:
Behind the scenes



The making of the Kenya sexual offenses act, 2006: Behind the scenes

**W. Onyango-Ouma¹, Njoki Ndung'u²,
Nancy Baraza³ and Harriet Birungi⁴**

¹Institute of Anthropology, Gender & African Studies, University of Nairobi

²Leadership Development Consortium

³Kenya Law Reform Commission

⁴Population Council

Published by Kwani Trust

Graphic Design and Layout by Sokoletu Creative Limited and Black Butterfly Ltd

This book is based on research undertaken by the Population Council together with the Institute of Anthropology, Gender & African Studies, University of Nairobi, the Leadership Development Consortium, and the Kenya Law Reform Commission.

ISBN: 9789966739231

© Population Council, 2009

Any part of this publication may be reproduced without permission for limited distribution, provided it is distributed without charge and the Population Council is acknowledged as its source. The Population Council would appreciate receiving a copy of any materials in which the text is used.

Suggested citation: Onyango-Ouma W., Njoki Ndung'u, Baraza N., Birungi H., 2009. *The making of the Kenya sexual offenses act, 2006: Behind the scenes*. Nairobi: Kwani Trust.



Foreword

Since 2003, the Ford Foundation office in Nairobi has supported over 20 sexuality grantees to give visibility, depth and legitimacy to the field of sexuality. Through this support, grantees have promoted informed dialogue and open discussions around sexuality and contributed to positive changes in the emerging field of sexuality by creating mechanisms for learning at the regional level. The grantees have sought to change public discourse on gender and sexuality and to create a more constructive and enabling policy environment in the field of sexual health and rights.

In 2007, the Population Council, an international, nonprofit, nongovernmental organization that seeks to improve the well-being and reproductive health of current and future generations around the world, received a grant from the Ford Foundation East Africa office to undertake a series of activities to promote informed discussion and dialogue on issues of sexuality in East Africa.

The grant came at a time when the main actors in the area of sexuality and gender relations in Kenya had participated, at one level or another, in the passing of the Sexual Offenses Bill. A lot of ground had been covered, even if some of the initial demands had been conceded when the Kenya Sexual Offenses Bill was finally passed. The Population Council wanted to document the process by which this Bill had been passed so as to develop guidance for other countries seeking to do the same. The grant's timing could not have been better.

Kenya made a milestone in dealing with sexual offenses and gender based violence through the enactment of the Sexual Offenses Bill. The bill is Kenya's first legal recognition of the many sex crimes that occur in the country. Among other things, the law criminalizes deliberate transmission of HIV/AIDS and will provide rape victims with free medical care and counselling in public institutions. It also broadens the range of sex crimes to include gang rape, sexual harassment, child trafficking, sex tourism, rape, incest and wrongful accusation.

Further afield, the discourse on sexual offenses was also being mainstreamed in criminal, legal and sociological initiatives. Tanzania had also passed a sexual offenses bill, and Uganda sought the passing of similar legislation. This also underpinned the need to tell the Kenyan tale and further motivated the Population Council to undertake more research and develop the project to prepare a book on the making of the Sexual Offenses Bill.

The documentation process itself, like the actual making of the bill, proved enduring and contentious, and without the selfless energies of various individuals it would not have been possible. The Population Council collaborated closely with the Institute of Anthropology, Gender and African Studies, University of Nairobi, the Kenya Law Review Commission, and the Centre for Legal Information and Communication in Kenya to complete a retrospective study of the process leading to enactment of the law.

The overall objective of the study was to document the Sexual Offenses law making process, the influence of different actors, and how these interacted with contextual factors to influence the substantive content of the law as well as its enactment. To achieve this, numerous interviews were conducted, literary reviews of similar processes elsewhere compiled, and discussion forums set up. The process was analyzed retrospectively and lessons drawn for other countries that intend to pursue a similar path.

This book is by no means the first of its kind. Rwanda has documented a behind-the-scenes account of the making of their sexual offenses bill. And Tanzania might now be considering the same course of action, not least because their legislation surpasses the Kenyan bill in content and coverage of issues proposed. Conducting research and publishing a book opens up possibilities for comparative research in regions that might not be as different from each other as perceived.

The book will serve as a reference point for any individual, institution or country planning to go through a similar process. The learning curve is a minefield as those involved have discovered, with many questions to be answered if success is to be attained. What kind of coalitions does one set up, which do you avoid, what kind of actors would be useful to draw upon, what role can the media play, etc.? This document describes a learning process for anybody intending to pursue a similar course.

Sexuality is of universal concern today, and thus the book is potentially for a universal audience. More specifically, it will garner special interest from policy analysts, women's groups, lobbyists, and parliamentarians interested in tabling private bills in parliament. It documents a process of public negotiations, and will give insights to those involved in similar processes.

The book is also a microcosm of the work the Population Council has carried out in Kenya. Since 1994, the Council has assisted the Government of Kenya in implementing a broader reproductive health strategy, based on recommendations of the International Conference on Population and Development. It collaborates with the ministries of Health, Education, Gender, and Social Services, and with national and international NGOs involved in service delivery, human rights, poverty alleviation, and social and gender equality. In response to the AIDS pandemic, the Council carries out innovative research and tests a wide range of interventions to reduce sexual and perinatal transmission of HIV, to highlight the particular vulnerability of young women, and to mitigate its impact on individuals, families, and society.

The Council's vision over the next five years is to continue to develop and test new program strategies to prevent and manage HIV and AIDS, to improve sexual and reproductive health, and to enhance healthy and successful transitions to adulthood. The Council will intensify its efforts to build the capacity of national partners to make better use of research-based planning and evaluation and to scale up interventions with demonstrated impact. Increased attention will be paid to cross-cutting issues of gender, sexuality, and health-related rights, to the structural determinants of sexual and reproductive health, and to strengthening health-care systems and diversifying and integrating the roles of the private, nongovernmental, and public sectors. Improving the lives of vulnerable groups, especially adolescents, will remain at the forefront of the Council's activities.



CONTENTS

Acknowledgments	1
Abbreviations and acronyms	2
Executive summary	3
Introduction	6
Lessons learnt	27
References	29
The deconstruction of the sexual offenses act — 2006	30

ACKNOWLEDGMENTS

This book was made possible by the generous support of the Ford Foundation to the Population Council under the contract agreement No. 1070 – 0231. The contents do not necessarily reflect the views of the Ford Foundation.

The authors would like to acknowledge the invaluable support of Dr. Carla Sutherland (Ford Foundation) during the conceptualization, planning, and initial implementation stages. We are grateful to Dr. Ian Askew of the Population Council who reviewed drafts of the document. Charles Matathia prepared the piece on, 'Deconstructing the sexual offenses act - 2006.' We are grateful to our editors Billy Kahora and Susan Linee.

The team would also like to acknowledge the support of individuals from the following organizations: The Federation of Women Lawyers-Kenya (FIDA), Coalition on Violence Against Women (COVAW), The Child Rights Advisory Documentation and Legal Centre (The CRADLE), Urgent Action Fund (Africa), IPAS, Kenya Law Reform Commission, Women in Law and Development in Africa (WILDAF), Kenya Women's Parliamentary Association (KEWOPA) and Centre for Rights Education and Awareness (CREAW).

We also thank Ms. Philisters Obunga (Population Council, Nairobi) and Ms. Mellyne Ongango (Ford Foundation, Nairobi) for providing administrative support to the project.

Above all, we would like to thank the individuals and especially Honorable Members of the Ninth Parliament who agreed to participate in this research.

ABBREVIATIONS AND ACRONYMS

AG	Attorney General
AIDS	Acquired Immune Deficiency Syndrome
COVAW	Coalition on Violence Against Women
CREAW	Centre for Rights Education and Awareness
FGM	Female Genital Mutilation
FIDA	The Federation of Women Lawyers-Kenya
HIV	Human Immunodeficiency Virus
KEWOPA	Kenya Women's Parliamentary Association
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
MP	Member (s) of Parliament
The CRADLE	The Child Rights Advisory Documentation and Legal centre
WILDAF	Women in Law and Development in Africa

EXECUTIVE SUMMARY

Kenya made a milestone in dealing with sexual offenses and gender-based violence through the enactment of the Sexual Offenses Bill in 2006. The bill is Kenya's first legal recognition of the many sex crimes that occur in the country. Among other things, the law criminalizes deliberate transmission of HIV/AIDS and will provide rape victims with free medical care and counseling in public institutions. It also broadens the range of sex crimes to include gang rape, sexual harassment, child trafficking, sex tourism, rape, incest and wrongful accusation.

A retrospective study was conducted to document the process leading to the enactment of the law in 2006. The overall objective of the study was to document the sexual offenses law-making process in Kenya, the influence of different actors, and how these interacted with contextual factors to influence the substantive content of the law as well as its enactment. The process was analyzed retrospectively and lessons drawn for other countries that intend to pursue a similar path. Data were collected using document reviews and key informant interviews.

