

**THE CENTER FOR POLICY ANALYSIS
(CEPA)**

**ANALYSIS OF CULTURAL AND CONSTITUTIONAL RESPONSES TO
COMPREHENSIVE SEXUALITY EDUCATION IN UGANDA**

POLICY SERIES PAPERS NUMBER 2-10 OF 2016

Published by CEPA

P. O. Box 23276, Kampala

Email: info@parliamentwatch.ug

Web site: <http://www.parliamentwatch.ug>

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Citation

Matsiko G. M, (2016). Analysis of Cultural and Constitutional Responses to Comprehensive Sexuality Education in Uganda. CEPA Policy Series Papers Number 7 of 2016. Kampala

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Abstract

Traditionally there have been two dominant approaches to sex education "comprehensive" and "abstinence-only-until-marriage." There has been multiple scholarly debate on these approaches in the West and policies have been developed to the extent of leaning towards the former in the recent past. This has reached the level of international human rights and a lot of pressure and lobbying has followed for the adoption of "comprehensive" sex education in African countries. In Africa however, the approach has been to emphasize abstinence only until marriage. This paper gives an introduction on the sexuality education debate and its status in the Ugandan education system. It evaluates statutory provisions and principles of constitutionalism surrounding sexuality education, it explores discussions in other jurisdictions where this aspect or related ones have been litigated upon. It also evaluates the religious context as well as cultural responses and how effective such considerations are in policy formulation and the law making process in a secular state like Uganda. The paper broadly addresses the question as to whether Uganda should adopt Comprehensive Sexuality Education as opposed to Abstinence-Only-Until-Marriage approach. It concludes that the Ugandan society is more inclined towards the latter and it is best that stakeholders explore options to improve the preferred approach even if the result is that a hybrid system unique to Uganda is developed.

1. Introduction

Sexuality education programs vary the world over. In certain jurisdictions, it is typical for the State legislature or department of education to mandate or recommend certain sexuality education guidelines and for local school boards to share autonomy in crafting the particular sexuality education curriculum for their district². In Uganda, this would fall to Parliament as the law making body of government to come up with a Parent Act on the subject or amend existing laws to reflect a position in broad terms. The Ministry of Education and Sports would then draft the necessary guides for curriculum development³ and the National Curriculum Development Centre would be expected to come up with the material guides to be used by teachers in schools countrywide⁴. Under the *Second National Development Plan*⁵ the government is committed to improve the quality of education, training and health care at all levels.

2. The Sexuality Education Debate

Historically under informal education (enculturation) in Uganda, different cultures had ways of passing on knowledge to the young generation through, stories, songs, and other forms of folk lore. This was always in line with all aspects of life such as work, marriage, family, war and leadership⁶. In some cultures, there are initiation practices which are used to prepare children who have reached puberty or marriage age in that culture on what to expect in the season ahead. It is at this point that certain delicate information considered to be for adults is given to those being initiated since they are now considered mature and responsible enough to deal with it. The challenges are that: there is no uniformity in the initiation practices, some of the practices are considered harmful to the health of those involved and this information could very easily filter down to underage children since there

² Gary J. Simpson & Erika A. Sussman, Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate Page 266 SSRN-id259256 published at ssrn.com accessed on the 11th of October 2016

³ Education Pre-Primary, Primary and Post Primary Act 2008 Section 5 (1) d

⁴ National Development Center Act Cap 135 section 3

⁵ National Planning Authority, *Second National Development Plan (NDPII) 2015/16-2019/20*, Uganda Vision 2040 "A Transformed Ugandan Society from a Peasant to a modern and Prosperous Country within 30 years" NDPII Theme "Strengthening Uganda's Competitiveness for Sustainable Wealth Creation, Employment and Inclusive growth" June 2015 page xviii

⁶ <https://education.stateuniversity.com/pages/1583/Uganda-HISTORY-BACKGROUND.html> accessed on 14th October 2016

are no clear controls. Some aspects of culture have been wholly discarded for being repugnant to natural justice, and unconstitutional⁷.

In the religious setting too, there is a practice of pre-marital counseling which takes a couple days, weeks or months before the nuptials in which period the prospective couple is given a crash course in a number of issues related to marriage including sexuality. The argument against this has been that sometimes the time is not sufficient for the prospective couples to absorb such information within such a short time with the associated pressures of organizing the functions. Also the relevance of pre-marital counseling has been questioned where the people involved are already cohabiting.

Traditionally, the formal education approach on sexuality in Uganda was loosely a reflection of what was acceptable in the society and this was *Abstinence-Only-Until-Marriage*. From the early 1990s, safer sexual intercourse was advocated for as a means to prevent people from contracting or spreading HIV to their sexual partners⁸. The rider of publications and sensitization moves at the time were to quell the paranoia surrounding the spread of HIV and discourage stigma against HIV positive persons. This paved way for more accommodative literature in mainstream media such as *Young Talk and Straight Talk*⁹. This was blown beyond control by the influx of Western entertainment material, internet, popular culture and domestic tabloids such as the *Red Pepper*. Literature in mainstream curricula has been conveniently adapted from such influences and has begged the question of what is acceptable or not. Government programs in the early 2000s advocating for sexuality education in schools in the urgency to fight the transmission of HIV allowed the influx of questionable opinions on sexuality. This backdrop has set the background on which a debate hitherto unpopular must be addressed and confronted.

