



Preventing and responding to violence against women and girls: From legislation to effective law enforcement

New Delhi, 15-17 September 2011



Inter-Parliamentary Union

Organized by
The Inter-Parliamentary Union (IPU) and the Parliament of India

The Kenyan Experience

By

Hon. Njoki.S. Ndungu
Judge, Supreme Court of Kenya
Former Member of Parliament and Mover of the Sexual Offences Bill 2006

1. Introduction

Global trends have shown that in the last twenty years governments have made deliberate efforts to increase women’s representation in law and policy making. These initiatives are informed by the direct linkages between discrimination against women and all its associated elements such as Gender based Violence and other gross violations of women’s rights, and the under-representation of women with a political voice and power to address these injustices through a legislative framework. Most Governments have now included affirmative action in their constitutions or political party policy to ensure that women’s voices can be translated into formal action through legislation.

Kenya is not one of these countries, where despite the modernization of its politico-economy, it has one of the most paternalistic parliaments in the African Region. This creates an environment not conducive to any advocacy or lobbying on issues of women’s emancipation; indeed since independence the Kenyan Parliament has not only opposed such bills (i.e. the rejection of the Marriage Bill) but has actively regressed laws that do offer some protection and rights to women (i.e. the repeal of the Affiliation Act). Where it has been said to have made some gains for women as in the law of succession Act 1981, the same Act contains biased and discriminatory clauses, which are largely sexist in nature. Efforts to bring about laws relating to affirmative action, equal opportunities and inheritance of land have also similarly been rejected. It is therefore in this environment that an analysis is made of the successful enactment of a ground-breaking sexual offences law in 2006.

2. History, Evolution and Process of the Sexual Offences Bill 2006

By the beginning of 2004, sexual violence in Kenya had risen to become the second highest reported crime to the Police. (The highest is common assault – 80% of which are estimated to be incidences of domestic violence). The rise in these crimes has been officially attributed to escalating drug and alcohol abuse, break-down in family values, poverty levels etc. but there is an underlying lack of respect for the dignity and privacy of women coupled with violence that dominates gender relations within the community that exacerbates this problem. (By the end of 2005 it was estimated that a sexual assault takes place at least every half hour). These statistics are still reflected even today.

Women in Parliament

Year/No.	1963-1973	1973-1991	1992-1997	1998-2002	2003-2007	2008-
	1/148	2/148	4/222	8/222	18/222	22/222

There were hardly any successful prosecutions conducted, as the law made it difficult for victims to testify and the chain of evidence would often be interfered with so that many of the perpetrators would walk free and with impunity, whilst more victims stopped reporting the crimes or would withdraw them in mid-hearing, (having either been intimidated by the perpetrator or pressurized by family members to negotiate a settlement out of court). The law up until 2006, was crafted under the ‘offences against morality’, a Chapter in the Penal Code which had been introduced during the colonial era in the late 1920’s. (Note this was a separate chapter from that on ‘offences against the person’). Thus these laws were Victorian in concept and totally out of sync with modern realities of HIV/AIDS, trafficking, sex tourism and male on male rape.

Women NGO's and activists in civil society had for sometime before 2004 attempted to lobby Parliament and the Government to make the necessary changes to have an effective Sexual Offences Law but to no avail. Access to the corridors of power normally proved difficult due to the marginal numbers of women in Parliament:

The relative increase of women in the 9th Parliament in 2003 opened up possibilities for development of women-friendly legislation, including the Sexual Offences Bill.

3. *The content of the sexual offences Bill 2006.*

The general objectives, among others, of the bill were:

- To define, amend, and consolidate laws on sexual offences, so as to enhance the protection of all persons from these offences. The Bill redefined particular issues such as the crime of rape, attempted rape, and defilement. The Bill further introduced other newer sexual offences that exist in our modern society. The Bill also sought to define and to determine in detail what constitutes consent.
- The Bill introduced stiffer and enhanced penalties for sexual offenders by introducing minimum sentencing in legislation to deter and to punish sexual offenders
- The Bill provided for easier reporting of sexual offences to the police. It further provided for medical treatment for both perpetrators and victims of sexual offences. The Bill also stipulated methods of post conviction monitoring of repeat sexual offenders.