Context for the law making process

The circumstances under which the Sexual Offenses Bill in Kenya was formulated date back to the 1990s when human rights advocacy groups realized that the country's laws had a weak legal framework for addressing sexual and gender-based violence perpetrated against women and children. Apart from legal concerns, there were social concerns arising from the fact that cases of sexual violence were increasing at an alarming rate in the society. The media played a significant role in creating visibility regarding the rising cases of sexual violence in the society. Furthermore, the coming into power of a new government that was pro-change in 2003 gave impetus to the move to address sexual violence in a comprehensive manner.

Main instigators of the law

Different actors were involved in the law-making process. These included civil society organizations, women's rights activists, politicians, the media, and the government. However, the main instigators of the law were Hon Njoki Ndung'u and the civil society organizations working under the Juvenile Justice Network who were keen on having a comprehensive law on sexual offenses. The role of Hon Njoki Ndung'u (women's rights activist, lawyer and politician) was particularly outstanding in this regard for taking the legislative process and steering it through to completion.

Strategies for mobilizing support for the law

A number of strategies were used to mobilize support for the law including organized meetings and workshops with different groups, media visibility for cases and debate on

sexual violence, public demonstrations by civil society, lobbying and advocacy, nationwide campaigns to educate the public on Sexual Offenses Bill, and forming coalitions of purpose.

The legislative process

The legislative process began in December 2004 when a motion seeking permission to bring a Private Members Bill on sexual offenses was tabled. The critical issue during the debate of the motion was the perception that the proposed draft bill would include a provision for the castration of rapists. While some male MPs raised serious concerns regarding castration of men, others supported the motion. The motion was passed in April 2005 paving way for the bill to be published and tabled in parliament.

Although the debate in parliament was polarized to a great extent on the basis of gender, it portrayed the differences between traditionalists and liberals. The traditionalists did not believe in women's rights, and enjoyment of the same was not permissible, while the liberals believed in women's rights and had no problem legislating against violation of such rights. Regional debates on sexual violence including the rape cases against Jacob Zuma in South Africa and Kizza Besigye in Uganda influenced the debate of the bill. These cases created the impression that the proposed law could be used to settle scores and specifically to fix men for political reasons.

Local and regional issues around the bill created an organized opposition within parliament across the political divide. The debate was therefore trivialized and sometimes got personal. To strike a compromise a series of amendments were made to the bill that made it acceptable to MPs, and it was eventually passed into law. The success of the legislative process was partly attributed to the fact that the bill was able to transcend the traditional party positions between those in government and the opposition.

Content of the law

The content of the law was a product of negotiations, changes, amendments and compromise. The content changed over time following workshop deliberations, stakeholders' suggestions in written memoranda, and parliamentary debates and amendments. The contentious issues that attracted greater attention included chemical castration, unlawful advances, marital rape, female genital mutilation (FGM), burden of proof, definition of a child, rape shield for victims, intentional exposure of genital organs and age of consent in marriage.

The Sexual Offenses Bill became law in Kenya in July 2006. The law contains 14 new offenses including gang rape, deliberate infection with HIV/AIDS, trafficking for sexual exploitation, and child pornography. It also introduces minimum sentences, provides for the setting up of a DNA data bank and a pedophile registry, and criminalizes sexual harassment.

The acceptability of the content of the law is varied among actors. Some actors from civil society and the women's rights movement have argued that the law does not reflect the original intent and that what was passed after a series of amendments was an empty shell that cannot adequately address sexual violations. They specifically cite Article 38 – offense to make false allegation – which makes it difficult for victims to report perpetrators of sexual violence for fear of being victimized. However, there are those who argue that the law, though not passed in its original form, was the first attempt to provide a comprehensive law to address sexual offenses in Kenya. These actors argue that the law comes with some new provisions that reflect a significant change in the way sexual offenses are handled and that the country is better off than it was without the law.

Lessons learnt

Key lessons drawn from the Kenyan experience in the law-making process of the Sexual Offences Act include the need to:

- Facilitate consultations across the board
- Coordinate efforts
- Harmonize strategies
- Develop joint ownership of the process
- Understand the legislative process
- Channel the process through the government
- Package the bill comprehensively

INTRODUCTION

Kenya made a milestone in dealing with sexual offenses and gender-based violence through the enactment of the Sexual Offenses Bill in 2006. The bill is Kenya's first legal recognition of the many sex crimes that occur in the country. Among other things, the law criminalizes deliberate transmission of HIV/AIDS and will provide rape victims with free medical care and counseling in public institutions. It also broadens the range of sex crimes to include gang rape, sexual harassment, child trafficking, sex tourism, rape, incest and wrongful accusation. Convicted rapists will now attract a minimum sentence of 10 years, while a maximum penalty will be life imprisonment. Penalty for deliberate transmission of HIV/AIDS will be a prison term of at least 15 years.

A retrospective study was conducted to document the process leading to the enactment of the law in 2006 in a bid to curb sexual abuse and gender-based violence. The study is expected to make an important contribution to sexuality knowledge and to be of interest to other countries in Africa intending to take similar actions.

The overall objective was to document the sexual offenses law-making process in Kenya, the influence of different actors, and how these interacted with contextual factors to influence the substantive content of the law as well as its enactment. The process was analyzed retrospectively and lessons drawn for other countries that intend to pursue a similar path. This book specifically;

1. Explores the circumstances under which the law was formulated and passed, including social and political concerns as well as media visibility of sexual violence;
2. Identifies actors and interest groups that were involved in the law-making process in order to gain insights into the roles of different actors and how coalitions were forged;
3. Explores how the substantive content of the law changed over time and what factors influenced that process; and
4. Draws lessons learnt which could be of interest to other countries in Africa intending to invoke similar actions.

Data were gathered through document reviews and key informant interviews. Document reviews involved gathering and reviewing relevant materials including various drafts of the law, final law (Sexual Offenses Act, 2006), media reports and correspondence to understand the content of the law. Key informant interviews were held with the initiator of the bill and several other actors to understand the circumstances under which the law was formulated and passed, to identify actors and interest groups that were involved in the law making process, to gain insight into how support for the law was marshaled, and to understand how the substantive content of the law changed over time. A total of 15 interviews were conducted: one with a representative of the Kenya Law Reform Commission (KLRC), seven with members of parliament who were involved at different stages in the formulation and debate of the bill, and seven with members of the civil society representing key actors involved in the formulation and soliciting support for the bill.

Context for the law-making process

The circumstances under which the Sexual Offences Bill in Kenya was formulated dates back to the 1990s when human rights advocacy groups realized that the country's laws (as inherited at independence) had a weak legal framework for addressing sexual and gender-based violence perpetrated against women and children. The Federation of Women Lawyers-Kenya (FIDA) and the Kenya Anti-Rape Organization provided leadership to groups that made concerted efforts to have the sexual violations against women and children addressed.

There were two issues that were of concern regarding the legal framework: the definition of rape and the lack of minimum sentences for offenders. Under the existing law at that time issues affecting women's rights such as sexual assault and rape were found within the Penal Code and were described as offenses against morality alongside other offenses such as homosexuality and abortion. In the Penal Code, offenses against morality carried much lighter sentences than offenses against the person, which were treated as felonies. In addition, the presumptions within the law, such as the requirement that the complainant (woman) should get corroboration, made it very difficult to convict suspects. Another critical issue was that the law did not prescribe minimum sentences for such offenses against morality. As a result convicts got away with a fine or a few days of imprisonment. It was realized that provisions within the Penal Code that were borrowed from English statutes of the Victorian period did not comprehensively address the sexual offenses as was experienced in Kenya.

Apart from legal concerns, there were social concerns which arose from a rapid increase in cases of sexual violence in the society. The period between 1991 - 2005 saw an upsurge in the number of women and children reporting cases of sexual violence of diverse nature, including rape. In 1991 there was the St Kizito mixed secondary school incident where boys invaded girls' dormitories and raped 70 girls, leading to 19 deaths in the ensuing stampede. Gang rapes were also becoming common where gangsters would hijack public vehicles and rape women. More cases of sexual violence including rape and incestuous relationships, were reported against minors as young as five months old and elders as old as 86. And with the opening of the Gender Violence Recovery Center at the Nairobi Women's Hospital various types of sexual violence were documented and rape survivors given a voice. The increasing number of sexual violations against women and minors inspired advocacy for a law to deal with offenders. Human rights activists during that period equated rape with murder and called for stiffer penalties in their anti-rape campaigns.

The media played a significant role in creating visibility regarding the rising cases of sexual violence in the society. The continued coverage brought cases of sexual violence to the public domain and in essence set the pace for public anger and outrage at what was happening. In the late 1990s the print media donated space for the campaign and

even provided a form that could be cut, signed and sent to the Attorney-General (AG) to petition him to take action against rape. In the same way the electronic media highlighted cases of rape showing the age of the victims and the severity of the cases reported at the Nairobi Women's Hospital Gender Violence and Recovery Center. The Stop Rape Campaign was at its peak in 2000 with the media playing a pivotal role alongside women's rights activists. The campaign collected a million signatures to petition the AG to act on sexual violence.