There has been increasing discussion in the recent past with groups from opposite sides of the sexuality education debate actively lobbying lawmakers on behalf of two extremely divergent approaches – *Comprehensive Sexuality Education* and *Abstinence-Only-Until-Marriage Education*. . In Uganda, a number of civil society education actors such as Uganda Youth Forum,

⁷ Muna Ndulo, *African Customary Law, Customs, and Women's Rights* (2011) Cornell Law Faculty Publications. Paper 187, Page 103 available at <http://scholarship.law.cornell.edu/facpub/187> (accessed on 16th October 2016)

⁸ The Republic of Uganda, TASO, UNICEF, WHO; *Living with AIDS in the Community, A book to Help People Make the Best of LIFE. 1st Edition March 1991 page 42*

⁹ Although such publications tried to be specific about what ages their audience were, there were no clear controls of enforcing this and also a constant question on whether the material was appropriate at all

True Love Waits, and Makerere Community Church have risen up in arms against the potential hijack by a global sexuality campaign infiltrating the Ugandan education system¹⁰.

In a recent discussion in Parliament it was appreciated that Comprehensive Sexuality Education lacks defined approaches to guide children at their tender age and to uphold Uganda with its morals, virtues of an Africa setting and a God fearing nation¹¹. During the debate, members supported the motion and blamed sexuality education in schools for the rapid spread of immorality such as pre-marital sex, abortions, homosexuality and teen disobedience.

Parliament agreed that the Ministry of Education and Sports halts the dissemination of Comprehensive Sexuality Education training materials and conduct of related programs in schools in Uganda until a policy has been laid out in Parliament. The

National Curriculum Development Center would in conjunction with relevant stakeholders develop a Comprehensive Sexuality Education Curriculum in line with Uganda's cultural values and practices¹². It remains to be seen in Uganda, what approach the lawmakers will adopt on Sexuality Education.

3. Comprehensive Sexuality Education (CSE)

Comprehensive sexuality education takes a broad multi-faceted approach to adolescent reproductive health. It teaches students the benefits of abstaining from early sexual activity, but also recognizes that some students will choose otherwise and offers a broad perspective on the role that sexuality plays in an individual's personal development. It gives students the liberty to choose contraceptives and disease prevention measures if they choose to be sexually active¹³.

Aspects of CSE were first introduced in mainstream curricula and gained acceptance through the window created by the paranoia surrounding the HIV/AIDS scourge in the 1980s and 1990s. Mutaryebwa Francis in a school edition's book titled *Facts and Myths About HIV/AIDS* explicitly elaborates the use of condoms as a means to prevent getting infected with HIV or other sexually transmitted diseases (STDs) emphasizing that "*Remember AIDS is a manageable disease*"¹⁴.

¹⁰ <https://www.hrw.org/reports/2005/uganda0305/5.htm>, accessed on the 14th of October 2016
<http://www.monitor.co.ug/News/Education/At-least-100-schools-tricked-into-teaching-homosexuality/688336-3192576-10r641y/index.html> accessed on 14th October 2016

¹¹<http://estanakkazi.blogspot.ug/2016/08/sex-education-in-uganda-schools-was-bad.html> accessed on the 13th of October 2016 (to be compared with actual Hansard records

¹²ibid

¹³ Gary, supra page 266,

¹⁴ Mutaryebwa Francis; *Facts and Myths About HIV&AIDS, A Practical Guide to Prevention, Health and Life; Schools Edition* Published by Classic Artworks Ltd 2001 pages 9 & 10

Under PIASCY¹⁵, the approach was that for the majority of pupils who do not go to secondary school after primary school should be prepared for safe sex¹⁶. The background was that at the time only about 30% of girls and 40% of boys would go to secondary school and that in some districts just 20% pupils. According to the *Second National Development Plan* only about 4 percent of the population above 15 years has an educational attainment above the secondary level¹⁷.

That such pupils needed to be prepared for when they became sexually active by being well disposed towards: being faithful to one sexual partner who has tested for HIV, testing for HIV, using condoms, family planning; talking about protection with their partner, living positively: getting treatment, care and support.¹⁸ Pupils were to be taught that although sex can be dangerous, it had positives such as expressing love, bringing up children and enjoyment. The purpose was to get pupils to recognize and accept sexual feelings, know that these feelings do not mean that they need to have sex and that they should continue to abstain¹⁹.

PIASCY acknowledged that teaching about condom issues had been in the Uganda primary school curriculum since the late 1980s, they were in P.7 science texts and that almost every child in P5 to P7 knew what a condom was²⁰. The message was that pupils should be openly told that when used consistently and correctly, condoms protect against HIV/STIs and pregnancy, that condoms have helped to reduce HIV in Uganda and that it was government policy. This was qualified with the message that pupils should know that condoms were not appropriate for them at that age and teachers were assured that talking about condoms would not make pupils start having sex. There was no statistical evidence given for this assertion. Teachers were also told that if they were uncomfortable handling sex education sessions, they could ask a colleague or health worker to deputize²¹. The question here would be, why would something uncomfortable for an adult be appropriate for a child?

