

## PROMOTING THE HEALTH AND HUMAN RIGHTS OF ADOLESCENT GIRLS AND YOUNG WOMEN USING THE EXISTING LEGAL FRAMEWORK ON ABORTION IN UGANDA

### Policy Brief – August 2020

*Many Adolescent Girls and Young Women (AGYW) are forced to choose between clandestine and risky abortions or carrying an unwanted pregnancy to term because of a general misconception that abortion is illegal and criminalized in Uganda except only when done to save a woman's life. This misconception limits the opportunities of AGYW, who are at the highest risk of sexual violence and unintended pregnancy, to access safe and legal abortion services. While Uganda's laws to a large extent restrict abortion, this brief argues that sensitizing communities, health providers and law enforcers on the available opportunities of intervention within the existing laws, and advocacy for a more progressive and clearer legal and policy environment will greatly reduce the mortality and morbidity rate associated with unsafe abortion.*

#### Background

An estimated 56 million induced abortions occur worldwide each year, with up to 25 million (45%) of them being unsafe<sup>1</sup>. Unsafe abortion occurs when a pregnancy is terminated either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both<sup>2</sup>. Unsafe abortion accounts for more than 70,000 maternal deaths each year and causes a further 5 million women to suffer temporary or permanent complications.<sup>3</sup>

- 1 World Health Organization. Preventing unsafe abortion: fact sheet. No. WHO/RHR/14.09. World Health Organization, 2014.
- 2 World Health Organization. Preventing unsafe abortion: fact sheet. No. WHO/RHR/14.09. World Health Organization, 2014.
- 3 Iqbal Shah and Elisabeth Ahman, 2009. Unsafe Abortion: Global and Regional Incidence, Trends, Consequences, and Challenges. *Journal of Obstetrics and Gynecology Canada*, 31 (12), 1149-58

In Uganda, an estimated 314,300 abortions took place in 2013 – a rate of 39 per 1,000 women aged 15-49 years (higher than the Africa regional average of 34 per 1,000 women) or 14% of all pregnancies.<sup>4</sup> Unsafe abortion is one of the leading causes of maternal morbidity and mortality in the country, contributing approximately 26% of the estimated 6,000 maternal deaths every year, and an estimated 40% of admissions for emergency obstetric care.<sup>5</sup> The major life-threatening complications resulting from unsafe abortions are hemorrhage, infection and injury to the genital tract and internal organs.

Globally at least 10 million unintended pregnancies occur each year among adolescent girls aged 15-19 years in developing countries.<sup>6</sup> Uganda has a predominantly young population, with 77% being under 25 years of age. Adolescent girls and young women (AGYW) between the ages of 15-19 are estimated at 6,569,000 or 16% of the population.<sup>7</sup> AGYW constitute the bulk of women who experience problems resulting from unsafe abortion.<sup>8</sup> Among adolescent girls aged 15-19 years, up to 70% of the abortions that occur each year are unsafe<sup>9</sup>, compared to 45% among women of all ages.<sup>10</sup>

According to the World Health Organization (WHO), AGYW who want to avoid pregnancies are not able to do so due to knowledge gaps and misconceptions; barriers to accessing contraception including restrictive laws and policies regarding provision of contraceptive to young people; health worker bias and/or lack of willingness to acknowledge adolescents' sexual health needs; adolescents'

- 4 Guttmacher Institute, 2017. Abortion and postabortion care in Uganda. <https://www.guttmacher.org/fact-sheet/abortion-and-postabortion-care-uganda>
- 5 Guttmacher Institute, Abortion in Uganda, <https://www.guttmacher.org/fact-sheet/abortion-uganda>; Uganda Bureau of Statistics (UBOS) and ICF International, Uganda Demographic and Health Survey 2011, Kampala, Uganda: UBOS; and Calverton, MD, USA: ICF International, 2012
- 6 Darroch J, Woog V, Bankole A, Ashford LS (2016). Adding it up: Costs and benefits of meeting the contraceptive needs of adolescents. New York: Guttmacher Institute.
- 7 Uganda Bureau of Statistics 2016, The National Population and Housing Census 2014 – Main Report, Kampala, Uganda
- 8 Christiansen CS, Gibbs S, Chandra-Mouli V. (2013). Preventing early pregnancy and pregnancy-related mortality and morbidity in adolescents in developing countries: the place of interventions in the pre-pregnancy period. *J Pregnancy*. <https://doi.org/10.1155/2013/257546>.
- 9 Darroch J, Woog V, Bankole A, Ashford LS (2016). Adding it up: Costs and benefits of meeting the contraceptive needs of adolescents. New York: Guttmacher Institute.
- 10 World Health Organization. Preventing unsafe abortion: fact sheet. No. WHO/RHR/14.09. World Health Organization, 2014.

