



**A LEGAL AND HUMAN RIGHTS ANALYSIS OF THE ANTI-HOMOSEXUALITY BILL,
2023**

8th March 2023

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1. Introduction

The Anti-Homosexuality Bill, 2023 was published in the Uganda Gazette on 3rd March 2023. It was due to be tabled in Parliament for the first reading on 7th March 2023 but it was never read because it lacked a certificate of financial implications. This follows the granting of leave by Parliament on 28th February 2023 to Bugiri Municipality Member of Parliament, Hon Asuman Basalirwa, a member of the opposition Justice Forum (JEEMA) Party, to table the Bill. In the motion, Hon. Basalirwa noted that homosexuality ‘contravenes the order of nature, our cultural and religious norms and poses a threat to the stability and survival of the family.’ He continued that the existing laws were not adequate to address ‘this creeping evil.’¹ He described homosexuality as a ‘cancer’ eating up the world, that needed to be addressed through legislation. He added that,

We always talk about human rights but it is also true that there are human wrongs. Homosexuality is a human wrong that needs to be tackled through a piece of legislation.²

According to the Memorandum of the Bill, the proposed legislation is intended to ‘establish a comprehensive and enhanced legislation to protect the traditional family’, and one of the ways in which this is proposed to be achieved is by ‘strengthening the nation’s capacity to deal with emerging internal and external threats to the traditional, heterosexual family’ and ‘protecting the cherished culture of the people of Uganda’. The Memorandum further indicates that the Bill is intended to address the fact that the Penal Code Act’s prohibition of same-sex sexual conduct is insufficient for this end. The Bill does not seek to repeal the Penal Code provisions but rather add to them.

The objects of the Bill are to establish a comprehensive and enhanced legislation to protect the traditional family by ‘prohibiting any form of sexual relations between persons of the same sex and the promotion or recognition of sexual relations between persons of the same sex’; ‘strengthening the nation’s capacity to deal with emerging internal and external threats to the traditional, heterosexual family’; ‘protecting the cherished culture of the people of Uganda, legal, religious, and traditional family values of Ugandans against the acts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda’; and ‘protecting children and youth who are made vulnerable to sexual abuse through homosexuality and related acts.’

The Bill aims at reaching its objects through: prohibiting marriage between persons of the same sex; prohibiting and penalizing homosexual behavior and related practices; prohibiting the promotion of homosexuality; and protecting and providing assistance and payment of compensation to victims of homosexuality. It therefore seeks to create offences aimed at this.

¹ See ‘Motion seeking leave of Parliament to introduce a private members bill entitled ‘Anti-Homosexuality Bill’ 28th February 2023 (copy on file with HRAPF).

² Parliament of Uganda ‘Anti-gay bill to be re-tabled’ 28th February 2023, <https://www.parliament.go.ug/news/6480/anti-gay-bill-be-re-tabled> (accessed 6 March 2023.)

This paper analyses the Bill from a legal and human rights perspective.

2. Summary of HRAPF's position on the Bill

HRAPF's position is that the Anti-Homosexuality Bill, 2013 is:

- 1) **Unconstitutional** because its provisions criminalising consensual same-sex relations among adults, introducing the 'homosexual panic' defence, and those seeking to criminalise 'aiding and abetting' as well as 'promotion of homosexuality' and the overall spirit of the Bill contravene the constitutional protections of the rights to: equality and freedom from discrimination; privacy; right to dignity and freedom from inhuman and degrading treatment; right to a fair hearing, freedom of expression, religion, conscience and association, liberty, and the right to health. The state in enacting such a law would be in contravention of its obligations to respect, fulfill and protect human rights under the Constitution and under international law. These rights as they relate to sexual minorities have already been established in Uganda's High Court in the cases of *Victor Mukasa & Another vs. Attorney General* (2008), High Court Miscellaneous Cause No. 24 of 2006) and *Kasha Jacqueline, Pepe Onziema & David Kato v. Giles Muhame and The Rolling Stone Publications Ltd* (2011).
- 2) **Redundant** because it replicates existing provisions. Most importantly:
 - Homosexuality is already criminalised under the 'unnatural offences' provisions of Section 145 of the Penal Code Act of Uganda Cap 120.
 - Sex with children under the age of 18, whether girls or boys, is already criminalised under the 2007 amendment to the Penal Code Act and punishable with a higher punishment than that proposed in the Bill.
 - Aggravated homosexuality has the same punishment as homosexuality, and attempted aggravated homosexuality has the same punishment as aggravated homosexuality.
 - All the other provisions essentially exist under the Penal Code and other laws.
- 3) **Retrogressive** because it provides for lesser punishments for non-consensual same-sex relations compared to those in existing laws. For example, defilement is punishable by death and yet the Bill proposes ten years' imprisonment for 'aggravated homosexuality.' It will also worsen the HIV situation in Uganda as it would deny LGBTIQ+ persons who are key populations access to HIV services as it criminalises 'promotion of homosexuality.'