According to the *Second National Development Plan* it is noted that there is inadequate access to basic and critical health services including sexual and reproductive health services, a lot of peer pressure

¹⁵ Ministry of Education and Sports, Presidential Initiative on AIDS Strategy for Communication to the Youth (PIASCY): Helping pupils to stay safe; a Handbook for teachers (P.5-P.7) first edition 2001

¹⁶ Ministry of Education and Sports, *Presidential Initiative on AIDS Strategy for Communication to the Youth* (PIASCY): Helping pupils to stay safe; a Handbook for teachers (P.5-P.7) first edition 2001, 3.11 Staying safe after primary school: protection plans page 29

¹⁷ *Second National Development Plan* 1.2.9 Enhancing human capital development bullet 22 page 7

¹⁸ *ibid*

¹⁹ *Ibid*, 3.12 Accepting Sexual feelings page 30

²⁰ *Ibid* 3.13 Addressing condoms page 30

²¹ *ibid*

and limited skills to resist such pressures and to practice safe behavior. That though teenage pregnancy has reduced from 43 percent in 1992 to 25 percent in 2013 it is still high compared to other countries²². Financial constraints are also blamed for limited control by women and girls on decisions for safer sex²³. According to *Sustainable Development Goal (SDG) 3*²⁴, the plan is to ensure universal access to sexual and reproductive health care services including family planning, information and education, and the integration of reproductive health into national strategies and programs by 2030.²⁵ The focus for children aged 13-17 years of age are: ensuring among other things that they get appropriate sexual and reproductive health information and services: and promoting male involvement in family planning and safe motherhood.²⁶

In the United States, though not a curriculum as such, *Guidelines for Comprehensive Sexuality Education: Kindergarten-12th Grade*²⁷ provides state and local lawmakers with a detailed outline of what a comprehensive sexuality education curriculum should entail. According to these guidelines, it should have four primary goals:

INFORMATION: To provide accurate information about human sexuality, including: growth and development, human reproduction, anatomy, physiology, masturbation, family life, pregnancy, child-birth, parenthood, sexual response, sexual orientation, contraception, abortion, sexual abuse, HIV/AIDS and other sexually transmitted diseases.

ATTITUDES, VALUES, AND INSIGHTS: To provide an opportunity for young people to question, explore, and assess their sexual attitudes in order to understand their family's values, develop their own values, increase self-esteem, develop insights concerning relationships with families and members of both genders, and understand their obligations and responsibilities to their families and others.

RELATIONSHIPS AND INTERPERSONAL SKILLS: To help young people develop interpersonal skills, including communication, decision-making, assertiveness, and peer refusal skills,

²² *Second National Development Plan*; bullet 246 page 68

²³ *Ibid* bullet 274 page 74

²⁴ National Planning Authority, *Second National Development Plan (NDPII) 2015/16-2019/20*, *Uganda Vision 2040 "A Transformed Ugandan Society from a Peasant to a modern and Prosperous Country within 30 years" NDPII Theme "Strengthening Uganda's Competitiveness for Sustainable Wealth Creation, Employment and Inclusive growth"* June 2015

²⁵ *Second National Development Plan*; Bullet 352 page 97 Target 3.7

²⁶ *Second National Development Plan*: Bullet 429 page 126

²⁷ National Guidelines Task Force, *Guidelines For Comprehensive Sexuality Education: Kindergarten-12th Grade* at v, 55-56 (2nd ed. 1996) (USA)

as well as the ability to create satisfying relationships. Sexuality education programs should prepare students to understand their sexuality effectively and creatively in adult roles. This would include helping young people develop the capacity for caring, supportive, non-coercive, and mutually pleasurable intimate and sexual relationships.

RESPONSIBILITY: To help young people exercise responsibility regarding sexual relationships, including addressing abstinence, how to resist pressures to become prematurely involved in sexual intercourse, and encouraging the use of contraception and other sexual health measures. Sexuality education should be a central component of programs designed to reduce the prevalence of sexually-related medical problems; these include teenage pregnancies, sexually transmitted diseases including HIV infection, and sexual abuse.

The Guidelines also set forth six “key concepts” as essential components of a sex education program: (1) “Human Development”, including “reproductive anatomy and physiology, reproduction, puberty, body image, and sexual identity and orientation”, (2) “Relationships”, including “families, friendship, love, dating, marriage and lifetime commitments, and raising children”; (3) “Personal Skills”, including “values, decision-making communication, assertiveness, negotiation and looking for help”; (4) “Sexual behavior,” including “sexuality throughout life, masturbation, shared sexual behavior, abstinence, human sexual response, fantasy, and sexual dysfunction”; (5) “Sexual Health,” including “contraception, abortion, sexually transmitted diseases including HIV infection, sexual abuse, and reproductive health”; and (6) “Society and Culture,” including “sexuality and society, gender roles, sexuality and the law, sexuality and religion, diversity, sexuality and the arts and sexuality and the media. These guidelines suggest that sex education should last throughout a child’s education and divide each of these concepts areas into *developmentally appropriate levels*.

Although comprehensive sexuality education teaches the value of abstinence before marriage and of sexual fidelity within marriage, it plainly takes an approach to premarital and extramarital sex that is more permissive than fundamentalist Christians and other religions that teach that such sex is sinful and necessarily avoided.