COMPARISONS OF THE SEXUAL OFFENCES BILL AND THE LEGISLATION ON SEXUAL OFFENCES BEFORE JULY 2004

S.O. BILL	LEGISLATION
<ul style="list-style-type: none"> • Consolidates all the laws that relate to sexual offences while making it easier to access justice 	<ul style="list-style-type: none"> • The Law is spread through four different legislations, the Penal Code, the Criminal Procedure Code, the Criminal Amendment Act, and the Evidence Act. This makes it difficult to access the law and punishments for sexual crimes.
<ul style="list-style-type: none"> • The Bill broadens the definition of the term rape, to include male individuals as victims of sexual offences and women as perpetrators of sex offences. 	<ul style="list-style-type: none"> • The definition of the crime of rape is very limited in the current legislation. It does not recognize men and boys can be victims of sexual offences.
<ul style="list-style-type: none"> • The bill regards rape as a question of law, and stipulates the necessary ingredients of this crime. This testimony of the victim is limited only to relevant information, protecting the victim from humiliation and invasion of privacy. 	<ul style="list-style-type: none"> • The current legislation categorizes rape as an issue of morality. The character and moral standing of women can be adduced as evidence in a court of Law.
<ul style="list-style-type: none"> • Defilement is not a bailable offence and the aggressor has no room to manipulate evidence to threaten the survivor. 	<ul style="list-style-type: none"> • Defilement is a bailable offence and there are high probabilities of the accused interfering with the evidence.
<ul style="list-style-type: none"> • The minimum sentence is prescribed, giving better guidance to magistrates during sentencing. 	<ul style="list-style-type: none"> • There is no minimum sentence prescribed by legislation and sentencing is left to the discretion of the magistrate.
<ul style="list-style-type: none"> • Makes it an offence for a person to infect another with HIV or other life threatening sexually transmitted diseases. 	<ul style="list-style-type: none"> • There are no provisions that regard the infection of another with sexually transmitted diseases.
<ul style="list-style-type: none"> • Defilement is a crime that can be committed to any person under the age of 18. 	<ul style="list-style-type: none"> • There are contradictions on the age of a child as regards the application of the law on defilement
<ul style="list-style-type: none"> • There is a limit on corroboration as evidence for sexual offences because rarely can one find witnesses to these crimes 	<ul style="list-style-type: none"> • There is a requirement for corroboration as a standard which in most cases is a barrier to a fair trial.
<ul style="list-style-type: none"> • Provides for responsibilities and training of the Police Force to deal with Sexual Offences 	<ul style="list-style-type: none"> • No provision for the responsibility and training of the police to deal with these crimes.

NEW LAWS INTRODUCED BY SEXUAL OFFENCES BILL:

- Laws that protect persons from trafficking, sex tourism, prostitution and pornography.
- Laws that protect the mentally impaired.
- Provisions that punish incest by female persons.
- Laws that punish the deliberate transmission of HIV or other Sexually transmitted Diseases.
- Laws that make it an offence to trespass with the intent to commit a sexual offence.
- Law on administration of a substance with the intent to offend another sexually. (drug rape)
- Provisions on who the court should consider a vulnerable witness.
- The Bill establishes the legal age at which one can consent to a marriage as 18 years.
- The Bill establishes consent as the freedom and capacity to make a choice.
- The Bill also makes gang rape an offence punishable by law.

Many of these proposals did not make it past the scrutiny of the relevant Committee of the house – indeed many were vigorously opposed (see below). However, in the approved Sexual Offences Act, the critical provisions on minimum sentencing were retained. The process of negotiations involved a give and take, but so-called ‘losses’ can always be revisited through amendments.