HRAPF therefore recommends that the Anti-Homosexuality Bill, 2013 should be withdrawn from Parliament as its provisions are unconstitutional, redundant and retrogressive, more especially in the fight against sexual abuse of children and HIV/AIDS.

3. Background to the Bill

On 23rd December 2013, the Parliament of Uganda enacted the Anti-Homosexuality Bill, 2014, which was later assented to by the President. It was intended to ‘prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of such relations and to provide for other related matters.’³ This law was later annulled by the Constitutional Court on the grounds that Parliament did not have the necessary quorum on the day the law was passed. Since then, there have been numerous threats by legislators over the years to retable the Bill.⁴

The tabling of the Bill follows a period of increased debate on homosexuality in Uganda, which generally started with photos of students who were suspected to be lesbians holding hands at one of the schools in Kampala, and later allegations of abuse of a student by a teacher at a leading secondary school. On 24th January 2023, the Deputy Speaker of Parliament, Hon. Thomas Tayebwa alleged that Kasese Municipal Council had passed a bylaw sponsored by an NGO, Human Rights Awareness and Promotion Forum (HRAPF), which would recognise homosexuals among marginalised persons. He linked this to what he referred to as a well-funded campaign to promote homosexuality in Uganda and to the abuse of children in schools. He ordered the Ministers of Local Government and Internal Affairs to investigate Kasese Municipal Council and the organisation.⁵ Later, a report from the NGO Bureau leaked indicating that 26 organisations were being investigated for promotion of homosexuality.⁶ At the same time, condemnation of homosexuality continued from different quarters, including President Yoweri Museveni,⁷ religious leaders including the Archbishop of the Church of Uganda who threatened to stop recognising the Church of England over blessing gay marriages,⁸ and the Mufti of Uganda who called for closure of NGOs promoting homosexuality.⁹ There have also been marches against ‘homosexuality’ in different cities, particularly Jinja.¹⁰ The Speaker of Parliament promised that the Anti-Homosexuality Bill would be tabled and voted on by calling names so that Ugandans would know where every

³ Long Title of the Anti-Homosexuality Act, 2014.

⁴ See for example, See ‘MPs start process to re-table gay bill’ *The Daily Monitor* 3 September 2014. Also see The Nile Post, ‘We won’t kill gays; government says after donors threaten to freeze aid’, October 27, 2019, <https://nilepost.co.ug/2019/10/27/we-wont-kill-gays-government-says-after-donors-threaten-freezing-aid/> accessed March 6.

⁵ See ‘Parliament red flags Kasese’s same-sex by-law’ *Monitor*, 26th January 2023, <https://www.monitor.co.ug/uganda/news/national/parliament-red-flags-kasese-s-same-sex-by-law-4099788> (accessed 17 February 2023)

⁶ ‘Leaked report shows intent to criminalise gay activities’ *Monitor*, 12 February 2023.

⁷ ‘Museveni: Uganda won’t support homosexuality’ *Monitor*, 17 February 2023.

⁸ See for example ‘Uganda Archbishop Kazimba’s Message on Homosexuality Awakens Old Ghosts’ *Red Pepper*, 14 February 2023 <https://redpepper.co.ug/uganda-archbishop-kazimbas-message-on-homosexuality-awakens-old-ghosts/127989/> (accessed 7 March 2023).

⁹ ‘Mufti Mubaje calls for closure of NGOs that promote LGBTQ rights in Uganda’ *Nile Post*, 26 February 2023 <https://nilepost.co.ug/2023/02/26/mufti-mubaje-calls-for-closure-of-ngos-that-promote-lgbtq-rights-in-uganda/> (accessed 7th February 2023)

¹⁰ ‘Muslims march against homosexuality’ *Monitor*, 26th February 2023

MP stands on this Bill,¹¹ and both the Speaker and the Deputy Speaker, who have both just assumed their offices, seem to be intent on building their clout through the Bill. Therefore, their promises to pass this Bill as soon as possible cannot be taken for granted, and there seems to be little or no opposition against the Bill as both government and opposition parliamentarians seem united to pass the bill into law.