4. Abstinence –Only- Until-Marriage

This approach presents abstinence until marriage as the reasonable choice for unmarried persons. Under PIASCY²⁸ the message was to teach that abstinence is the only 100% protection method against HIV transmission. Children must be taught that abstinence is safe, that their bodies do not need sex to develop and that sex does not make them smart. The message was also to clear the

²⁸ PIASCY 26

misconceptions that abstinence causes future infertility or impotence, future painful childbirth; a hardened hymen or blocked vagina, a withered small penis and underdeveloped buttocks and small breasts.²⁹

*Sex Respect: The Option of true Sexual Freedom*³⁰, promotes the abstinence-only approach. Sex Respect emphasizes the dangers of pre-marital sex stating somewhere that:

If premarital sex came in a bottle, it would probably have to carry a Surgeon General's warning, something like the one on a package of cigarettes: 'THERE's NO WAY TO HAVE PREMARITAL SEX WITHOUT HURTING SOMEONE'³¹.

It underlines the ease with which “passion becomes like a car with worn-down brakes speeding downhill³²”, Sex Respect warns that physical intimacy leads to destructive and uncontrollable results. Sex respect seeks to leave no doubt in students' minds that abstinence until marriage is the morally correct course of behavior. “Do the right thing. Wait for the ring³³” reads the caption framing a picture of a bride and groom in the student workbook.

Sex Respect has little to say about condom use and nothing good, cautioning that “you can never be sure the condom has no defects or will not tear, leak or slip.”³⁴ *Sex Respect* emphasizes to students the risk that condoms may fail to provide the physical protection anticipated. It also broadly warns students that “contraceptives can also carry some health risks³⁵” and firmly reminds them that “condoms do nothing to protect you from the emotional and psychological consequences of premarital sex.”³⁶

Sex Respect teaches that abortion is not a reasonable option, morally or medically in the event of an unplanned pregnancy. It highlights quite graphically any possible physical complications that a pregnant teenager may experience during or after the abortion procedure. “Is it fair”, Sex Respect

²⁹ *ibid*

³⁰ Coleen Kelly Mast, *Sex Respect: The Option of true Sexual Freedom* (rev. ed. 1997) The curriculum package consists of a Student Workbook, Teacher Manual and Parent Guidebook

³¹ Mast, *Sex Respect- Student Workbook*, at 35

³² *Ibid* at 7

³³ *Ibid* at 64

³⁴ *Ibid* at 56

³⁵ *Ibid* at 36

³⁶ *Ibid* at 56

asks “to make the baby die because of a decisions his or her parents made?”³⁷ A pregnant teen who is not selfish,” *Sex Respect* explains, “can see adoption as her sacrifice for the good of her baby.”³⁸

Sex Respect and other abstinence only programs emphasize that teaching abstinence and avoiding instruction in birth control methods is a sound strategy for preventing teen pregnancy and the spread of sexually transmitted diseases because it provides students with a “clear message.” When teens are taught contraception in the classroom, ...they are led to believe that this is a legitimate option for them...since sex outside of marriage is not healthy for the teens in our classes, why offer them advise on ‘how to do it?’³⁹

A number of African academics and psychologists have vehemently made the case for this traditional approach without being oblivious to popular trends on free access to information. Rosemary Ndambuki gives elaborate guidance to the teenage girl about her body but when it comes to sexuality she restricts her discussion to abstinence and how to avoid rape but not contraception as an option⁴⁰. Margaret Lubega also addresses issues related to adolescent body changes, and a host of other issues affecting teenagers that would ordinarily form the content of Comprehensive Sexuality Education. In her topic on intimacy she opines that an intimate relationship is possible without any sexual involvement and that in fact intimacy is often lost by engagement in premarital sex⁴¹. She emphasizes that premarital sex is largely fueled by peer pressure, the lack of role models in society and the lack of contentment in availed material conditions. She further argues that neither the amount of information people have been given about sexual risks nor their level of awareness of risk is a measure of whether they will change their behavior⁴².

Lubega emphasizes the need to teach moral responsibility to adolescents. She encourages parents and teachers to provide emotional security, a healthy environment for self-expression; leisure time, discipline and self-control models and life skills. With this, she says that adolescents would then have

³⁷ Ibid at 95

³⁸ Ibid at 96

³⁹ Mast, *Sex Respect Teacher manual supra* at 7-8, *Parent Guidebook* at 11 (“Birth control education for teens weakens the message of abstinence, it gives a double message of ‘how to say no and how to say yes’ to an age group that only needs clear guidelines”)

⁴⁰ Rosemary Mueni Ndambuki; *African Girl: A Girls’ Guide to teenage body Care*, Published in Kenya by Faithspring Products Ltd 2009 Chapter 5 Pages 80-95

⁴¹ Margaret K. Lubega; *Handling Adolescent Children: A Guide for Teachers and parents*, Fountain Publishers 2003, reprinted in 2008 page 48

⁴² Ibid page 50

a high sense of discipline, self-control, the ability to make decisions and stick to them, a sense of responsibility and self-determination⁴³.