4. *Negotiating the Sexual Offences Bill in Parliament.*

The 9th parliament has seen Kenya making strides on women’s rights issues (zero-rating of sanitary towels, the adoption of a national gender policy, the establishment of a Womens Development Fund, the tying of political party funding to representation of women in official party positions and introduction of paid maternity and paternity leave). The most publicized and celebrated however is the Sexual Offences Act 2006. This is partly due to the fact that although it was statistically clearly a serious national problem, it faced opposition from the majority of male MP’s (and other men) for a plethora of reasons, from ignorance of the law to cultural and social attitudes about male ownership of women’s bodies. Some saw the Bill as a threat to the status quo where ‘men use sex to control’; others saw it as a threat to the sanctity of marriage where ‘having paid for dowry I obtain the rights to have sex with my wife’. (This belief was also held by leaders in the religious sector). Some members were also of the opinion that “when an African woman says no, she means yes”; while others coming from communities where raiding is still carried out opposed introduction for the offence of gang rape (very much a part of these raids). The criminalization of FGM was opposed by MP’s from three different communities who practice it, and who cited fears that they would be voted out if they supported the Bill. Repeatedly, the mover’s personal status as a single woman with no children was called into question – “she has no husband or sons – she wishes to punish men”.

It was therefore obvious from the beginning that the enactment of the law needed a carefully planned campaign. Strategies were developed and applied successfully. It is hoped that these can be used as a framework for future legislative initiatives on the women’s rights agenda:

1. *Introducing the Bill as a Private Members Bill:* Many bills or motions tend to get bogged down in government bureaucracy and never make it to the floor of the house. The Domestic Violence Family Protection Bill has suffered this fate twice. It was therefore important for the Bill to be brought to the House using a different methodology. Private members Bills in Kenya rarely make it through the house from start to finish, as either the government ‘kills’ the Bill (if it is opposed to it) or ‘takes over’ the Bill if it is popular. However, it is a method that can be used to jump the queue of Government sponsored legislation, particularly if it is sponsored by a Party.
2. *Seeking male and cross-party support.* It was crucial to find a male supporter to second the Bill, particularly across parties so to narrow down the opposition to the Bill. The Leaders of the different political parties were also engaged and even their own notes to the debate developed so as to ensure their positive support.
3. *Development of a media strategy and identification of media partners:* The media were absolutely critical in influencing public opinion and getting the information on the seriousness of the situation round sexual violence into the public arena. The print media started to ‘headline’ cases of sexual violations, while the broadcast media carried documentaries and advertisements on the situation of sexual violence in Kenya. In order to establish a partnership with the media, the mover held several seminars with journalists covering the proceedings of Parliament and also Breakfast meetings with the Media owners association. The media carried free screenings of a 5 minute documentary on the 1991 incident at St Kizito girl’s school where 71 girls were raped by boys from a neighboring school. FM stations also carried the ‘Scream’ Advertisement calling on the public to respond firmly against sexual violence. These ads were carried the week before the debate started on the house. The mover held many press briefings to ensure the

awareness on the situation on sexual violence in Kenya was carried in the media before debate started on the floor of the house.

4. *Patterning with the medical fraternity.* The key partner in the campaign for the sexual offences Bill was the Nairobi Womens Hospital and its chief administrator, Dr. Sam Thenya (often dubbed the male face of the campaign). Many of the survivors who had been treated at this hospital gave testimony at a workshops held for MPs, religious leaders and law enforcement officers which shifted the opinion of some of those opposing towards supporting the Bill.

5. *Consultations with actors in the criminal justice system;* The Mover worked closely with the Attorney General and the Commissioner of Police, which ensured support of the Bill from mainstream government and access to information with regard to statistics, and the different challenges and legal barriers facing police enforcement of sexual violence laws.

7. *Identification of allies and opponents in the House:* The Kenyan Parliament is largely composed of conservative patriachs, a small group of whom came out publicly to oppose sections of the bill (and eventually voted against the criminalizing of FGM and marital rape). Opposition to the Bill became entrenched amongst sympathizers of *Zuma* and *Besigye*, who misadvisedly viewed the Bill as a political weapon. Strong Allies and supporters of the Bill were found amongst women MP's (who however had negligible votes) and the more paternalist members who felt a strong sense of protectionism towards abused children and elderly persons. There was some opposition amongst religious leaders who thought the bill sought to legalize abortion and homosexuality, but seminars were held to address these fears.