The women's rights activists coalescing under FIDA worked to hard to bring to the limelight the increasing sexual violence that women faced in the society. They advocated for the flaws in the legal framework to be addressed and tried to convince the government that something was wrong. In 1996 FIDA initiated the Women's Rights Monitoring and Reports Writing Project through which they produced a periodical known as 'Sauti ya Akina Dada' (The Voice of Women). To show that sexual violence was a big issue they reported on rape of minors which was becoming common. This periodical advocated for rape to be treated as attempted murder and argued that rape was the most under-reported crime in the society. The reports were often sent to the AG's office for his attention.

As a result of FIDA's spirited advocacy campaign that sexual offenders deserved stiffer penalties, the AG's office came up with the Criminal Law Amendment Act of 2001. The amendment was made to the Penal Code pertaining to minors and, in effect, removed inconsistencies in penalties and protected the identity of minors. It did not, however, address evidentiary burdens leaving out the whole issue of comprehensive legislation to deal with sexual violence. Amendment to the criminal law was all that the women's rights activists could achieve by 2002.

An important milestone in the making of the Sexual Offenses Act was the change in the political context with the coming of a new government into power in January 2003. The new government was pro-change and gave impetus to the move to address sexual

Box 1: Facts on sexual violence in Kenya by 2005

- The youngest rape survivor in Kenya is five months old
- The oldest rape survivor in Kenya is 86 years old
- 102 male sexual violence survivors were treated at the National Women's Hospital alone in the last three years
- 2,329 female sexual violence survivors were treated at the Nairobi Women's Hospital alone in the last three years
- 2,308 cases were reported in 2003 while 1,653 cases were reported between January and July 2004, according to police reports
- Statistics compiled in hospitals and community-based organizations where the victims go for treatment and counselling indicate that there are at least 16,482 rapes every year. This translates into a rape occurring every half hour in Kenya.

Source: <www.sexualoffensesbill.co.ke/documents/sexual_offenses_statistics.pdf>

violence in a comprehensive manner. The democratic change also came with a free media, free society and change of government institutions that were formerly resistant to change. In addition, many individuals from the women's rights movement in the civil society were appointed to government positions.

However, some negative developments also accompanied the new-found freedom. Cases of sexual violence escalated to alarming proportions that had never been experienced and once again created the urgency to deal with them. The rise in cases of sexual violence could be partly attributed to the new-found freedom – people who previously lived under authoritarian rule now thought that they could break the law with impunity. The same was experienced in South Africa after apartheid rule was abolished in 1994. It could also be due to the free media that came with the change and hence more coverage was

given to issues of sexual violence than was done previously. Whatever the explanation, the change in the political context and the subsequent rise in cases of sexual violence against women and children gave the women's rights activists and civil society the determination to come up with a comprehensive law to address sexual violations in Kenya.

Box 2: Timeline for Sexual Offense Bill

- Up to 2000 – FIDA and other women's rights organizations spearhead advocacy for reforms on laws relating to sexual offenses
- 2001 – Criminal Law Amendment Act passed dealing with sexual offenses against minors
- 2004, September – Juvenile Justice Network drafts a bill to address sexual offenses.
- 2005, April – Motion to introduce the Sexual Offenses Bill is passed in parliament
- 2005, August – Sexual Offenses Bill published
- 2006, March – Bill republished with amendments from relevant House Committee
- 2006, April – July – Parliamentary Debate on Sexual Offenses Bill
- 2006, July – Parliament passes Sexual Offenses Bill into law

The law-making process and the role of different actors

Origin of the process

The origin of the Sexual Offenses Bill can be traced to the 1990s when human and women's rights activists realized there was a weak legal framework for dealing with sexual offenders. The rights groups began advocating for piecemeal reform of laws relating to sexual offenses. Of special concern at that time was the lack of minimum sentences for sexual offenses within the Penal Code. FIDA and other women's rights organizations pressurized the AG to instigate review of the Penal Code which led to the Criminal Law Amendment Act of 2001. This amendment removed inconsistencies in penalties on sexual offenses and gave protection to the identity of minors in criminal proceedings.

The Juvenile Justice Network initiated the idea of a comprehensive law on sexual offenses in 2003/2004. The Network had previously worked on a comprehensive law addressing children's concerns - Children's Act 2001 - that was successfully enacted by parliament. The Network combined issues that FIDA had been working on regarding sexual violations against women with new ideas on sexual violence against children such as oral sex and rape of minors. Based on these experiences, the Network comprising 17 civil society organizations drafted a bill to address sexual offenses. The bill borrowed heavily from South Africa which by that time had commenced a process of coming up with a similar law. The bill was popularized through workshops, public processions, and memoranda to parliament and the chief justice calling for the amendment of laws.

In September 2004 Hon Njoki Ndung'u gave notice in parliament to bring a motion on sexual offenses, particularly rape, through a private member's bill. Parliamentary rules require that a private member's bill be preceded by a motion seeking permission for the same. The motion is then debated and, if passed, the member is granted leave to table the bill. After giving notice of the motion, Hon Njoki Ndung'u informed the AG's office of her intention to bring legislation against rape and other sexual offenses. The Juvenile Justice Network wrote to Hon Njoki Ndung'u in November 2004 and informed her that they were working on a similar bill. The Network submitted their bill to the AG in February 2005. Probably after realizing that the two groups had similar intentions, the AG organized a joint meeting to discuss the way forward. The outcome of the meeting was the formation of a task force to work on the Sexual Offenses Bill. It was this task force comprising Hon Njoki Ndung'u, the Juvenile Justice Network, KLRC, the Kenya National Commission on Human Rights (KNCHR), FIDA and legal officers from the AG's office that drafted the comprehensive bill on sexual offenses. The draft bill drew a lot from the English Sexual Offenses Act of 2003.

The coming of Hon Njoki Ndung'u on board was a blessing in disguise for the process because as an MP she was able to spearhead the crucial legislative process which members of civil society could not. As a former member of FIDA and a women's rights activist she was well versed with the issues to be addressed regarding sexual offenses. To initiate the legislative process, she tabled a motion seeking to introduce the Sexual Offenses Bill. The motion was debated and passed on April 20, 2005 paving way for the drafting and tabling of the bill in parliament.

After the passing of the motion Hon Njoki Ndung'u coordinated the drafting process and worked with the task force set up by the AG which incorporated members of the civil society to agree on the content of the draft bill. Several workshops and meetings were held to deliberate on the content. A team of experts drawn from the KLRC, KNCHR and lawyers in private practice backed up the process through research while legal draftspersons from the AG 's chambers provided technical support.

Main instigators of the law

Different actors were involved in the law-making process. These included civil society organizations, women's rights activists, politicians, the media, and the government (the KLRC and AG). However, the main instigators of the law were Hon Njoki Ndung'u, the civil society organizations working under the Juvenile Justice Network, and individual women's rights activists who were keen on having a comprehensive law on sexual offenses to deal with sexual violence against women and children. The role of Hon Njoki Ndung'u (women's rights activist, lawyer and politician) was particularly outstanding in this regard for taking the legislative process and steering it through to completion.

Role of different actors in the law-making process

Different actors played complimentary roles in the law-making process. Roles depended very much on the core responsibility of the actors. The broad categories of the actors included civil society organizations, media, government and politicians.

Civil society organizations

Civil society played the most important role in the law-making process. This was mainly because their mandate was broad and included human rights violations such as sexual violence against women and children. Civil society comprised many organizations, but the ones that played significant roles included FIDA, The CRADLE/Juvenile Justice Network, CREAM, COVAW, Urgent Action Fund (Africa), WILDAF and IPAS. The role of the civil society started long before the drafting of the bill when they campaigned against sexual violence in the society. A number of organizations also engaged in civic education by educating women about their rights in the society. The civil society created awareness against sexual violence, mobilized community based organizations and religious groups to speak against perpetration of sexual violence in Kenya. The incremental effect of this played off when the Sexual Offenses Bill was being debated in parliament. The civil society made the bill a national agenda item that required urgent action.

The civil society was also involved in drafting the content of the bill. The Juvenile Justice Network was a key member of the task force that worked on the initial draft bill. The content reflected key issues that women's rights organizations had been working on for over a decade. Key issues such as rape, sexual assault, child rape and trafficking, and defilement had dominated the agenda of the civil society organizations prior to the drafting of the Sexual Offenses Bill.

Apart from playing a role in the drafting of the bill, civil society organizations did help in mobilizing resources to support the process. Resources were needed to fund workshops that were organized to mobilize support for the bill and produce adverts in the media. Organizations such as IPAS, COVAW, Urgent Action Fund (Africa) and WILDAF put in their own resources and mobilized others to fund activities. Other organizations used their money directly to fund their own activities (producing pamphlets, T-shirts, billboard

posters, etc) aimed at mobilizing support for the bill. A member of civil society described their role as follows:

“What can we do? Who is having what activity? How can we build the publicity of this bill into our ongoing programs? And how can we get the message to parliamentarians? We mobilized resources to educate the masses and communities on the importance of the bill and why they needed to urge their leaders to pass this bill.”