4. Commentary on provisions of the Bill

The new Anti-Homosexuality Bill, 2023 essentially has all the provisions of the Anti-Homosexuality Act, 2014, with a few additions. Perhaps the most notable addition is clause 2(d), which further expands the offence of homosexuality, by making it an offence for one to identify as gay, lesbian, transgender, queer 'or any other sexual or gender identity that is contrary to the binary categories of male and female.' The other is clause 6 on 'Consent of the Victim', which provides that consent of the victim to homosexuality shall not be a defence to the offence of homosexuality, and the last one is clause 15 on special provisions of the court. In addition, the Bill contains punishments that are less than those in the nullified Anti-Homosexuality Act (AHA). For example, offences that previously attracted life imprisonment now attract ten years imprisonment, while those that previously attracted seven years imprisonment now carry two years imprisonment.

The Bill has four substantive parts: Part I which contains interpretation section; Part II which relates to the prohibition of homosexuality; Part III which focuses on related offences and penalties, and Part IV which contains miscellaneous provisions.

The different provisions of the Bill are presented as follows:

Clause 1: Definition clause

This defines the various terms used in the Bill, and of specific concern are the definitions for: 'homosexual,' 'homosexuality,' 'sexual acts,' 'sexual organ,' 'touching', and 'victim'. These definitions differ from the usual usage of those terms. 'Homosexuality' and 'homosexual' is of particular concern as the Bill interpret them to mean 'same gender or same sex sexual acts' and 'a person who engages or attempts to engage in same gender sexual activity' respectively. This essentially regards homosexuality as an act rather than as a sexual orientation. Sexual orientation is different from sexual acts, as it refers to an 'enduring pattern of emotional, romantic and/or sexual attractions to men, women or both sexes.'¹² It is not a sexual act. The Bill therefore essentially does away with the concept of sexual orientation, despite years of research showing that human sexuality is complex and not simply a matter of sexual acts. Indeed, it emphatically states in the Memorandum that 'This legislation further recognizes the fact that same sex attraction is not an innate and immutable characteristic,' an assertion that goes against decades of research and science in this area.

¹¹ 'Anti-homosexuality law to be tabled tomorrow - Speaker Among' Monitor, 28 February 2023.

¹² American Psychological Association 'Sexual Orientation & Homosexuality'
<https://www.apa.org/topics/lgbtq/orientation> (accessed 7 March 2023)

'Sexual act' is defined to go beyond penetration of sexual organs to include touching of another's breast, vagina, penis or anus; stimulation or penetration of a vagina or mouth or anus or any part of the body of any person, however slight by a sexual organ; and the unlawful use of any object or organ by a person on another person's sexual organ or anus or mouth. This is a progressive definition, and it would be good if it was to be applied across all sexual offences, and not simply to target as many LGBTIQ+ persons as possible, as seems to be the intention in this Bill.

'Sexual organ' is defined to mean 'a vagina, penis or any artificial sexual contraption.' So essentially, the Bill seeks to make sex toys or other contraptions sexual organs, which greatly differs from the usual definition of an organ, which usually refers to human organs.

'Touching' is defined to include touching with any part of the body; with anything else; or through anything; particularly touching amounting to penetration of any sexual organ, anus or mouth. So touching is no longer just by hand, but using any other part of the body, and such touching is also not necessarily restricted to any particular parts of the body.

Finally, victim is defined to include 'a person who is involved in homosexual activities against his or her will.' It is not clear who else it includes, but it is obvious that this status would be bestowed on whoever reports first, as victimhood comes with lots of protections in the Act.

It is ironic to have definitions that greatly divert from the usual and ordinary meaning of words in a Bill that prides itself in maintaining what is 'natural'. These definitions also give a new meaning to the various offences in the Bill, sometimes leading to ambiguity and practical challenges in enforcement as will later be shown.

Clause 2: The offence of homosexuality

The offence is in addition to Section 145 of the Penal Code which criminalises 'carnal knowledge against the order of nature' and has been used to arrests people for both consensual and non-consensual same-sex relations. The difference is that the new offence is now defined specifically. What is sought to be criminalised under this Bill is penetration of the anus of mouth of another person (of the same sex as the offender) with a penis or any other sexual contraption; using any object or sexual contraption to penetrate or stimulate the penis or vagina or sexual contraption of another person of the same sex; touching someone with the intention to commit homosexuality; and self-identification or presentation as LGBTIQ+.