8. *Consolidation of public opinion outside parliament:* the key to the success of the bill was to reach out to the public (read electorate). A year to the next general election, the timing of the Bill was essential to getting support from MP's who were keen on mobilizing their women voters' constituency. The mover hired a reputable firm on opinion polling to conduct a survey on what Kenyans in general felt about the scourge of sexual violence. The findings were then presented and distributed to MP's, who are keen to support the opinions of their voters on the subject. (some MP's who opposed the Bill during the much published debated, lost their seats in the next general election).

9. *One on One intensive Lobbying:* one of the key elements of male networks on such issues is the closing of ranks – whether that position is well informed or not. Since the debate dominated public discussion particularly on the gender relations, the need to create a support base from Male MP's was critical. Therefore intensive, painstaking and time was taken to lobby individuals whilst providing relevant information including those directly affecting voters in his constituency.

10. *Lessons Learned:* After lengthy and difficult debate the Sexual Offences Act was assented to in July 2006. There are several lessons to be learned that should be taken on board when lobbying for women's rights legislation. A strong radical feminist approach tends to create apprehension and irrational opposition in a male-dominated institution. Well intentioned protestors marched outside Parliament at the start of the debate but almost caused the collapse of the process: Male MP's do not take kindly to threats (through placarding, sms messages, and language) which they perceive to be invading their male 'political' space. Many women activists do not understand this, and such activity undermined if not threatened the Bill while under debate. There is also a disconnect between women inside (political practitioners) and outside of Parliament (in civil society) that is to be bridged for more effective advocacy and lobbying on women friendly legislation. In particular , women outside of parliament must inform themselves of legislative processes and procedure, so as to develop effective strategies for engagement with Parliamentary committees.

The cost of such a national campaign should not be underestimated, as is the need for champions (both male and female) inside the Parliament itself.

Challenges around Implementation of the Act.

One of the important achievements of the Sexual Offences Act is that it provided an inbuilt regulatory mechanism for a national framework for implementation as well as a multi-sectoral set up to address the cross-cutting issues affecting issues on sexual violence. Section 47 provides that the Ministries charged with the responsibility of police, provincial administration, prisons, health, education, justice, social services and prosecutions engage effectively to ensure delivery of services under the Act. In March 2007 the Attorney General set up the National Taskforce on the Implementation of the Sexual Offences Act, this is currently developing the curriculum and training for the law enforcement sector. However a lot more needs to be done, in particular in the training of medical staff to preserve the chain of evidence and also to inform the general public – many of whom know a law was passed but remain ignorant of the content of that law.

There are other laws that were passed in the 9th Parliament that complement the Sexual Offences Act: Sexual Harassment is criminalized under the Employment Act 2006 and the Public Officer Ethics Act 2004. Further trafficking in persons is outlawed under the Employment legislation, which adds to the provisions under the SOA on trafficking for sexual exploitation and sex tourism. Sadly no such crimes have been reported to date despite the high number of incidences that is known to women and human rights specialists. Without the deterrence of an effective law – these criminals will continue with impunity.

Amendments to the law are still being made periodically to ensure full compliance of the law. A taskforce has been set up by the Attorney General to ensure implementation is comprehensive across all security, judicial, health and prison sectors.

Conclusion:

Any action targeting violence against women must include legislation. However, we need to engage parliamentary Processes, in order to achieve this. In the past we have only engaged governments – World Bank style, that is to engage the Executives of Governments but not their law-making institutions. Any national programme must have a parliamentary strengthening programme with specific reference to women’s rights – a legal framework is an absolute vehicle for the war on violence against women.