Media

The role of the media was very critical in creating visibility for the Sexual Offenses Bill. The print media donated space for the ads and gave extensive coverage to incidents related to sexual violence. The electronic media donated time for ads, organized talk shows with influential people and held call-in sessions for the public at large to voice their concerns. One striking ad - “Scream: end the plague of sexual violence in Kenya” – prepared by WILDAF was very informative and helped in raising nationwide awareness about sexual violence. The ad showed a screaming woman holding her cheeks and was also played on radio and put on billboards on major roads. Another ad – “Silence is betrayal” – a small video documentary on the St Kizito tragedy, was aired on all the TV stations. The extensive coverage by the media highlighted the magnitude of sexual violence and portrayed the issue as a national problem that had gone out of proportion and needed to be addressed. The coverage changed the mindset of most people, including politicians.

Government

The role of government came through the AG’s office and the KLRC. The AG was very supportive, and as the chief legal advisor to the government his support was instrumental throughout the process. The AG set up a task force to collate views from different groups and to draft the bill. In addition, the AG provided legal draftspersons to the task force who ensured that all the provisions of bill were appropriate and did not contradict existing laws.

The government (through the AG) did not interfere or attempt to take over the bill as has happened before with private member’s bills. By opting to facilitate and support a private member’s bill, the government left the bill to be led by a very experienced women’s rights activist. This decision saved the bill from a polarized debate on the basis of the government side and the opposition side. Instead the debate drew support and opposition across the political divide. In fact, the Sexual Offenses Bill became only the second Private Members Bill to succeed in independent Kenya.

Government support also came through the House Business Committee which is responsible for the order of bills debated in parliament. The committee allowed the Sexual Offenses Bill to be prioritized on the order paper, leaving other crucial bills that

were already lined up for debate. This saved time and enhanced the process within the parliamentary bureaucracy.

The KLRC was a member of the task force set by the AG and participated in the drafting of the bill. They also provided legal support to the drafting team and also mobilized public support by advocating for the law and responding to criticism leveled against the bill.

Politicians

The MPs' role was through the legislative process in parliament. The mover of the motion (Hon Njoki Ndung'u) relied on the support of MPs for the bill to go through the various stages before becoming law. Although the civil society was fully supportive of the bill, their role was limited to outside parliament. The role of the MPs was therefore crucial, first in passing the motion to introduce the bill, and later in debating and passing the bill into law. The motion seeking to introduce the bill drew support across the political divide and garnered majority support despite opposition from certain quarters.

The House Committee on Administration of Justice and Legal Affairs played a key role in ensuring that the bill did not die a natural death as often happens with many bills. The committee discussed the bill and suggested amendments based on comments recorded during the debate. As a result the bill was withdrawn, amendments incorporated and the bill republished again, paving way for another round of debate in the second reading. When the bill came up again for debate, the MPs struck a compromise on the content and passed it into law.

Strategies for mobilizing support for the law

Meetings and workshops with different groups

The task force on Sexual Offences Bill organized meetings and workshops to drum up support for the bill. Two important workshops were organized for MPs to brief them on the bill and solicit for their support. Hon Njoki Ndung'u and other members of the civil society through WILDAF facilitated these workshops. As lawmakers, the MPs were a crucial group for the passing of the bill, and workshops outside parliament presented an opportunity for their concerns to be addressed. This strategy won over a number of MPs and prepared them for the debate in parliament. Other constituencies that were reached through meetings and workshops included the media (owners and editors) and religious groups. These groups were briefed on the contents of the draft bill and asked to play an advocacy role. The media played great role in educating the public when they reported cases of sexual violence and underscored the need for the draft bill to be enacted into law. The religious groups communicated the bill to their followers and also lobbied the MPs to support the bill.

Media visibility for cases and debate on sexual violence

The use of the media as a strategy for mobilizing support was very successful. Media coverage on issues of sexual violence increased during the period when the bill was being debated and drew public attention. Both print and electronic media dedicated time and space to issues relating to the bill. The Parliamentary Journalists Association was enlisted to provide adequate coverage of the parliamentary debate in the local dailies. Women journalists were particularly outstanding in highlighting and responding to issues relating to the bill. The media influenced public opinion and mobilized public support.

Public demonstrations by civil society

Members of the civil society organized several street demonstrations to mobilize support for the bill. Some of the demonstrations targeted MPs and were meant to convince them that sexual violence was a public issue worth legislating against. Street demonstrations also elicited public empathy and brought the draft bill to the public attention. Some of the placards carried messages such as – “Rape is equal to murder”, “MPs, we are watching you”. A member of the civil society asserted:

“We mobilized children and women [to demonstrate on the streets] because we said this bill stands to benefit us. There were attempts by the police to stop us, but we still soldiered on and eh... when we were stopped by police we tried to call on women Members of Parliament; nobody came to our aid. So we said we are looking at the bigger picture.”

Lobbying and advocacy

Civil society organizations and Kenya Women’s Parliamentary Association (KEWOPA) did a lot of advocacy and lobbying. Civil society organizations used their own resources to talk to parliamentarians, church groups, and the media. They also organized group discussions with different groups to drum up support for the bill. On the eve of the debate in parliament civil society organizations petitioned MPs through short text messages (SMS) to support the bill. The Juvenile Justice Network wrote speeches for party leaders to enable them to speak in support of the bill authoritatively during the debate in parliament. The KEWOPA also did a lot of lobbying within parliament among their male colleagues. In addition, women parliamentarians talked to the spouses of their male colleagues to convince the men to support the bill because it was not a gender issue but one that affects their daughters, mothers and spouses. KEWOPA, in collaboration with civil society, also sought the support of high profile political leaders to influence their followers in parliament. The political leaders supported the bill in and out of parliament and convinced the public that sexual violence needed legislation.

Nationwide campaign to educate the public on the Sexual Offenses Bill

A nationwide campaign to educate the public on the Sexual Offenses Bill was used to mobilize support for the bill. The campaign was conducted through the media and other fora such as ongoing programs of civil society organizations, religious meetings, and public debate. Summaries of the bill were printed into booklets and pamphlets and made available to the public. Billboards and banners were also erected to raise concern about the draft bill. Religious groups, especially the Catholic church, used their grassroots network to educate their followers on the bill and to implore MPs to pass the bill into law. Such campaigns created the impression among MPs that the bill was in the public domain and their constituents would take note of those who did not support the bill.

Forming coalitions of purpose

Coalitions of purpose were formed to marshal support for the bill. Several civil society organizations came together for a unity of purpose. They matched funds, organized street demonstrations, and printed advocacy materials like booklets. They also conducted workshops on the bill for different groups as part of their advocacy efforts. KEWOPA brought together women parliamentarians of different political persuasions to mobilize support for the bill in and out of parliament. KEWOPA members worked hard to lobby their male parliamentarians, participated in workshops together with members of civil society and defended the bill during debate in parliament.

Although all the different coalitions were not well coordinated, they played complimentary roles which mobilized support for the bill. At times the groups appeared to pull in different directions as they were not agreed on a uniform strategy to apply. A women's rights leader described the scenario as follows:

"What happened is that... when preparation to the first reading, we actually took it upon ourselves. ...because there were tensions, bad blood. The civil society on one hand was feeling that 'yes we cannot legislate, but we need to be recognized as people who were the original initiators of the whole idea'. But on the other hand, the MP was feeling that 'no, this is my idea, and you're not supporting me at all and anyway you're not Members of Parliament'..."

While some preferred a soft approach (use of workshops to persuade those who were opposed), others preferred a more proactive approach (use of street demonstrations). However, all the different groups were driven by the women's rights agenda, and they saw the Sexual Offenses Bill as the first step towards addressing many of the human rights violations against women and children.

The legislative process

The legislative process began when Hon Njoki Ndung'u tabled a motion seeking permission to bring a private member's bill on sexual offenses. Although the motion

was not a bill, it had to be debated and passed so as to allow for the bill to be tabled in parliament. Hon Njoki Ndung'u strategically sought a male Muslim MP to second the motion, and this helped in mobilizing support from Muslim MPs. When the motion came up for debate, there was not as much opposition as expected.

The critical issue during the debate of the motion was the perception that the proposed draft bill would include a provision for the castration of rapists. While some male MPs raised serious concerns regarding castration of men, others supported the castration of rapists. In supporting the motion an MP said:

"Since the deadly weapon used in this kind of robbery is well known, I think the manner in which the 'robber' should be disarmed is to make sure that this 'deadly weapon' is removed completely, so that in future the culprit cannot use it to victimize other people". Parliamentary Hansard

The motion was eventually passed in April 2005 paving way for the bill to be published in August 2005. However, the bill did not go far as it died a natural death when parliament was prorogued in August 2005 for the referendum campaign until December 2005.