Whereas the clause targets LGBTIQ+ persons, it will also affect heterosexuals and cisgender people if strictly enforced as it outlaws persons of the same sex touching in any way that might appear to indicate sexual intention, and also outlaws dressing up or in any other way 'holding out' as an LGBTIQ+ person. Clearly, identifying who engages in such acts without a complainant might involve spying on people in their houses, and this will affect both LGBTIQ+

and non LGBTIQ+ persons. This is a provision that ought to worry every Ugandan, or every potential visitor to Uganda, regardless of their sexual orientation or gender identity.

The offence is committed regardless of whether the persons involved are consenting or not.

The prohibition of 'touching' also raises important implications. In essence, dancing with a person of the same-sex, shaking hands with them, or any such other usual and routine close contact could amount to homosexuality. The only difference is that it should have been done with the intention to commit homosexuality. Unfortunately, it is difficult to decipher intention from touching alone, unless the touching involves touching sexual organs. This potentially exposes people to prosecution over innocuous bodily contact that is the natural consequence of human beings living and working in close contact in crowded cities/ spaces. The Bill further defines touching to including touching a person's body with any part of another's body, with anything/ object wielded by the offender or through anything,¹³ and this can easily be stretched to cover accidental and innocent touches in a bid to harass LGBTIQ+ individuals.

The punishment for this is 10 years' imprisonment, which is different from the life imprisonment prescribed by section 145 of the Penal Code.

Clause 3: Criminalisation of aggravated homosexuality

The Bill in this clause seeks to recriminalise defilement of children by persons of their own gender, with the penalty of 10 years imprisonment in case of conviction,¹⁴ instead of the more serious penalty for defilement under the 2007 amendment to the Penal Code which replaced section 129(1) of the Penal Code with a gender neutral provision and maintained the punishment as death.¹⁵

It also defines as aggravated homosexuality being a 'serial offender', which will cause serious absurdities in the case of people arrested and convicted of homosexuality because they self-identified as LGBTIQ+, since identity is not necessarily something over which one has control.

HIV status immediately makes the offence aggravated. This is worrying as it is discriminatory against persons on the basis of their HIV status and has the potential to deter people from testing and seeking treatment because ignorance of one's HIV status would then be considered a defence in such cases.¹⁶

Similarly, if the victim is a disabled person, the offence automatically becomes aggravated. Since 'victims' can also be persons consenting to the act, this implies that persons with disabilities are considered in the law as incapable of making their own choices and decisions regarding sex, which in itself is discrimination.

¹³ Clause 1, Anti-Homosexuality Bill, 2023.

¹⁴ Above, clause 3(2).

¹⁵ See Section 4 of the Penal Code (Amendment) Act, 2007.

¹⁶ Human Rights Awareness and Promotion Forum, Analysis of the Sexual Offences Bill, 2015, 9 <https://hrapf.org/legal-policy-analyses/> (accessed March 6, 2023).

The provision introduces a mandatory HIV test regardless of nature of the act – as such one has to be tested for HIV if they have been charged with ‘touching’ a person of the same-sex with the intention to commit homosexuality, or for ‘holding out’ as LGBTIQ+! This is an invasion of privacy and creates more stigma against persons living with HIV/AIDS.

The punishment is still ten years’ imprisonment, the same as for homosexuality, which makes the provision redundant.

Clause 4: Attempts to commit homosexuality

This creates the inchoate offences of attempts which are punishable by imprisonment for two years for attempted homosexuality and imprisonment for ten years for aggravated homosexuality. The punishment for attempted aggravated homosexuality is the same as that for aggravated homosexuality and for homosexuality, which makes the provision redundant.

Clause 5: Protection, assistance and payment of compensation to victims of homosexuality

This provision protects victims of homosexuality who are defined in clause 1 to include persons who are involved in homosexual acts against their will. This also implies that other persons, who may not have been forced can also be victims since clause 6 provides that consent of the victim to homosexuality shall not be a defence under the Act. Such persons are free to commit any crime without fear of being penalised provided they do it as ‘a direct result of their involvement in homosexuality.’ They are also entitled to be heard in a criminal trial and to be paid compensation as ordered by the court. Decisions of court concerning victims are enforceable as decrees of court under the Civil Procedure Act, making it easier to actually obtain the ordered remedy.