For more information visit www.click-kenya.com

SCHEDULE OF OFFENCES AND PUNISHMENTS UNDER THE SEXUAL OFFENCES ACT 2006

PROVISION	OFFENCE	SENTENCES
Section 3	Rape	Imprisonment for not less than 10 years and may be enhanced to Imprisonment for Life.
Section 4	Attempted Rape	Imprisonment for not less than 5 years and may be enhanced to Imprisonment for Life.
Section 5	Sexual Assault	Imprisonment for not less than 10 years and may be enhanced to Imprisonment for Life.
Section 6	Compelled Or Induced Sexual Acts	Imprisonment for not less than 5 years
Section 7	Acts that Cause Penetration or Indecent acts done within the view of a Child or a Mentally Disabled person	Imprisonment for not less than 10 years
Section 8	Defilement	<ul style="list-style-type: none"> • Of a child of 11 years or less imprisonment for life • Of a child of 12-15 years imprisonment of not less than 20 years • Of a child of 16 – 18 years imprisonment of not less than 15years
Section 9	Attempted Defilement	<ul style="list-style-type: none"> • Of a child of 11 years or less imprisonment for not less than 15 years • Of a child of 12-15 years imprisonment of not less than 10 years • Of a child of 16 – 18 years imprisonment of not less than 5years
Section 10	Gang Rape	Imprisonment for not less than 15 years and may be enhanced to Imprisonment for Life.
Section 11	Indecent Act with a Child	Imprisonment for not less than 10 years
Section 12	Promotion of Sexual Offences with a Child	Imprisonment for not less than 5 years.
Section 13	Child Trafficking	Imprisonment for not less than 10 years, and if a Juristic person a fine of not less than 2 Million Kenyan Shillings.
Section 14	Child Sex Tourism	Imprisonment for not less than 10 years, and if a Juristic person a fine of not less than 2 Million Kenyan Shillings.
Section 15	Child Prostitution	Imprisonment for not less than 10 years.
Section 16	Child Pornography	Imprisonment for not less than 6 years, or to a fine of not less than 500,000 Kenyan Shillings, or both.

Section 17	Exploitation of Prostitution	Imprisonment for not less than 5 years, or to a fine of not less than 500,000 Kenyan Shillings, or both.
Section 18	Trafficking for Sexual Exploitation	Imprisonment for not less than 15 years, or to a fine of not less than 2 Million Kenyan Shillings, or both.
Section 19	Prostitution of Persons with Mental Disabilities	Imprisonment for not less than 10 years, and if a Juristic person a fine of not less than 2 Million Kenyan Shillings.
Section 20	Incest by Male Persons	Imprisonment for not less than 10 years
Section 21	Incest by Female Persons	Imprisonment for not less than 10 years
Section 23	Sexual Harassment	Imprisonment for not less than 3 years, or to a fine of not less than 100, 000 Kenyan Shillings.
Section 24	Sexual Offences relating to Position of Authority and persons in position of Trust	Imprisonment for not less than 10 years
Section 26	Exposure	Imprisonment for not less than 2 years, or to a fine of not less than 50, 000 Kenyan Shillings, or both.
Section 27	Deliberate transmission of HIV or any other life threatening Sexually Transmitted Disease	Imprisonment for not less than 15 years but may be enhanced to life.
Section 28	Administering Substance with Intent	Imprisonment for not less than 10 years
Section 29	Distribution of Substance by a Juristic Person	A Juristic Person can be fined for not less than 5 Million Kenyan Shillings, or the imprisonment of its Directors for not less than 10 years, or both.
Section 32	Cultural and Religious Sexual Offences	Imprisonment for not less than 10 years
Section 33	Non Disclosure of Conviction of Sexual Offences	Imprisonment for not less than 3 years, or to a fine of not less than 50, 000 Kenyan Shillings, or both.

In addition to the specific offences laid out, the Act also provides for victim support and witness protection, publically funded medical treatment, special rules for the judicial and prosecutorial process (intermediaries, rape shield, intimidation of witnesses, and withdrawal of cases only with the permission of the State) and a framework for implementation of the Act as a whole.

Training of criminal investigators, medical personnel, prosecutors and judicial officers has been undertaken in an effort to have a coordinated and effective response to sexual crimes.