The bill was revived and published again in January 2006. Parliamentary practice requires that a once a member brings a bill it is handed over to the relevant parliamentary committee to look at it and submit its report to the house before the commencement of debate. The Committee on Administration of Justice and Legal Affairs was the relevant committee for the Sexual Offences Bill. In order to fasttrack the report of the committee, Hon Njoki Ndung'u organized a retreat for the committee to discuss the bill and prepare a report. Other stakeholders including the KLRC and KNCHR joined the committee at the retreat. The bill was discussed and amendments suggested before it could be debated in parliament. A member of the committee asserted:

"We managed to sanitize the thing [bill]. We went clause by clause, and we proposed amendments, major amendments... we streamlined the sentences... which were accommodated in the next version of the bill."

Due to the many amendments agreed on during the retreat with the committee, Hon Njoki Ndung'u wrote to the speaker requesting to withdraw the bill and make corrections. The request was granted, and the bill was amended and republished in March 2006. Once the bill was republished, the mover lobbied the House Business Committee to speedily line it up for debate. As was done with the motion, a male MP was strategically selected to second the bill. The seconder was also the spokesperson of the Official Opposition and provided the much needed bipartisan support since the mover was from the government side.

Parliamentary debate on the Bill

The debate on the bill was very much influenced by local and regional debates on sexual violence. The time of the debate coincided with the rape case against Jacob Zuma in South Africa and a similar case against Kizza Besigye in Uganda. These cases created the impression that the proposed law could be used to settle scores and specifically to fix men for political reasons. On the local scene, women's rights activists held street demonstrations with placards on the day of the debate ostensibly to marshal support for the bill. They also petitioned MPs to support the bill through SMSs saying - "We are watching you, and if you vote against us we will vote against you". The activists were also present at the public gallery in parliament during the debate. The action of the activists made the male MPs feel that women were intimidating them to pass the bill into law, and this made some of them to harden their positions against it.

The contextual issues around the bill created an organized opposition within parliament across the political divide. The debate was therefore trivialized and sometimes got personal about the character of the mover. Some MPs questioned the intention of the mover, given that she was single, an urbanite and had no son. An MP asserted:

"She is from town. What does she know about the rural women? She wants to punish our sons. When my son dates somebody's daughter, then my son will be jailed by people who don't have children."

The debate became nasty, and the house was polarized between those who wanted the bill and those who opposed it. Women and men yelled at each other, abused each other and the speaker was unable to control the situation. Eventually a male MP precipitated a walkout by women MPs when he referred to women as "those lovely creatures" and alleged that African women say NO when they mean YES to a sexual advance. These remarks angered women who walked out of the house in protest. However, the mover did not walk out, for to do so would have killed the bill.

After two days of debate the mover of the bill stood it down. When the House Business Committee met she indicated that she was not ready to proceed with the bill, and hence other bills were slotted for debate. This move was strategic to allow tempers to cool down because the debate was degenerating into a gender fight. In the meantime more lobbying and advocacy continued through the media, church groups and women's rights organizations. MPs who had opposed the bill were approached to soften their position.

When the bill came back on the order paper ready for debate there was a more sober debate, but unfortunately there was still some opposition. And it was evident that the opposition intended to kill the bill in the debate stage. The second round of debate determines whether a bill will proceed to the next stage. At the end of debate the bill is put to vote, and if the number of Ayes exceed the Nays then it proceeds to the next stage. To secure the vote for the bill, the mover adopted a strategy of continuing with the debate whenever MPs opposed to the bill were in the House and at the same time monitoring

their attendance. One afternoon, the mover realized that the opposition was not in the House and pleaded with members present to allow the debate to end and a vote be called. The speaker and members present (mainly women MPs) obliged, and they voted and passed the bill. After this the bill went to the committee stage for amendments, and this did not give those opposed a chance to kill the bill. The mover of the bill described the scenario as follows:

"I looked round and none of the opposition was in the House. I went to the deputy leader of government business [female] and said let's stop the debate.... I moved up like in five minutes we got all the women MPs in and voted, and it went to the committee stage. The opposition could not believe it, so their choice was now in the amendments. They can't kill the bill..."

Box 3: Provisions that were deleted from the bill

- Trespass with intent to commit a sexual offense
- Intentional exposure of genital organs
- Assessors to sit in cases of sexual offenses
- Application of caution and requirement for corroboration
- Presumption that a boy under 12 is incapable of sexual intercourse
- Age of consent for marriage
- Children competent to testify in criminal proceedings
- Marital rape
- Female genital mutilation
- Forced wife inheritance

Source: Draft Sexual Offenses Bill , 2005

Thereafter the bill was sent to the relevant house committee for the necessary amendments and brought back to the House for approval. Additional amendments were made on the floor of the House during debate. In the amendment stage the women MPs did not have the numbers, and hence they could not make a difference. However, the women MPs engaged male MPs and political parties to persuade perceived hardliners to change their minds and support the bill. Civil society organizations also approached the MPs on a one-on-one basis and requested them to support the bill. While these attempts convinced many MPs, it did not completely eliminate opposition. Those opposed to the bill came up with a series of amendments some of which watered down the provisions of the bill. To ensure the success of the bill, the mover adopted a trade-off strategy where she accepted certain provisions to be removed provided some core elements were retained. Finally the amendments were acceptable to MPs, and the bill was passed into law in July 2006.

Although the debate in parliament was polarized to a great extent on the basis of gender, it can be characterized analytically as differences between the traditionalists and the liberals. The traditionalists did not believe in women's rights and enjoyment of the same was not permissible. Most MPs in this group came from cultures where women traditionally are discriminated against and equated with children. Women in such societies have a low status and are considered appendages of men. Most of these communities also practice female genital mutilation (FGM). The traditionalists trivialized the debate and made it look like the bill sought to legislate against culture. Most of them opposed the bill because they feared being victimized by their male constituents.

On the other side of the debate were the liberals – MPs who believed in women’s rights and had no problem legislating against violation of such rights. Some of these MPs were lawyers who periodically dealt with cases of sexual violence while others were progressive MPs who wanted Kenyan women to be protected from human rights violations as was being done in other countries. Another group had links with civil society and easily identified with the women’s rights movement. The liberals were also concerned about the escalating cases of sexual violence in Kenya.

Overall, the bill drew support from all political parties. The liberals and traditionalists came from across the political divide. The success of the legislative process was partly attributable to the fact that the bill was able to transcend traditional party positions between those in government and the opposition.

Content of the law

Change of the content over time

The content of the law that was agreed on was a product of negotiations, changes, amendments and compromise. The content changed over time following workshop deliberations, stakeholders’ suggestions in written memoranda, and parliamentary debates and amendments. The changes were reflected in the different drafts of the law. The initial draft bill written by the AG’s task force was discussed in workshops and subsequently revised before it was taken to parliament. In parliament the first draft bill was published in August 2005, but it had to be republished in January 2006 after it died a natural death when parliament was prorogued. The draft bill was later withdrawn in February 2006 to accommodate the recommendations of the Committee on the Administration of Justice and Legal Affairs. The second draft bill was again republished with amendments in March 2006. The bill was then debated and passed on to the relevant committee for amendments. The bill was brought back to the House with a series of amendments for debate and again additional amendments were made before it was passed into law in July 2006.

What influenced the change in content?

The change in content over time was influenced by a number of factors including the perception that some provisions were against culture, contradicted existing laws, proposed to criminalize sexuality, and could be difficult to prove (rape in marriage). In addition there was the misconception that the bill would be used to settle scores, and the drafters’ strategic decision to include certain controversial provisions.

There was the feeling among some MPs that provisions such as FGM were cultural issues and any attempt to regulate them through the law would be trying to legislate against culture. It was argued that since cultures are dynamic, other means should be pursued to discourage communities against FGM instead of using legal means. There were arguments that indeed some communities used to practice FGM but had since

stopped without being forced through legal means and that communities which still practiced it should be educated about the risks involved.

Another reason for the change in content was the argument advanced by certain MPs that some provisions of the bill contradicted existing laws. There was the argument that the definition of rape as provided in the Constitution was sufficient enough to deal with rape cases and that some of the provisions touching on children were already covered in the Children's Act, 2001.

It was also argued that the bill intended to criminalize sexuality by legislating against sexual advances. It was felt that courtship in the local scene - usually characterized by a man making an unwelcome advance to a woman - would be considered illegal by the proposed law. The opponents argued that if passed the law would make it difficult to find a partner because one is not allowed to make an advance. Most MPs saw this as an attempt to criminalize sexuality by making courtship illegal.

Some provisions such as rape in marriage were considered to be difficult to prove in court. It was argued that there is no such a thing as rape in marriage, given that sexual relationships were provided for in an African marriage. Those who opposed the bill on these grounds argued that it was an attempt to impose Western values in African settings.

There was also the misconception that the bill would be used to settle scores.