own inability to access contraceptives because of knowledge, transportation and financial constraints; and sexual violence, which is widespread with more than a third of girls in some countries reporting that their first sexual encounter was coerced.<sup>11</sup>

These statistics indicate that the accessibility, availability and quality of Sexual Reproductive Health services and information is not up to the required standard of Uganda's human rights obligations in the National and International frameworks. Uganda is obligated to ensure the health of its citizens and that health services including SRH services are accessible and available to all.<sup>12</sup> This entails physical accessibility, information about these services and affordability of these services by all.

AGYW in Uganda are left to resort to unsafe abortions because they cannot or do not know how to access information and services to prevent unwanted pregnancies even in instances where they suffer sexual violence. These unsafe abortions result in death or health risks which violate their rights to life, dignity and health. For those who carry the unwanted pregnancies to term, they face the risk of being shunned by their families, dropping out of school, usually without a source of livelihood. This still affects their dignity and quality of life and consequently that of their baby.

Abortion resulting from unintended conception is a major maternal health problem, especially in settings where abortion laws are restrictive.<sup>13</sup> Restrictive laws are one of the main barriers to accessing safe abortion.[13] Evidence suggests that in countries where abortion is completely banned or allowed only to save the woman's life or her physical health, only 1 in 4 abortions are safe, whereas in countries where abortion is legal on broader grounds nearly 9 in 10 abortions are safe. Moreover, there is no evidence to suggest that restrictive laws lower the rate of abortion incidence.<sup>14</sup>

Furthermore, an estimate of global incidence of abortion has found that maternal mortality ratios due to complications of unsafe abortion are higher in regions with restrictive abortion laws than in regions with no or

few restrictions on access to safe and legal abortion.<sup>15</sup> In jurisdictions with restrictive abortion laws, women with unwanted pregnancies often resort to clandestine, risky and unsafe options.

### Regional and international human rights standards on access to safe abortion

Uganda has ratified a number of regional and international human rights treaties that protect the rights of women and girls, including access to safe and legal abortion services. These include: the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>16</sup>; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>17</sup>; the Convention on the Rights of the Child (CRC)<sup>18</sup>; the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)<sup>19</sup>; the African Charter on Human and Peoples' Rights (ACHPR)<sup>20</sup>; ACHPR's Protocol on the Rights of Women in Africa (Maputo Protocol); and the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>21</sup>.

The Maputo Protocol recognizes the need to protect the reproductive rights of women by authorizing access to medical abortion in Article 14(2)(c) which requires State Parties to take all appropriate measures to protect the reproductive health rights of women by among others authorizing medical abortion in cases of sexual assault, rape, incest and fetal abnormality. Uganda however is one of the few African countries to have placed a reservation on this Article stating that abortion shall be implemented according to the laws of Uganda. The reservation in effect means that the Government of Uganda cannot be held accountable for failure to implement obligations under this Article.

Several international and regional human rights bodies have issued opinions, guidelines and recommendations on abortion. The UN Committee on Economic Social and Cultural Rights (CESCR) and the ACHPR Commission have issued separate guidance on the rights to sexual and reproductive health, including access to safe abortion. According to CESCR's General Comment

<sup>11</sup> WHO 2020. Adolescent pregnancy. Factsheet. <https://www.who.int/news-room/factsheets/detail/adolescent-pregnancy>

<sup>12</sup> Committee on Economic Social and Cultural Rights, General Comment No.14 on the Right to the Highest Attainable Standard of Health

<sup>13</sup> Ushie, B.A., Izugbara, C.O., Mutua, M.M. et al. (2018). Timing of abortion among adolescent and young women presenting for post-abortion care in Kenya: a cross-sectional analysis of nationally-representative data. *BMC Women's Health* 18, 41 (2018). <https://doi.org/10.1186/s12905-018-0521-4>