5. Sexuality Education Programs in Uganda

a) Presidential Initiative on AIDS Strategy for Communication to Youth (PIASCY)

Sex education was introduced in schools in 2001 under an official program rolled out by H.E President Yoweri Kaguta Museveni under the Presidential Initiative on AIDS Strategy for Communication to Youth (PIASCY). This program was funded by United States Agency for International Development (USAID) and the U.S Centers for Disease Control and Prevention (CDC)⁴⁴. It has also become a foundation feature in the United States' President's Emergency Plan for AIDS relief (PEPFAR⁴⁵). The short introduction to P5 - P7 asks, "By how much more could Uganda reduce HIV if all pupils were well informed about their bodies and how to stay safe?"⁴⁶

The main focus for PASCY was primary schools, secondary schools and after school youth rallies for young people to be empowered to delay sexual relations until marriage through abstinence. Under PIASCY, children aged 5-12 years were taught abstinence and its benefits and subsequently correct condom application and uses. Children 13-18 years were in addition taught subjects like masturbation, abortion, and homosexuality but there was concern with information on condoms and HIV prevention⁴⁷. President Museveni has since discouraged the teaching of sexual education in schools saying that there are other more appropriate avenues for teaching children about matters of sex and sexuality⁴⁸.

b) Abstinence, Be faithful, use a Condom (ABC)

ABC an acronym, A for Abstinence, B for Be Faithful, and C for Condom use was an approach introduced during the US-Ugandan efforts to propose Abstinence-only as a way to lower HIV transmission⁴⁹. The application of ABC is disaggregated for specific populations with Abstinence for

⁴³ Ibid Pages 63 - 69

⁴⁴<https://www.hrw.org/reports/2005/uganda0305/5.htm> supra

⁴⁵ ibid

⁴⁶Ministry of Education and Sports, Presidential Initiative on AIDS Strategy for Communication to the Youth (PIASCY): Helping pupils to stay safe; a Handbook for teachers (P.5-P.7) first edition 2001

⁴⁷<https://www.hrw.org/reports/2005/uganda0305/5.htm> supra

⁴⁸ <http://ntv.co.ug/news/local/12/jul/2016/museveni-discourages-teaching-sex-education-schools-13351> accessed on 12th October 2016

⁴⁹ <https://www.hrw.org/reports/2005/uganda0305/5.htm> supra

people not yet married, Be Faithful for those in marriages, and Condom Use only for people that are already infected or are in a marriage where one person is infected⁵⁰.

Since its inception ABC has evolved to a program known as AB, released in 2004 as an official abstinence-only education program for Uganda. Under AB there has been less emphasis on condoms to avoid confusion of differing systems and entrenching the emphasis on abstinence⁵¹.

6. Constitutional Approaches to the Sex Education Debate

The Constitution of the Republic of Uganda 1995 provides that all power belongs to the people of Uganda and that any provision of the law is only valid to the extent of its consistency with the constitutionally reflected wishes of the people of Uganda⁵². Article 30 provides for education as a human right⁵³. Similarly, under *Article 34 (2)*, a child is entitled to basic education which is the responsibility of the State and the parents of the child to provide.

a) Secular State v Establishment of Religion

Under the *Constitution Article 29 (1) c*, every person has a right to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organization in a manner consistent with the Constitution. In Uganda, there is therefore a Constitutional right to practice any religion and be involved in any religious practice.

However *Article 7* provides that Uganda shall not adopt a State religion and *Article 34 (3)* provides that no child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs⁵⁴. This implies that government entities would not be expected to endorse any particular religion in coming up with laws and policies. Any provision contrary to such an expectation would be interpreted to mean that the government has established a particular religion.

It has been argued that if a form of education passes on ideas to children that parents find offensive it becomes increasingly strenuous for parents to pass on to their children religious principles that they cherish. The Bible says, “*Do not awaken love until it so desires*”⁵⁵, and “*train up a child in the way they*

⁵⁰<https://www.hrw.org/reports/2005/uganda0305/5.htm> ibid

⁵¹ ibid

⁵² Constitution of the Republic of Uganda 22 September 1995, Articles 1 and 2

⁵³ ibid

⁵⁴ ibid

⁵⁵The Holy Bible, King James Version. New York: American Bible Society: 1999; Bartleby.com, 2000. www.bartleby.com/108/ Song of Solomon 2:7, 8:4

*should go and when they have grown up they will not depart from it*⁵⁶”. In Christian practice, it is believed that parents are responsible for instilling values in children and determining what education they get exposed to. Some elements of CSE such as those that condone premarital sex are considered grossly immoral and sinful. In Malaysian context as a predominantly religious State, sexuality education is predicted to be the most attuned with the country’s learning preferences and cultural environment, which include single sex classes, teachers of the same sex, teachers who are particularly well-trained in effective conveying of sex education, and opportunities for peer-education activities, that involve problem solving and interactive styles of learning⁵⁷

In *Shempp*⁵⁸ whereas the practices of Bible reading and prayer had an excusal provision, they were held to violate the Establishment Clause’s bar on government endorsement of religion⁵⁹. Another Establishment Clause decision *Epperson v. Arkansas*⁶⁰ is worth examining. The court struck down an Arkansas statute prohibiting public schools from teaching evolution on the basis that the curriculum should not be tailored to comport with the principles or prohibitions of any religious sect or dogma⁶¹. It is indeed a delicate balancing act to allow religious freedom and still maintain a secular State if the education system applies generally to all people and includes aspects that some members of society might consider repugnant on religious grounds.