This perception was driven by the fact once in force the law could be used to punish past offenders. But more fundamentally there was the fear of the provision that once one was accused, it was up to the accused to prove that he was not guilty. A lot of MPs' concerns were driven by this fear, and they came up with a series of amendments to make sure

Box 4: Offences covered in the act and main chapters

- Rape
- Attempted rape
- Sexual assault
- Compelled or induced indecent acts
- Acts which cause penetration or indecent acts committed within the view of a child or person with mental disabilities
- Defilement
- Attempted defilement
- Gang rape
- Indecent act with child or adult
- Promotion of sexual offenses with a child
- Child trafficking
- Child sex tourism
- Child prostitution
- Child pornography
- Exploitation of prostitution
- Trafficking for sexual exploitation
- Prostitution of persons with mental disabilities
- Incest by male persons
- Incest by female persons
- Sexual harassment
- Sexual offenses relating to position of authority and persons in position of trust
- Deliberate transmission of HIV or any other life threatening sexually transmitted disease
- Administering substance with intent
- Cultural and religious sexual offenses
- Vulnerable witnesses
- Offense to make false allegation
- Conclusive presumptions about consent
- National policy framework

Source: The Sexual Offences Act, 2006

that the proposed law would not be used to settle scores. The cases against Zuma and Besigye reinforced their concerns.

The change in content of the law was also influenced by the drafters' strategic decision to include certain controversial provisions such as rape in marriage and burden of proof with the accused. A member of the civil society who supported this strategy argued:

"Because in every law it is a sort of give and take so load it to the limit so that when it comes to barter then you can trim off some of the things that are less important to you. I think I would aim for the sun and get the moon. If what we get needs more refinement or upgrading later, then we can do this. But people will only give you what you ask for. They won't give you more than you ask for."

The strategy was to pack the bill with a lot of things so that some would be easily pointed out and amended while at the same time leaving other equally important provisions. This provided the grounds upon which to strike a compromise on the content of the law. For instance, rape in marriage and burden of proof were taken out, but equally important provisions such as minimum sentences and sexual harassment were left in.

Contentious issues

While all aspects of the bill were looked into, some issues turned out to be contentious and therefore received greater attention than others.

Chemical castration

The provision in the initial drafts of the bill that rapists be punished through chemical castration attracted greater attention than any other aspect of the bill. While those who opposed it argued that the punishment was too cruel, those who supported it argued that rape was equally a cruel and dehumanizing offense. During the debate of the motion to introduce the bill an MP who supported castration argued:

"The Bible says: 'If any part of your body causes you to sin, it should be removed'....I want to propose that these parts be removed in our hospitals. This should apply to those people who defile and rape."
Parliamentary Hansard

Castration was seen as an attempt to punish men since once castrated, a man would not be able to impregnate a woman. Although those who supported it argued that it would be deterrent against future rapists, opposition against it was so strong that it had to be taken out even before the bill was tabled in parliament.

Unlawful advances

The provision in the bill that made advances toward women unlawful touched on traditional courtship patterns and hence became an issue of concern. It was argued that the bill proposed to criminalize sexuality and that when passed into law it would outlaw everyday courtship practices in the Kenyan society. Those opposed to this provision claimed that it would make it difficult for people to find partners if advances were outlawed in places of work and in public spaces. An MP asserted:

First, how do you know the advances are unwelcome until you make them? Two, the world over people get their spouses from places of work ... that's where people interact, people get to know each other start dating and within the realms of civility they end up as families. If you criminalize that kind of association, what society are we trying to get?

Marital rape

The provision that one could be charged for marital rape also received great attention. This was especially picked up in the debate in parliament where some MPs argued that it would be difficult to prove rape in marriage and that conjugal rights were given by the marriage covenant between the parties involved. The argument was extended to infer that in African marriages there could be no rape in marriage as was presupposed in the bill. An MP argued:

"An activity between a man and his wife in his bedroom cannot within reason be constituted to be rape. Many people believe and think this is not an African issue. Marriage creates sexual license to each party... that is the license they get by saying I do."

Another concern was that marital rape could be abused and there was need to protect families from such abuses. An MP claimed:

"Every day your wife suspects that you have spent half your salary on someone outside the home, she will go and complain that you have raped her. People were not keen on that and again as leaders we are looking at the protection of families."

Those who supported the clause argued that rape in marriage was very common in Kenya and constituted a violation of women's rights. They argued that marriage did not automatically confer conjugal rights if there is no consent. This clause was, however, removed in one of the amendments to strike a compromise.

Female genital mutilation

FGM was another controversial issue that received great attention since it is a deeply rooted cultural issue. The core argument amongst those who opposed it was that it was not a sexual offense and hence should not be included in the bill. An MP asserted:

“They used this bill almost as a bandwagon of other things which they would have wanted to deal with, and I think that is how FGM came in. Some of us who are lawyers saw that this is not a sexual offense. It is something else, it may be assault, grievous harm or something else... but it cannot be a sexual offense.”

FGM was considered a cultural issue, and an attempt to include it in the bill was tantamount to legislating against culture. However, those who supported its inclusion argued that it was a sexual offense because it denied women sexual pleasure. The cultural apologists maintained their ground and argued that they could not pass a law that would go against their cultures. Eventually it was removed from the bill to enable MPs to pass the bill.

Burden of proof

The initial draft had proposed that in any case of sexual offense the burden of proof would remain with the accused and not the complainant or prosecution. This was strongly contested by those opposed to the bill who argued that under criminal law the burden of proof lies with the prosecution. It was argued that this provision could be used to settle scores in society as it would encourage women to come up with cases against men, and then it would be up to men to prove that they did not commit the offense. An MP who shared this view argued:

“..this frightened our male colleagues. Cause you can imagine tomorrow, if you have chief justice who is female, an attorney-general who is female, a minister for justice who is female, a police commissioner who is female, a director of criminal investigation department who is female with a law like that in their hand. You can imagine how they’ll swing around the society... ‘We should pass a law that we would be safe with in the hands of our enemies’....”

Those who supported the bill argued that it would be unfair to subject victims of sexual offenses to undergo the same experience mentally by describing the circumstances under which the offense occurred. They also questioned how rape victims who are minors would prove that the accused raped them. This line of argument was mainly supported by women MPs, and since they did not have the numbers this clause was amended. It was replaced by an even more stringent clause (article 38) that makes complainants who are found to have made false claims against others liable for the same amount of punishment as the supposed offender. This clause had been seen as likely to deter victims of sexual violence from reporting their offenders for fear of being victimized.

Definition of a child

While in the Children’s Act 2001 a child is defined as any person below 18 years of age, it was argued that this age limit was too high for sexual offenses. It was seen as an attempt to criminalize sexual activity among the youth which usually begins at 16 years. Legislators objected to the provision that would, for example, commit a boy of 17

years who had consensual sex with a girl of 17 years to jail for life. Such a law would criminalize courtship and target the youth unnecessarily. An MP asserted:

“One is the circumstances of two young people, maybe 17, who have gone to drink... they are a bit tipsy, there is no expressed consent... what do you do with the young man? Jail him for life? These were the issues that were disturbing the minds..”

Age of consent in marriage

Muslim and pastoralist MPs saw the bill as an attempt to outlaw early marriages which are common in their communities. The initial draft had proposed to put the legal age of consent for marriage at 18 years. It was proposed that any person who marries a person under the age of 18 years commits an offense and is liable upon conviction to imprisonment for a period of 20 years. This contradicted the common practice of marrying off young girls in such communities.

Intentional exposure of genital organs

The earlier draft made intentional exposure of one’s genital organs unlawful. This was opposed on the grounds that some Kenyan communities do not use underwear. It was argued that such a law would target them unnecessarily and make them liable to prosecution. The clause was eventually deleted.

Rape shield for victims

The rape shield clause was meant to protect the rape victim’s previous sexual history from being used as evidence against her. For instance, a person who rapes a prostitute and tries to justify the act by arguing that the victim was a prostitute, and yet he was not her client. A compromise was reached in which it was agreed that one could ask for previous sexual history of the victim but only if it is directly related to the offense before court.

Compromise on the content of the law

After a series of debates and amendments a compromise was reached and the bill was passed into law. The compromise was the product of concessions between the mover of the bill and the opposition. An MP described the scenario as follows:

“If she [mover of the bill] hung with the constituents outside parliament, it was going to be sealed and thrown out. But if she hung with the moderate views of the house that said we support the bill but only to this extent, it would be OK. She was able to see that half a loaf was better than no loaf at all. She would still have achieved something.”

While the content of the original draft bill had changed drastically, it still retained some of the crucial elements as originally proposed. The act contained new provisions that had

not featured in Kenyan laws before. The new and radical provisions included minimum sentences for sex offenders, sexual harassment, gang rape, promotion of sexual offenses with a child, child trafficking/sex tourism/prostitution, deliberate transmission of HIV or any other life threatening sexually transmitted disease and evidence of medical, forensic and scientific nature. Although other radical provisions such as marital rape and FGM were taken out, the acceptance of the above provisions was a good trade-off for the proponents of the bill.

Contents of the law as passed

The Sexual Offences Bill became law in Kenya in July 2006. The law contains 14 new offenses including gang rape, deliberate infection with HIV/AIDS, trafficking for sexual exploitation, and child pornography. It also introduces minimum sentences, provides for the setting up of a DNA data bank and a pedophile registry, and criminalizes sexual harassment.