<sup>14</sup> Sedgh G, Bearak J, Singh S, Bankole A, et al (2016). Abortion incidence between 1990 and 2014: global, regional, and subregional levels and trends. *The Lancet*, vol. 388, Issue 10041, P258-267. [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(16\)30380-4/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)30380-4/fulltext)

<sup>15</sup> Iqbal Shah and Elisabeth Ahman, 2009. Unsafe Abortion: Global and Regional Incidence, Trends, Consequences, and Challenges. *Journal of Obstetrics and Gynecology Canada*, 31 (12), 1149-58

<sup>16</sup> Article 12(2)(d)

<sup>17</sup> Article 12(1)

<sup>18</sup> Article 24(1)

<sup>19</sup> Article 1(1)

<sup>20</sup> Article 1(1)

<sup>21</sup> Article 14(1)

No. 22 (2016) on the Right to Sexual and Reproductive Health (ICESCR, Article 12) and the ACHPR's General Comment No. 2 on Article 14 of the Maputo Protocol, stating that:

1. Denying access to safe abortion is a violation of sexual and reproductive health and rights of women and girls including their right to life, equality and non-discrimination, privacy and confidentiality, and freedom from cruel, inhuman and degrading treatment or punishment.
2. Restrictive abortion laws and lack of implementation of more permissive laws violate the human rights of women and girls.

These bodies have also recommended that States should:

- *Ensure access to safe abortion in certain circumstances and to interpret laws, even restrictive ones, in a manner that promotes and protects the rights of women and girls.*
- *Remove legal restrictions and other barriers to safe abortion.*
- *Ensure availability of essential supplies and medicines for abortion and post-abortion care.*
- *Ensure that women and girls have a right to access correct information on all aspects of sexual and reproductive health including access to safe abortion and post-abortion care.*
- *Adopt evidence-based national standards and guidelines for safe abortion that provide necessary information and guidance to key stakeholders on how to achieve equitable access to good-quality care with a view to eliminating barriers to obtaining the highest attainable standard of sexual and reproductive health.*

Specific recommendations have been issued to Uganda on access to safe abortion. For instance, in 2015 the African Commission noted that Uganda's reservations on Articles 14 and 21 of the Maputo Protocol impede women's full enjoyment of health and reproductive rights. In 2016, the Committee on Economic Social and Cultural Rights recommended that Uganda revises its abortion legislation, and consider decriminalizing

abortion and expanding exceptions to the general prohibition on abortion to include cases such as rape, incest, and fetal abnormality.

### Uganda's abortion laws and their understanding

There is a persistent and widespread, albeit mistaken, misconception in Uganda that abortion is always illegal except only when done to save a woman's life (CRR et al., 2013). However, contrary to this perception, legal analyses have suggested that the laws and policies possibly allow abortion in a wider range of circumstances.

The Constitution of the Republic of Uganda (1995?), in Article 22(2), provides that "*No person has the right to terminate the life of an unborn child except as may be authorized by law.*" This provision does not preclude access to abortion, but merely requires one to only terminate "the life of an unborn child" if the law authorizes them to do so.[15] And the only existing law that attempts to prescribe the circumstances, the Penal Code Act (Cap 120), provides under Section 224 that, "*A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his or her benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.*"

However, the law leaves it open to interpretation on what would amount to "good faith"; "reasonable care and skill"; "patient's state"; and the "circumstances of the case". In addition, neither the Constitution nor the Penal Code Act (Cap 120) provide an explicit legal definition of the term "unborn child" [16] as used in Article 22(2) of the Constitution and sections 212 and 224 of the Penal Code Act (Cap 120).

These gaps have left the law, vague and open to different interpretations. While some have limited the interpretation to saving the mother's life, others have interpreted "good faith" to mean having no financial motive and the circumstances to include the broader definition of health to include both physical and mental health.