The US Supreme Court’s test for deciding whether a law oversteps the bounds of prohibition on laws “respecting an establishment of religion” has drifted considerably over time. In 1971, in the case of *Lemon v Kurtzman*⁶² the court adopted a three pronged test in order to pass Establishment Clause Review: it must be supported by a secular purpose; its principal effect must not advance or inhibit religion; and it must not excessively entangle government and religion⁶³

i. Evidence of Religious Purpose

Often times, abstinence-only programs are biased against on the premise that their foundation is in religious purpose. It is argued that some of the proponents have strong religious background and only adopt secular terminology to suit *Sex Respect* curricula⁶⁴. The discussion on this point becomes

⁵⁶Ibid Proverbs 22:6

⁵⁷ Bennet L.R (2007). Zina and the enigma of sex education for Indonesian Muslim youth. *Sex Education*, 7 (4), 371-386

⁵⁸ supra

⁵⁹ Ibid 223-25

⁶⁰ 393 U.S 97 (1968)

⁶¹ Ibid at 106

⁶² 403 U.S 602 (1971).

⁶³ Ibid at 612-13

⁶⁴ Gary 284

whether it is possible for law makers to take a particular position for secular reasons that others might take for religious reasons.

ii. Endorsement Test and Entanglement of Government and Religion

The endorsement test sets out to check if the law is based on a purpose endorsing religion in order to invalidate it. This is an uphill task because the person challenging such a law must prove that it was enacted entirely or almost entirely for that purpose and serves no secular interests⁶⁵. The Court is *Stone v Graham*⁶⁶ concluded that a state law requiring that the Ten Commandments be posted in public school classrooms rested on a “pre-eminent purpose of endorsing religion. It is argued that the pre-eminent purpose of a law must not be “plainly religious in nature”⁶⁷ In *Edwards v Aguillard*⁶⁸ the Court stated that families entrust public schools with the education of their children, but that this trust is qualified by the presumption that the classroom would not be purposely used to advance religious views that may conflict with the private beliefs of the student and his or her family. That given the mandatory attendance requirements, the attendance of students in public schools is impressionable and involuntary and as such should be a reflection of democracy and the State’s role to keep out divisive forces⁶⁹. It would be crucial to establish a secular purpose for a law against Comprehensive Sexuality Education beyond religious disdain.

Parents in Malaysia have insisted that for someone to teach sexuality education, they should have a firm religious grounding to be able to sieve what is appropriate or not.⁷⁰

The argument on secular purpose of all laws and policies would best suit a public education system but might be distinguished in a private school system. In the post *Dimanche Sharon and others v Makerere University*⁷¹ days, it is apparent that in Uganda, a private institution might reserve unique autonomy on how it runs its programs on religious grounds. It remains to be seen if such an argument would work for pre-university scholarship where the curriculum and final exams are the same for public and private schools.

⁶⁵ Bowen v Kendrick, 487 U.S. 589, 602 (1988)

⁶⁶ Stone v Graham 449 U.S. 39 (1980)

⁶⁷ *ibid* 39,41 (1980)

⁶⁸ 482 U.S. 587 (1987)

⁶⁹ *Ibid.* at 583-84

⁷⁰ Pute Rahimah Makol-Abdul et al, *Parents’ Attitudes towards Inclusion of Sexuality Education in Malaysian Schools*, European network about Parents in Education ISSN 1973-3518, SSRN-id1557319 at page 51

⁷¹ *Dimanche Sharon and Others v Makerere University* ((Constitutional Cause No. 1 of 2003)) [2003] UGCC 6 (24 September 2003);

b) Culture and Customary Law

The Constitution under *Article 37*⁷² provides that every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. The Judicature Act Section 14 of ⁷³ provides for customary law as one of the sources of law in Uganda.

In Uganda, The Education Act allows parents as relevant stakeholders to participate in the development and review of the curriculum⁷⁴. Alder confirms that parents have the legitimacy to decide what courses are included in the curriculum of their children.⁷⁵

In *Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi*⁷⁶ the strength of culture was such that contrary to the well-known definition that marriage is between a man and woman to the exclusion of all others, under customary law, marriage extended to union between families and as such what was culturally unacceptable could effectively nullify prospective nuptials.

Lubega defines culture as the way communities live and says that it gives one an identity and guidelines as to how one should behave in society. She says that culture is dynamic and covers views on various things such as clothing and music and that it is important for parents and teachers to be equipped for when the teenager might question culture.⁷⁷

His Excellency the President in starting PIASCY noted that children may ask many questions but adults are often tight lipped-either not ready or lacking the skills to talk to them about sexuality. He emphasized that teachers needed to equip youngsters to confront AIDS through sex education⁷⁸.

In public opinion, a number of topics taught under CSE such as pre-marital sex and homosexuality are considered immoral and seen as foreign values propagated to undermine African values. Considering that custom forms a formidable part of the fabric of the law and legal system in Uganda, any policy on Sexuality Education would need to incorporate generally acceptable cultural views.

⁷² Constitution of Uganda supra

⁷³ Judicature Act Cap 13 Laws of Uganda

⁷⁴ Education Act 2008 Section 5 (2) g

⁷⁵ Adler, M., Parental Choice and the Enhancement of Children's Interests; In P. Munn (Ed.), *parents and Schools: Customers, managers of partners?* (pp 44-64). London & New York: Routledge.

⁷⁶ Bruno Kiwuwa vs. Ivan Kiwanuka Serrunkuma & Juliet Namazzi, HCCS 52 of 2006

⁷⁷ Lubega Pages 71-75

⁷⁸ PIASCY supra intro.