Parliament amended the law through the Miscellaneous Amendments, October 2007. The amendments clarified the meaning of gang rape and also introduced a transitional provision which required the chief justice to make rules of court for the implementation of the act.

Acceptability of the content of the law among actors

The acceptability of the content of the law is varied among actors. There are those who argue that the law, though not passed in its original form, was the first attempt to provide a comprehensive law to address sexual offenses in Kenya. These actors, including the Hon Njoki Ndung'u and some members of the civil society, argue that the law comes with some new provisions that reflect a significant change in the way in which sexual offenses are handled in tandem with other progressive societies. They cite provisions such as the idea of minimum sentences for sexual offenders, sexual harassment, deliberate transmission of HIV, the use of DNA tests to adduce evidence and sexual offenses against children as important milestones in the fight against sexual violations in Kenya. They argue that the country is better off than it was without the law.

However, some actors from civil society and the women's rights movement have argued that the law did not reflect the original intentions and that what was passed after a series of amendments was an empty shell that cannot adequately address sexual violations. They specifically point out a last-minute amendment – offense to make false allegation (Article 38) – which makes it difficult for victims to report perpetrators of sexual violence for fear of being victimized. An MP who shared this opinion asserted:

“The bill was considerably watered down in order to secure its passage. It was quite clear that the bill was going to be killed so we decided it was better to get even 10 or 20 percent of what is right being enacted.”

Another area of concern for this group is the removal of marital rape as a sexual offense. They found this unacceptable and argued that there was enough evidence to prove that rape in marriage was a common phenomenon in Kenya.

Other concerns have to do with enforcement of the law by various parties including the judiciary and police. The enforcement concerns stem from lack of knowledge of the various provisions of the law and how to handle cases presented. The police, for instance, require a thorough training to create awareness among them, given that they handle crime reports and prosecution. The act also introduced new procedures; e.g. use of DNA test to adduce evidence, which magistrates are not familiar with, and hence they require to be trained as well. The other concern for the judiciary was that the act initially did not provide for the chief justice to make rules for the courts. This made enforcement of the law difficult in courts since the chief justice had no legal power to make rules to guide magistrates and judges handling sexual offenses. However, this has since been addressed through the Miscellaneous Amendments Act, 2007 that gave the chief justice legal power to make the necessary rules for the implementation of the act.

Part of the problem regarding enforcement also has to do with the multisectoral and cross-cutting nature of the law. For its successful implementation, it requires concerted efforts from doctors, police, the public and the judiciary. Doctors, for instance, have to follow certain protocols when handling suspected cases of sexual offenses to help in adducing evidence. The AG therefore set up a task force on the implementation of the Sexual Offenses Act in 2007 to look into the modalities of implementation. The task force has developed training manuals for the police, doctors and the judiciary on the Sexual Offenses Act, 2006 and modalities for implementation.

Lessons Learnt

A number of lessons can be drawn from the Kenyan experience in the law making process of the Sexual Offences Act. These include the following:

Facilitate consultations across the board

It is very important to consult widely before embarking on such a project. Consultations should be done with all stakeholders to bring on board divergent views and all shades of opinion. A multisectoral project like the sexual offenses law will have different people working on different things in the same country, and it is essential that their views be accommodated and efforts recognized. If serious consultations are not done, the project is likely to be derailed through suspicion, mistrust, misinformation and endless competition. Great care must be taken to ensure that the project is not labeled as feminist because this can polarize debate, and even people who agree with the bill may not want to be associated with it because they do not want to be labeled as feminists.

Coordinate efforts

The experience with the process that led to the enactment of the sexual offenses law in Kenya shows that all stakeholders need to coordinate their efforts to rally support for the law. In Kenya efforts appeared uncoordinated and sometimes almost led to conflicts among the different groups that supported the law. There appeared to be two groups that engaged in parallel activities to marshal support for the law. One group comprising women MPs, complete with its secretariat led by Hon Njoki Ndung'u, was mainly involved in the legislative process. The other group involved mainly civil society organizations dealing with women's rights issues and sexual violations against women and children. Although some civil society organizations were involved in the drafting, most of them were only involved in mobilizing support for the law through their own resources. Due lack of coordination, there was a lot of duplication in terms of activities aimed at mobilizing support for the bill. The two groups were more effective when they participated in joint activities than when they worked individually. When stakeholders coordinate their efforts they are likely to save resources and develop trust amongst themselves.

Harmonize strategies

To avoid pulling in different directions all stakeholders need to harmonize their strategies to ensure that they target the right people in society who could vouch for the sexual offenses law. In Kenya, due to the uncoordinated efforts, different groups tended to apply different strategies. For instance, the civil society organizations preferred an activist approach through public demonstrations and petitioning MPs through SMSs. The group led by Hon Njoki Ndung'u preferred a more focused and less activist approach of conducting workshops and meetings with special constituencies like MPs, religious groups and the media. They felt that activism by their colleagues in civil society only hardened the MPs' positions and did not in any way mobilize support. And because there

was no coordination, they could not restrain the activist groups from using the strategies that appeared to be confrontational.

Develop joint ownership of the process

Failure to coordinate efforts and to harmonize strategies was the result of a failure to develop joint ownership of the process. There were sharp divisions within the women's rights movement, and many individuals felt that Hon Njoki Ndung'u had hijacked the process which they had initiated many years back. As a result suspicion and mistrust developed within the civil society. Due this lack of joint ownership it was difficult to match funds, coordinate efforts and harmonize strategies. It is therefore recommended that all stakeholders need to recognize each other's efforts and develop unity of purpose.

Understanding of the legislative process

Since laws are made within parliament, it is very important that stakeholders who want to push an issue of concern to become law should develop a clear understanding of the legislative process. Knowledge of parliamentary rules and procedures regarding bills, relevant committees and the parliamentary calendar are essential in the process. For instance, there is a need to understand different committees in parliament and identify the relevant one for the bill so that they could be sensitized in advance. Without such knowledge it would be difficult to know how to go about the legislative process which can go on for a long time. In Kenya the legislative process was aided by the fact that Hon Njoki Ndung'u was not only an MP but also a lawyer who had worked on issues of sexual violence for decades. She therefore provided the process with the requisite legal and legislative knowledge. Other countries may need to identify a friendly MP to take the lead within parliament.

Channel the process through the government

The experience in Kenya shows that it is advantageous to channel the law making process through the government rather than as a private member's bill. When the government supports the bill, it receives facilitation in terms of personnel to do research, drafting, and to mobilize the necessary support. In Ghana, the minister for women's affairs moved a similar law in parliament and succeeded in getting it passed. Movers of Private Members' Bills have to look for resources from outside government to perform all the necessary tasks. This can be very expensive for the individuals involved, and countries are strongly encouraged to explore ways of pushing the law through their governments either through the law reform commission or the AG's office. It is much easier when the process is initiated as a government project with necessary funding and coordination.

A good negotiator should lead the process

To pass a law on sexual offenses in male-dominated societies requires a good negotiator to persuade and convince men that the issues at stake are not about the fight between men and women but serious violations against women and children which should not be cordoned. Hon Njoki Ndung'u, who led the process in Kenya, was a good negotiator who always humbled herself before her male colleagues to impress upon them to see sense in the need for the law. She managed to convince the men that the offenses considered under the proposed law affected their daughters, mothers and wives. Although sometimes the debate became trivial, she never got distracted from the objective of ensuring that the law was passed. The scenario would have been different if the leader of the process had been combative and not persuasive.

Package the bill comprehensively

Sexual violence is a highly emotive issue that raises passions whenever it is mentioned, and people might end up raising concerns about every issue for the sake of argument. There is need to make the bill as comprehensive as possible in order camouflage the key aspects of the bill. In Kenya, the bill was comprehensive enough and included things such as FGM, unlawful sexual advances and marital rape. These aspects of the bill were picked out by those opposed to it; their suggestions that they be removed were granted without losing other important issues such as sexual harassment. A key strategy here is that the bill should include something that the opposing side can take out so that they feel involved in the process.

References

Draft Sexual Offenses Bill, 2005.

Kenya National Assembly. 2005. The Hansard Parliamentary Debates, April 27, 2005. Nairobi.

Republic of Kenya, 2006. The Sexual Offenses Act, 2006, Kenya Gazette Supplement No. 52 (Acts No.3). Nairobi: Government Printer.



The deconstruction of the sexual offenses act - 2006

By Charles Matathia

One Wednesday in April of 2006 more eyes than usual were watching the Kenyan parliament. Out on the bustling Nairobi streets, harried urbanites took momentary pause from the frantic pursuit of their daily bread to ask perfect strangers: “Do you think they will pass that Bill?”

No way!

“But they have to,” a section of the citizenry yelled. Voices shrill with passion, poignant with urgency, bold as the billboard that stared down at them from the head of certain city streets: BEWARE OF HUMAN DOGS. On another street, a group of civil society activists gathered for a march on parliament. Gather they did, but march, well, not past the cordon of armed policemen in anti-riot gear. Back in parliament, the debate raged. No, debate implies rational arguments and counter-arguments; this one had degenerated into a shouting match.