The aggregate effect of these clauses is to suggest that anyone can be considered a victim of homosexuality, whether they consented to the sexual acts complained about or not, as long as they report such acts to the police. Victimhood pays and as such many people are likely to turn victims and victimise their colleagues. This has the potential to subject suspected LGBTIQ+ persons, particularly transgender women and gay men, to undue harassment and extortion by persons without proof, especially if the law maintains that even a person who willingly consented to sexual intercourse and is not a minor can be accorded victim status for purposes of prosecuting another person.

These clauses create unnecessary confusion while also providing very little protection to actual victims of sexual violence in same-sex encounters. For instance, where the victim happens to be a child, the prudent thing to do would be to charge their abuser under section 129 of the PCA, which carries a more serious penalty than 10 years’ imprisonment. Similarly, an adult who is sexually assaulted by a person of the same sex would receive better relief if the culprit was charged with rape under section 123 of the Penal Code Act. Actual offences of sexual violence in this bill are therefore under-penalised and made to appear less serious under the haze of the homophobia, which permeates the entire Bill.

It is necessary that these offences are separated from the otherwise victimless offences sought to be defined in the Bill, that is, homosexuality between two consenting adults. This will allow for a more stringent penal regime which, if properly enforced, might help curb the rising tide of sexual exploitation, abuse and harassment, particularly of minors.

Clause 5(1) essentially introduces the 'homosexual panic' defence which entitles people to commit any crime while 'protecting' or defending themselves from homosexuality. This provision may lead to a bloodbath against LGBTIQ+ persons, with people acting in the impunity created by this provision.

Clause 6: Consent of a victim of homosexuality not a defence

It does not matter that the person identified as the victim consented or not. This will not absolve the 'perpetrator.' As such, in consensual relationships where people fall out or are discovered, many would choose to play victim so as to get off the hook. This provision would have dangerous, unintended repercussions.

Clause 7: Confidentiality

This protects the privacy of the victim at any time during the trial. Cases involving children can be conducted in camera. Persons who breach such confidentiality or privacy of the victim through publication of their names and personal circumstances or other information as to the identity of the victim are liable to a fine not exceeding five million shillings. This is a good provision, but also redundant as it is provided for already in laws on children and sexual offences.

Clause 8: Aiding and abetting homosexuality

Persons who aid, abet, counsel or procure another person to engage in acts of homosexuality are liable to be imprisoned for two years. This is largely undefined as to what it means, and may cover a wide range of conduct, which one may not reasonably know that it is criminalised. For example, in the case of *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo*,¹⁷ the High Court extended the criminal prohibition of same-sex sexual acts to apply to all persons who do actions that are seen to be 'aiding and abetting' those engaging in acts that criminalised, and accordingly included the holding of an economic skills training workshop with the scope of 'aiding and abetting'. This decision was relied on by the High Court again in *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB)*¹⁸ to find that the refusal to register Sexual Minorities Uganda as a company by the URSB was justified by the constitutional prohibition of same-sex marriage and by the criminalisation of same-sex conduct under section 145 of the Penal Code.

Clause 9: Conspiracy to engage in homosexuality

¹⁷ High Court Miscellaneous Cause No. 33 of 2012 (High Court of Uganda).

¹⁸ Miscellaneous Cause No. 96 of 2016.

Persons who conspire with others to induce another person using false pretences or other fraudulent means to have same-sex relations with another person are liable to imprisonment for two years.

Clause 10: Procuring homosexuality by threats

This criminalises using threats, intimidation, false pretences, or false representations to get a person to have sexual relations with any person of the same sex. A person convicted of this is liable to imprisonment for five years. Conviction under this provision will require the evidence of one witness to be corroborated. This is an important offence since it involves use of force or fraud. However, it is redundant as existing laws already provide more protections.

Clause 11: Detention with intent to commit homosexuality

Detaining another person with the intention of committing homosexuality with them or with any other person would attract a punishment of imprisonment for two years. Section 134 of the Penal Code Act provides for the same offence but provides a more deterrent penalty of up to 7 years' imprisonment. This makes this provision redundant and retrogressive.