As Lord Denning noted in *Nyali Ltd v Attorney General*⁷⁹ that English common law is like an oak tree which cannot be transplanted wholesale into the African system without the necessary modification, we should carefully borrow from advanced education systems without abandoning our treasured culture and moral fabric. A number of parents have recently expressed concern for their children when explicit material was circulated on social media as part of children's books in a leading primary school. The material was thought to be age inappropriate and generally advocating foreign values. Public outcry prompted the schools' administration to issue a public apology and withdraw the material⁸⁰. This is a clear indication that parents in Uganda are opposed to free dissemination of age inappropriate sexuality education.

c) Freedom of Expression

The *Constitution in Article 29*⁸¹ provides that every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media, (b) freedom of thought, conscience and belief which shall include freedom in institutions of learning.

A lot of proponents for Comprehensive Sexuality Education would argue that sexual expression is part of those rights related to identity and freedom of expression. They would then argue that it is imperative that the legal and education systems deliberately provide ways and guides for such expression beyond just accommodating it. The debate on what extent sexual expression is a human right goes beyond the scope of this paper but there are relevant aspects for us to presently consider. According to the Constitution⁸², all rights provided for save for *non-derogable* rights can be limited in line with what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this constitution. Such claw back clauses are very much a part of every discussion of human rights provisions in Uganda. It would therefore mean that an individual's claim to enjoyment of a particular right cannot be effectively evaluated without considering the effect of such enjoyment to other members of society.

⁷⁹Nyali Limited vs Attorney General [1956] 1 QB 7, at pp 13 -14

⁸⁰ <http://www.observer.ug/news-headlines/46229-greenhill-academy-on-spot-for-stocking-bad-textbooks> accessed on the 16th of October 2016

⁸¹ Constitution of the Republic of Uganda supra

⁸² Ibid Articles 23, 43,44

i. Free exercise clauses

If Parliament was to legislate on sex-education, in relation to freedom of expression, it would have to as well consider the preferences of those who would not be comfortable with Comprehensive-Sexuality Education programs for religious, cultural or secular reasons. In matters relating to children, *Article 30 (4)* provides that it is the right and duty of parents to care for and bring up their children and that (5) children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law⁸³. It is also clear elsewhere that the overriding principal is about the welfare of the child and as such all stakeholders have responsibilities toward children on this premise⁸⁴. It is the duty and responsibility of a parent to maintain a child and this involves education and guidance⁸⁵

A free exercise claim to comprehensive sexuality education would take two forms depending upon whether the particular program gives parents the opportunity to opt out on the child's behalf. If the program has no opt-out provision, the free exercise claim would call for judicial invalidation of the program across the board⁸⁶.

If the law is generally applicable particularly in Uganda where the curriculum development function is centralized⁸⁷, would Courts have jurisdiction to carve out exceptions? Let us consider the practice to religious education teaching at basic education level. Though the Social Studies exam, has questions on Christian Religious Education and Islamic Religious Education, there has always been an either or rule on what questions to answer. Would this work for sexuality education if the final exams are the same and grading is uniform? If Comprehensive Sexuality Education is taught on the syllabus, would the fact that certain children do not answer questions on it guarantee that they do not have access to information that their parents consider harmful?

In USA, before the 1990 decision of *Division v Smith*⁸⁸, it was settled that the free exercise clause requires courts to carve out an exemption from a generally applicable law if:

- The religious liberty claimant can prove that the law substantially burdens his or her free exercise of a sincere religious belief and;

⁸³ *ibid*

⁸⁴ Children Act Cap 159 Section 3

⁸⁵ *Ibid* Sections 5 and 6

⁸⁶ Gary *supra* page 271

⁸⁷ Education Act *supra* Section 5, NCDC Act *supra* Section 3

⁸⁸ 494 U.S. 872 (1990)

- The state cannot show that denying the claimant an exemption is necessary to serve a compelling state interest

How would religious freedom affect the possibility of carving out exceptions to generally applicable laws? In *Smith (ibid)*, the Court frowned upon the sustainability of exemptions to generally applicable laws on religious grounds but this position has subsequently legislated and adjudicated upon; and the debate continues⁸⁹.

Another question that begs to be answered is whether a child’s consent matters in determining what they are taught in school. *Article 23 (e)*⁹⁰ which provides for restriction of personal liberty provides that in the case of a person who has not attained the age of eighteen years, the person may be restricted for the purpose of the education or welfare of that person

According to the welfare principal, law makes it the responsibility of parents, guardians, government and other stakeholders to determine when something is in the best interest of the child.

The issue of consent in sexual matters in Uganda is only debatable after the age of eighteen⁹¹. In defining who a guardian is, the *HIV and AIDS Prevention and Control Act*⁹² provides that a guardian one who has the legal responsibility for providing the care and management of a person who is incapable, either due to age, or to some other physical, mental or emotional impairment, of administering his or her own affairs. In defilement cases, it is immaterial that there was consent if the necessary age had not yet reached⁹³. Consent of minors therefore is limited by the Constitution and there is overwhelming parental control over children entrenched in statute.