When women say ‘no’ to the advances of men, an honourable representative of his people contributed from the floor of the house, they usually mean ‘yes’. Women members of parliament were scandalised. They stormed out of the house — all but the lady deputy leader of government business and nominated MP Njoki Ndung’u. And the debate—a vitriolic shouting match more often than not—had begun, inside as well as outside parliament, on the Sexual Offenses Bill of 2006, the bill that would come to be popularly known as the Njoki Ndung’u Bill, even if the war was fought in many a trenches, involving tens of human rights activists, civil society workers, lobbyists and eventual was successful not least, because of many a sympathetic and liberal male MP. Such is the information society — we cast easy labels on everything and obscure the complexities of societal processes.

The Kenya Sexual Offenses Bill is now an act of parliament, which is to say that its stipulations are now law in Kenya. Even though the wording of the eventual act differs significantly from that of the bill tabled before parliament in April 2006, its spirit remains. The passage of the bill was nothing less than a victory for progressive forces, and the process of its passage was a lesson in achieving policy change. And that lesson is: it is strategic to compromise on certain specific demands if it means winning broader changes.

The journey to the enactment of the Sexual Offenses Act was a long and tortuous one that dates back to the early 1990s. In 1991 one of the most heinous acts of gender-based violence in Kenya's recorded history took place at St. Kizito Mixed Boarding School in Meru district. In one night of premeditated orgy, the male students raided the girls' dormitory, and by the time they were done, 70 girls had been raped, and several of them were dead. In the days that followed as more survivors succumbed to their injuries, the death toll rose steadily to settle at 19. But St. Kizito, unfortunately, was just a flashpoint; the contagion of sexual violence had long ripped its way through Kenya's social fabric and taken its place amongst our catalogue of pandemics. Rape just did not make headlines around here; not even those of a five-month-old infant or an 86-year-old grandmother.

Human rights activists decided to rise to the occasion but were soon thwarted by the realisation that there was not much available to them in the way of legal recourse. For one, the definition of rape in Kenya's statute books was limited, and its punishment flexible. Although a maximum penalty was stated, a minimum was not; this allowed many perpetrators brought before magistrate courts to get off with far less than a slap on the wrist. And even that kind of conviction could only be handed down if the rape victim-plaintiff could provide corroborative evidence that such an offense had actually been committed against her.

The laws concerning rape specifically and gender-based violence generally needed to change. What needed to change was clear to human rights defenders. But activists and lobby groups—and there were many of them committed to this cause—do not change laws; legislators do. A collaborative effort was undertaken between FIDA-Kenya and the Juvenile Justice Network (JJN), a coalition of at least 17 women's and children's rights organisations, that pressured the attorney-general to instigate a review of the penal code. This successfully led to the Criminal Law Amendment Act of 2001. JJN had won an inch, and now they set to demand a mile: a comprehensive law that would address the crime of sexual violence. They drafted the bill and handed it to the attorney-general, but he stalled. This is where Njoki Ndung'u and many other faceless players come in.

Njoki Ndung'u, a trained lawyer and human rights activist, was a nominated member of the Ninth Parliament. If the government was not going to bring this bill up for parliamentary debate, she would. And she did, backed by dozens of foot-soldiers and thousands of voices for change in September 2004, giving notice to bring a motion on Sexual Offenses, especially rape, as a Private Member's Bill. But Private Members' Bills had a pitiful record in the Kenyan parliament; only one had been voted into law. Furthermore, no gender-related act had been passed in parliament before; over the years the Affirmative Action Bill, the Equality Bill and the Domestic Violence (Family Protection) Bill had been rejected. But laws that curtailed the rights of women such as the repeal of the Affiliation Act (1974) and a lopsided Law of Succession (1981) were enacted. Getting the Sexual Offenses Bill through parliament was clearly going to be an uphill struggle.

And the fight had to be fought, both inside and outside parliament, as this bill went against the entrenched views of a decidedly patriarchal society with its cultural conservatism, chauvinism, and gendered power relations. Getting the bill passed called for a massive and well-orchestrated public relations and media strategy. Organisations and individual supporters of the bill reached out to the public through a variety of ways, all aimed at creating awareness of the issues and their impact on everyday life, earning visibility for the bill, generating debate on the issues surrounding it, and garnering public support. Talk shows discussed the bill, and activists gave radio and television interviews. Public debates and forums were held, and newspaper articles and columns were written. A documentary on the St Kizito tragedy, *Silence is Betrayal*, was aired on all television stations, and a strategy of front-paging and headlining cases of rape was organised with one of Kenya's biggest newspapers.

Looking beyond the general public, the bill's supporters met and attempted to influence community and opinion leaders. They also set up workshops to raise awareness on sexual violence and related issues as well as the proposed law amongst religious leaders, editors, doctors, police and other focus groups. In a further attempt to influence the outcome of the debate in parliament, the bill's supporters reached out to the wives and families of male MPs, their religious advisers and the opinion shapers in their constituencies.

Back in parliament the hostile reception persisted. To begin with, the strategy by some women's rights activists to send text messages to the male members of parliament informing them that how they voted on the bill was being noted ahead of the 2007 general election, proved counter-productive. The opponents of the bill felt that they had an edge on the matter, seeing that only the exceedingly controversial issues of the bill, such as castration of rapists, were what informed public debate, and they were using these issues to incite the public against the bill.

But there was a realisation by all involved of the need for compromise on content to win a change in policy that would serve as the small trickle that could later burst into a torrent of change in sex and gender-based violence legislation. When the female members of parliament walked out of the chamber, even though Hon. Ndung'u was as appalled as they were at their male colleagues' insolence, she stayed put. She knew that had she walked out then, she would have made a small point but lost a larger battle; the motion would have been thrown out if its mover left the chamber. She had to stay to keep the debate going while at the same time arranging a strategic withdrawal of the draft legislation. She withdrew the bill from the floor of the House for two weeks in order to redraft it and get rid of some of the contentious issues. And all the activists, lobbyists, civil society workers who were fuelling her fight lived to fight another day.

In the meantime a public relations firm was hired, and the pivotal element of the bill—ending rape—was marketed to the public. The general idea was to focus on the rape of children and the elderly; this would serve to dispel the fears amongst some male MPs about how wooing could be construed—and punished—as a sexual offense. Research

requested from Steadman Group was brought in. Their statistics on rape in Kenya were sufficient to trigger a call to action. In addition, and just as in parliament where the movement supporting the bill had strategically used a male member of parliament as a seconder to the motion, a male doctor became the public face of the Sexual Offenses Bill campaign. This reinforced the message that rape was not about women; it was about sons, daughters, wives and mothers. There was no way not to care about it when such a thing could happen to those close to you.

And where was the government all this while? It should be noted that even though the attorney-general had failed to act on the recommendations of JJN at the outset, he stepped in to give invaluable aid to the bill. As soon as notice was given to bring the motion on sexual offenses to the house, the AG, as principal legal adviser to the government, brought together varied players to form a task force that collated views and drafted the Sexual Offenses Bill. He also provided legal draftspersons who ensured that all the provisions of the bill were appropriate and did not conflict with existing laws. Even though it was in its power to do so, the government did not interfere with or attempt to take over the bill but opted to facilitate and support the private member's bill. The government further allowed the Kenya Law Review Commission—a government body—to sit in on the task force and also prioritized the bill through the House Business Committee.

So with government support evident, a public campaign in full effect and a redrafted bill ready, only the members of parliament stood in the way of a Sexual Offenses Act. Of the 224 members of parliament (including the attorney-general and the speaker) there were only 18 women. That said, there were several male members of parliament who supported the original bill, and they made that clear. But they were also adamant that they still had to and would vote against it as for them it was a matter of getting re-elected. The reworded bill, however, had their support.

Then there was the opposition which consisted of four interwoven categories of MPs. There was a group of not only articulate and excellent debaters but also very influential members of their political parties. Then there were all those professionals—lawyers and doctors—in the House; the traditionalists who could not understand why sex and sexuality were being discussed in public; and the male chauvinists who thought it their place to think and speak for the African woman. With all these groups, negotiations were carried out and offers of support on other bills were made. In the end, the best tactic used was to push the debate through the House when the majority of these parliamentarians were out of the country.

The Sexual Offenses Bill was signed by the president and became law in July 2006. Even though many of its original provisions had been removed, the new act of parliament had managed to consolidate laws on sexual offenses into one act and also to introduce 14 new offenses. The moral of the story: always bring as many controversial issues when you go to the table, then expect the unexpected. You might win some.

One Dag Hammarskjold Plaza, New York
1 Dag Hammarskjold Plaza, 9th Floor
New York NY USA 10017
Tel: +1 212 339 0500
Fax: +1 212 755 6052

General Accident House
Ralph Bunche Road
Nairobi
Kenya
Tel: +254-2713-480
Fax: +254-2713-479



www.popcouncil.org