The Penal Code Act (Cap 120) is more elaborate on the penalties than on the circumstances for legal abortion; it prescribes a jail term of 14 years for anyone that attempts to induce an abortion on a woman "unlawfully"<sup>22</sup> ; a jail

<sup>22</sup> S.141, Penal Code Act.

term of 7 years for a woman who attempts on her own or allows a third party to induce an abortion on herself<sup>23</sup> and a jail term of 3 years for anyone who supplies a drug or substance used in an “unlawful” abortion.<sup>24</sup>

Nevertheless, section 224 of the Penal Code remains critical as it is widely understood to permit abortion to safeguard the life and health of the pregnant woman, and creates a lawful exception to criminalization by providing a defense for a qualified health care provider who performs a surgical abortion to preserve the pregnant woman’s life.<sup>25</sup>

References have also been made to case law, particularly the 1938 case in which British gynecologist Aleck William Bourne was acquitted for performing an abortion on a 14 year old girl who was gang raped by 5 soldiers and became pregnant as a result<sup>26</sup>, at the time, British law recognized justification for the termination of a pregnancy only if the life of the woman was in danger. In East Africa this English case was upheld in the case of Mehar Singh Bansel v. R<sup>27</sup>, Given that British law is the basis for Uganda’s Penal Code Act (Cap 120), some analysts have argued that the incorporation of this ruling in Uganda’s jurisprudence effectively provided allowed circumstances for saving the woman’s life and preserving her physical and mental health.

The Ministry of Health sought to clarify these circumstances in the 2006 National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights, which provide t S. 142, Penal Code Act. hat abortion is permissible in cases of saving the life of a pregnant woman, fetal anomaly, rape and incest. With regard to AGYW, the Adolescent Health Policy Guidelines and Service Standards of 2012 recognize early pregnancies and unsafe abortions among the reproductive health challenges that adolescents face but only recommend behavioral change and post-abortion care and management. The School Health Policy and the National Sexuality Education Framework that would have provided additional guidance have stalled for years in the corridors of policy makers.

While they do not have the force of law, these policies and policy guidelines constitute general acceptance on the part of the State, and as such create a conducive environment for not only legal reform but more progressive interpretation of the existing legal provisions.

Both the CEDAW Committee (General Recommendation 35) and the UN Working Group on Discrimination against Women and Girls (WGDAW) have determined that the right to safe abortion is equality right for women. It has been stated that governments violate the rights to health and life of women seeking abortion by making safe and legal abortion inaccessible through the enforcement of criminal abortion laws.

Unsafe abortion raises human rights concerns. While women from all backgrounds have abortions, it is largely mature women with higher socioeconomic status that have access to relatively safer abortion services as they are more likely to use health professionals.<sup>28</sup> But this does not guarantee them a safe abortion. Due to the restrictive legal setting, even skilled providers often work clandestinely, which often compromises the safety of the procedures they perform and frequently leads them to charge high premium for their services. This results in discrimination against economically disadvantaged women, many of whom are AGYW without financial independence.

According to the International Conference on Population and Development (ICPD, 1994), every woman has the right to decide freely and responsibly without coercion and violence the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.<sup>29</sup> [22] Access to safe, legal abortion services is a fundamental right of women, irrespective of where they live, and is essential for the realization of these rights.<sup>30</sup>

At the national level, the 1995 Constitution of Uganda enshrines the inalienable and inherent human rights of all individuals, including the responsibility of the State to fulfil the fundamental right of all Ugandans to social justice, basic medical services, healthcare, and economic development.

<sup>23</sup> S. 142, Penal Code Act.

<sup>24</sup> S.143, Penal Code Act.

<sup>25</sup> Center for Reproductive Rights, 2012. A Technical Guide to Understanding the Legal and Policy Framework on Termination of Pregnancy in Uganda.

<sup>26</sup> R v Bourne (1938) 3 All ER 615

<sup>27</sup> [1959] E.A.C.A. 813, 832

<sup>28</sup> Aparna Sundaram, Michael Vlassoff, Frederick Mugisha, Akinrinola Bankole, Susheela Singh, Leo Amany and Tsuyoshi Onda, 2013. Documenting the individual- and household-level cost of unsafe abortion in Uganda. International Perspectives on Sexual and

Reproductive Health, vol.39, issue 4; pp. 174-184.

<sup>29</sup> <https://www.un.org/en/development/desa/population/theme/rights/index.asp>

<sup>30</sup> Grimes, David A., et al. “Unsafe abortion: the preventable pandemic.” The lancet 368.9550 (2006): 1908-1919.