The aspect of parental consent in education has been litigated in the United States of America. In *Wisconsin v Yonder*⁹⁴ where the Amish successfully obtained a court-ordered exemption for their children from compulsory schooling beyond eighth grade; there was deliberation on free exercise and the “right of parents ...to direct the education of their children”⁹⁵ Justice Douglas in this case dissented on the basis that apart from one Amish child who was religiously opposed to education beyond the eighth grade the opinions of the other two children were not on record. Chief Justice Yonder did not see the children’s wishes as relevant since the prosecution was for the obligation on

⁸⁹ See Religious Freedom Restoration Act Pub. L. No. 103-141, 107 Stat. 1488 (1993); *City of Boerne v Flores* 521 U.S 507 (1997),

⁹⁰ Constitution supra

⁹¹Constitution supra Article 30 (1) age of marriage

⁹²HIV and AIDS Prevention and Control Act 2014

⁹³Penal Code Act Cap 120 Section 129 (as amended by Act 1 of 2009)

⁹⁴ 406 U.S 205 (1972)

⁹⁵ *Smith* 494 U.S at 881

the parents to follow Amish law by invariably exercising their religious duties upon the children⁹⁶. Barbara Bennet Woodhouse has sided with Justice Douglas arguing that the conception that the child is a “key tool of the parents’ free exercise but has no free exercise protections” is seriously deficient.⁹⁷

ii. Facial Invalidation

Even if the law or practice allowing Comprehensive Sexuality Education gave parents the chance to opt out, it might be hard for parents to enforce such decisions on their children with glaring competition from readily available and legal scholarship on it. They would not be in libraries to determine what books the children read, the children might be curious about the forbidden information their contemporaries are accessing and seek it for themselves even if stealthily.

Some parents have claimed that as a result of the peer pressure felt by their children to do what other children are doing, their ability to opt out on their behalf is limited⁹⁸. For this argument, they have often relied on the school prayer decision, *Abington School District v. Schempp*⁹⁹ where court struck down Bible reading and prayer practices even though the schools provided for excusing students who did not wish to participate.

Mrs. Musisi (not real name) a parent in one of the top private schools in Kampala claims that, “children learn some of these things (sic) from their friends who have magazines at home or are taught the same in upper classes or from books in the library¹⁰⁰”.

Lubega argues that the mean age for first sexual encounter is nine years and as such it is important that parents take the initiative in teaching children about sex, sexuality and safe sex. She does not think that that teaching children about how to use a condom necessarily encourages children to go ahead and have sex¹⁰¹! Whereas she advises that parents should set limits considering the skill of self-control is not yet fully developed, it does not appear that she would use such a yardstick for sex education. She opines that in relation to punishment, when measures are over-strict, adolescents

⁹⁶ Ibid at 242 (Douglas J. dissenting in part)

⁹⁷ Barbara Bennett Woodhouse, “Who Owns the Child?” Meyer and Pierce and the Child as Property, 33 W.M. & Mary L. Rev 995, 1114-15 & n.655 (1992).

⁹⁸ Citizens for Parental Rights v San Mateo County Board of Education, 124 Reptr 68, 80-82 (Ct. App. 1975; Medeiros v Kiyosaki, 478 P.2d 314, 317-19 (Haw. 1970; Smith v. Ricci 446 A.2d 501, 520-23 (N.J. 1982).

⁹⁹ 375 U.S 203 (1963).

¹⁰⁰ Mrs. Musisi was interviewed in relation to how children would access CSE if not specifically taught in class.

¹⁰¹ Lubega 115-116

perceive the world as terribly hostile and that they consequently become submissive or rebellious. Conversely, that if the parent is excessively permissive, he/she will be perceived as a weakling¹⁰²

d) Outright Unconstitutionality

Comprehensive Sexuality Education is permissive of abortion and even though it may not present homosexuality as preferable to heterosexuality, it is clearly more accepting of homosexuality than religions that treat homosexual orientation as unnatural and homosexual sex as an abomination¹⁰³.

In Uganda, a proposition for abortion would be unconstitutional and a criminal offence¹⁰⁴. Although the Anti Homosexuality Act was nullified for being passed without following proper procedure, homosexual relations are considered criminal as unnatural offences¹⁰⁵. They would also not meet the Constitutional standard of marriage being between a man and woman¹⁰⁶.

7. Conclusion

It is clear that Comprehensive Sexuality Education is very much already part of the material that forms our curriculum and media. Whether this was introduced by the campaign to fight against HIV/AIDS, PIASCY or liberal media and scholarship; it has found its way in our school systems. Not all is lost however and rather than let pressure from different interest group hijack the education system, it is important that clear guides are developed in consultation with parents and other stakeholders on what they would be comfortable their children learning.

We should not be held hostage to the reactionary measures that were taken to fight Sexually Transmitted Infections (STIs) by allowing Comprehensive sexuality education material that is not consistent with the holistic and shared convictions of the Ugandan people. In absence of clear statistics in the affirmative, such programs should be reevaluated on their progress and revised accordingly.

There is no merit in blindly borrowing foreign approaches to comprehensive sexuality education if such approaches contradict our Constitutional provisions thus undermining the sovereignty of the people of Uganda and their culture. Just like was done with the AB program, it is possible for

¹⁰² Page 124-125

¹⁰³ Gary 274

¹⁰⁴ Constitution supra Article 22, Penal Code Act Cap 120 Section 188,189 190

¹⁰⁵ Penal Code Act Cap 120, Sections 145, 146 unnatural offences, indecent assault and indecent practice, Sections 147, 148

¹⁰⁶ Constitution Article 30 (1) supra

Ugandan technocrats to craft a curriculum unique and tailored to the constitutional wishes and aspirations of the people of Uganda.

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