Clause 12: Brothels

This seeks to criminalise the operation of houses, rooms, set of rooms or place of any kind for purposes of homosexuality, with a penalty of up to seven years' imprisonment. This essentially renders hotels, lodges and rented houses where homosexuals stay to be regarded as brothels. Hotel owners/ managers, landlords who induce or cause persons to use the premises for same-sex acts are liable for imprisonment for one year. It also makes all homes of LGBTIQ+ persons to be designated as brothels. This would encourage property owners to deny LGBTIQ+ individuals lodging/rented accommodation at their premises.

Clause 13: Prohibition of same-sex marriages

This seeks to expressly prohibit same sex marriages and define the offence of attempting to contract or solemnise a same-sex marriage, with the penalty being 10 years' imprisonment both for the intending couple and the celebrant of the marriage. This proposes a fairly significant change in the legal position also as it seeks to expressly criminalise same-sex marriages which, although prohibited in the Constitution,¹⁹ did not constitute a defined offence.

Clause 14: Prohibition of promotion of homosexuality

This seeks promotion of homosexuality which includes: producing, procuring, marketing, broadcasting, disseminating or publishing of pornographic material for purposes of promoting homosexuality;²⁰ funding or sponsoring homosexuality or other related activities;²¹ offering premises and other related fixed or moveable assets for purposes of homosexuality or

¹⁹ Article 31(2)(a), 1995 Constitution of the Republic of Uganda.

²⁰ Anti-homosexuality Bill, 2023, clause 14(1)(a).

²¹ Above, clause 14(1)(b).

promoting homosexuality;²² using electronic devices for purposes of homosexuality or promoting homosexuality;²³ acting as an accomplice or attempting to promote or in any way abetting homosexuality and related practices;²⁴ This is punishable by on conviction to a fine not exceeding one hundred million Uganda shillings or imprisonment for five years or both.

Where the offender is corporate body, a business, an association or a non-governmental organisation, they are liable to the cancellation of the body's registration certificate and incarceration and/or payment of the fine by the director, proprietor or promoter of the company.

By directly targeting organisations providing services to or conducting advocacy on behalf of members of the LGBTIQ+ community and organisations established and run by members of the LGBTIQ+ community under the guise of preventing the promotion of homosexuality under clause 14, the Bill seeks to disenfranchise an entire community purely on the basis of their sexual orientation/ gender identity.

This provision would not only prevent LGBTIQ+ persons from freely associating together but would also have far-reaching consequences on access to essential social services for LGBTIQ+ persons including legal and health services that they have hitherto only managed to access through the efforts of civil society organisations. Even though the government has through the Ministry of Health made valiant efforts to provide access to health services for KP groups, including MSM and transgender persons, the fact remains that the majority of the social services that LGBTIQ+ persons have access to come to them through the efforts of civil society organisations. Preventing these organisations from existing and serving the communities will prevent LGBTIQ+ persons from accessing services.

Clause 15: Special powers of court

This provides for the powers of the court in trying cases involving homosexuality, which include the power to make protection orders in respect of children considered at risk of being engaged in homosexuality, rehabilitation for victims of homosexuality/ convicts that the court believes can be rehabilitated, etc. This provision was also not in the Anti-Homosexuality Act.

Clause 16: Extradition

This seeks to make all offences under the Act to be extraditable offences.

Clause 17: Regulations

This gives powers to the Minister for Ethics and Integrity to make regulations for the better implementation of the Bill.

²² Above, clause 14(1)(c).

²³ Above, clause 14(1)(d).

²⁴ Above, clause 14(1)(e).

5. The constitutionality of the provisions of the Bill in light of Uganda's human rights obligations

The Constitution of Uganda under Article 79 gives parliament the power to 'make laws on any matter for the peace, order, development and good governance of Uganda.' It however subjects this power to the Constitution itself. Some of the provisions that may check Parliament's power to make any law are the contents of the Bill of Rights of the Constitution, which is under Chapter 4. Some of the relevant provisions that may render the Bill's provisions unconstitutional if passed into law are:

5.1 The right to equality and freedom from discrimination

The criminalisation of consensual same-sex relations among adults, as is sought to be done in clauses 2, 3 and 4 of the Bill contravene the right to equality and freedom from discrimination which are protected in Article 21 of the constitution.

Article 21(1) provides that,

All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law of the Constitution of Uganda

Sub-article 2 provides that,

Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

Under sub-article 3, it is provided that,

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

The right to equality under Article 21(1) of the Constitution enjoins equal protection and treatment without discrimination. Article 21(2) and (3) prohibit discrimination on the basis of personal characteristics, such as, inter alia, 'sex.'²⁵ The differential treatment in clauses 1, 2, 3 and 4 of the Act is based on same sex/ gender, sexual preference or sexual orientation and is unacceptable.²⁶

Article 21(1) of the Constitution guarantees equality in 'all spheres of ... life' and this includes the ability to form and carry on *private relationships*.