In addition, the Constitution outlines the duty of the State to ensure that women are accorded full and equal dignity of person with men by protecting women and their rights, as well as their maternal functions in society (Article 33). And under Objective XV of the National Objectives and Directive Principles of State Policy, the Constitution provides that the State shall recognise the significant role that women play in society. As such, the State is obliged to provide reproductive health services and commodities that are necessary to enhance the welfare of women and girls, to enable them realize their full potential (Constitution Art 33).

## Conclusion

It is widely perceived that abortion is illegal, but Ugandan women from all backgrounds have abortions. No doubt, some of these abortions are legitimate under the current abortion laws, given that Uganda does not absolutely outlaw abortion. However, because interpretations of the law are ambiguous, medical providers are scared of providing abortion services for fear of legal consequences. Improving access to modern contraception can reduce but never eliminate the need for abortion. Yet, access to safe abortion services, even for such legitimate cases, is extremely limited, leaving most women, especially AGYW, to risk their health and lives trying to have abortions through unsafe methods.

The Government of Uganda should improve the policy environment for AGYW access to comprehensive sexuality education and contraception information, services and commodities (including expediting the Sexuality Education Framework and School Health Policy); lift the current reservation to Article 14 of the Maputo Protocol and domesticate it by expanding the minimum grounds for safe abortion to comply with the provisions of the treaty; revise abortion laws, including by repealing sections 141 to 143 of the Penal Code; increase awareness among medical healthcare personnel, law enforcement and judicial officers on the legal exceptions for abortion; and encourage a more progressive interpretation of the current law to promote women's access to safe, legal abortion to enable them realize their rights to health and life.

1. Unsafe abortion is among the leading causes of maternal morbidity and mortality in Uganda, contributing to four maternal deaths per day (26% of the total), and responsible for 40% of all admissions for obstetric emergencies. Adolescent girls and young women (AGYWs) are disproportionately affected, accounting for 70% of unsafe abortions, compared to 45% among women of all ages.
2. AGYWs are a vulnerable population, at high risk of unintended pregnancies through sexual violence, GBV, or transactional sex for survival; consequently, many AGYWs face the tough and untenable choice between clandestine, risky abortions and the uncertainty of carrying an unwanted pregnancy they are not mentally, physically, and/or financially prepared for because of the perception that that abortion is criminal.
3. Ugandan women from all backgrounds have abortions, some of which are legitimate under the current abortion laws, given that Uganda does not absolutely outlaw abortion. However, because the exceptions are not always clear, coupled with the fact that interpretations of the law are ambiguous, compounded by religious and socio-cultural influences lead to the perception that abortion is always criminal in Uganda. Consequently, health practitioners are scared of providing abortion services for any reason for fear of legal repercussions.
4. Global data show that restrictive abortion laws do not lower the incidence of abortion, on the contrary they increase the risk of unsafe abortions and lead to greater risks to women and health practitioners alike.
5. Uganda Law provides for, and covers the sexual and reproductive health and rights of women, particularly the AGYWs; and Uganda has ratified a number of international and regional human rights treaties that protect the rights of women and girls, including the right to safe, legal abortion and post-abortion care; however, most of these have not been domesticated to expand the minimum grounds for safe abortion to comply with the provisions.
6. It is therefore imperative that the unacceptably high morbidity and mortality due to unsafe abortion

in Uganda, especially among the AGYWs be addressed through a multi-pronged, whole of government and whole of society approach to ensure:

- *Improved policy and legal framework for comprehensive sexuality education towards the realisation of the sexual and reproductive health and rights, especially among AGWYs, in line with international and regional commitments and national laws.*
- *Sustained advocacy for progressive interpretation of the existing options within the current laws to afford AGWYs and the healthcare practitioners appropriate safeguards.*
- *As a matter of urgency, effort be made for Uganda to lift reservations and domesticate existing international treaties, such as the Maputo Protocol, and amend anachronistic abortions laws that are still on the Penal Code.*
- *The Ministry of Health which is at the frontline in dealing with the burden of morbidity and mortality due to unsafe abortions mobilises all stakeholders to address the scourge of unsafe abortions in Uganda.*
- *Improved access to modern contraception methods, services and commodities, backed by age-appropriate and client-friendly access to contraception information, which are proven to reduce the need for abortion and recourse to unsafe abortion.*

It is everybody's business to protect Ugandan adolescent girls and young women from the hidden scourge of unsafe abortion.