²⁵ See *Uganda Association of Women Lawyers & 5 Others v Attorney General*, Constitutional Petition No. 2 of 2003; [2004] UGCC 1).

²⁶ (See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128.

Similar provisions on non-discrimination are provided for under Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). However, on the list of attributes of diversity, the word 'other status' is added which is not there under article 21 of the Ugandan Constitution. The UN Human Rights Committee has however held that 'sex' as a protected ground on the basis of which one cannot be discriminated against is not limited to physical sex alone but also includes sexual orientation.²⁷

This is also the position of the Court of Appeal of Botswana, which held that sexual orientation is included into the prohibition of discrimination based on sex in section 3 of the Constitution of Botswana.²⁸

Criminalising homosexuality would be using the law to discriminate against a group of people on the basis of their sex and sexual orientation read together and is a violation of their right to equality under article 21 of the constitution and article 26 of the International Covenant on Civil and Political Rights.

While striking down section 15(6)(d) of the Equal Opportunities Commission Act, 2007, which prohibited the Equal Opportunities Commission (EOC) from entertaining '*complaints concerning behaviour which is considered to be immoral and socially harmful, or unacceptable, by the majority of the cultural and social communities in Uganda*' in *Adrian Jjuuko vs Attorney General*,²⁹ the Constitutional Court held that the section sought to create a class of social misfits that are not deserving of protection under the law. Indeed, the court made it clear that Section 15(6)(d) of the Equal Opportunities Commission Act was unconstitutional partly because it was '*legislating the discrimination of persons said to be immoral, harmful and unacceptable.*'

The High Court of Uganda has also recognised this right, emphasising that all citizens of Uganda are entitled to all the rights guaranteed in the Constitution irrespective of their sexual orientation.³⁰

Although the Bill purports to apply to all persons, the entire framing of the Bill as well as the reasoning behind it, evidenced by its memorandum, various media reports of political statements made both by the movers and other political leaders lead to the obvious and reasonable conclusion that the Bill is meant to target LGBTIQ+ persons. In effect, the Bill if passed into law would substantially affect LGBTIQ+ persons far more than it will affect heterosexual and cisgender persons. The offences introduced by the Bill target a certain class of people—expressly identified as 'homosexual' and defined in clause 1 of the Act. The offences apply irrespective of the ages of the persons involved and irrespective of whether the act is committed in public or private or with or without consent. The effect is that clauses 1, 2 and 4 of the Act afford differential and unequal legal treatment to homosexual as opposed to heterosexual members of society.

²⁷ UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992.

²⁸ *Letsweletse Motshidiemang v Attorney General* [2019] MAHGB-000591-16, para 157 – 159.

²⁹ *Constitutional Petition No 1 of 2009*.

³⁰ *Victor Juliet Mukasa and another v Attorney General*, High Court Miscellaneous Cause No. 247 of 2006.

Another aspect of discrimination under clause 3 is on the basis of HIV status and being a person with disability. The offence of homosexuality is aggravated when the offender is a person living with HIV and when the victim is a person living with HIV. These provisions perpetuate the stereotype that People Living With HIV (PLWHIV) cannot engage in safe adult-to-adult sex and that People with Disabilities (PWDs) are eminently *victims* in human relationships. This is differential and unequal legal treatment to PLWHIV and PWDs. Further, the Constitution enjoins recognition of the right of PWDs to respect and human dignity.³¹

Yet another instance of discrimination is in Clause 5(1), which creates an absolute pardon for any crime committed by ‘victims’ of homosexuality. Clause 5(1) of the Act sets out an *absolute pardon for any crime* committed by victims of homosexuality. The subclause encapsulates the so-called ‘homosexual panic’ *defence*—as a defence to actual or perceived homosexual acts—exercisable by ‘victims’ of homosexuality. The creation of the defence contravenes, or is inconsistent with, the right to equal protection of the law. Firstly, it affords differential legal treatment to victims of homosexuality in terms of a defence to commission of crime not available to victims of crime under other penal laws. Secondly, it deprives an alleged homosexual of the equal protection of the law as underpins the restrictions of reasonableness, proportionality, etc. usually placed on traditional defences in criminal law such as self-defence, provocation, and insanity.

Therefore, the Bill in its entirety is discriminatory as far as it targets a specific group of persons, ‘homosexuals’, and specifically its clauses 1, 2, 3, 4 and 5(1) are discriminatory based on grounds of sex while clause (3) also discriminates on the grounds of social and health status and disability.

5.2 The right to a fair hearing

Articles 28 and 44(c) of the Constitution provide for the right to a fair hearing, which is a non-derogable right.

Article 28(12) which entrenches the principle of legality, which requires criminal offences to be clearly defined. Clauses 1 and 2(1)(c) of the Anti-Homosexuality Bill seek to define and criminalise homosexuality in respect of, inter alia, the act of ‘touching’ by persons of the same gender. The touching can be ‘with any part of the body’, ‘anything else’ and ‘through anything.’ Since clause 5(1) creates the ‘homosexual panic’ defence, this makes it dangerous for real and suspected LGBTIQ+ persons as people may feel justified to harm real or suspected LGBTIQ+ persons. Clauses 8 and 9 of the Act create offences relating to aiding and abetting homosexuality and conspiracy to commit homosexuality respectively while clause 14(1) seeks to criminalise promotion of homosexuality and clause 12 of the Act criminalises letting out houses or using premises for purposes of homosexuality.

³¹ See objective XVI of the National Objectives and Directive Principles of State Policy, Article 35 of the Constitution.

These provisions Act create offences that are overbroad. Firstly, they are vague, uncertain and ambiguous as regards the proscribed acts. In spite of the attempt to define 'touching' in clause 1, the meaning of the word—central to the definition of the offences created by the Act—remains vague. The same is to be said of the words 'counsel', 'publish', 'procure' in clauses 7 and 8 of the Bill. Professional counsel by doctors, psychiatrists and lawyers may be deemed to be offering of 'counsel.' In effect, these provisions would penalise the provision of professional counsel on issues of homosexuality on the part of, among others, medical, religious and legal professionals. Filing cases in court may be deemed promotion as may selling a newspaper with a report about homosexual rights or a hotel offering a venue for a seminar discussing HIV health service provision for homosexuals.

Secondly, the perception of conduct as an act of homosexuality is largely subjective. The elements and prohibited acts of homosexuality—'touching', 'publish', 'counsel', etc.—can invoke diverse emotional responses from different persons. The vague definition of 'touching' in section 1, may, for instance, result in a mistaken perception by the victim of the intent of the alleged offender. The grave consequence of the subjective perception is a fatality or grave injury ensuing from the exercise by the victim of the broad and subjective 'homosexual panic' defence in clause 5(1) of the Act. As a variant of provocation or sudden heat of passion, the 'homosexual panic' defence tends to be subjective, rather than objective, in character.³²

The subjectivity in reactions to 'touching' therefore renders it inappropriate to be an element or ingredient of the offence of homosexuality.

The provisions of the Bill are vague, uncertain and ambiguous and, being subjective, it may be impossible or difficult for a person to determine what conduct is acceptable and what conduct is *in fact* criminalised and prohibited by law as is required by the Constitution.³³

In *Francis Tumwesige Ateenyi v Attorney General*,³⁴ the Constitutional Court struck down sections 168(1)(c) and 168(1)(d) of the Penal Code Act Cap 120 which are part of the offence of being rogue and vagabond for being vague. Egonda Ntende JSC stated that,

It must be noted that presumption of innocence is a constituent element of the right to a fair trial... There is an absolute bar imposed by the Constitution against whittling away or diminishing the content of the right to a fair trial.

Articles 28(3)(a) and 44(c) of the Constitution provide for the right to presumption of innocence. Clause 3(3) of the Act prescribes compulsory HIV-testing for *all* persons charged with aggravated homosexuality. An alleged sexual offender cannot be deemed to forfeit his or her rights—especially in the context of private adult-to-adult sexual relations—because he or she is still only an accused person and not a convicted criminal. Subjecting an individual charged with aggravated homosexuality to a compulsory HIV test, irrespective of the nature of the

³² See *State of Wyoming v Aaron James McKinney*, Criminal Action 6381/1998.

³³ See *Charles Onyango-Obbo & Another v The Attorney General*_Constitutional Appeal No. 2 of 2002; [2004] UGSC 1).

³⁴ Constitutional Petition No. 36 of 2018.

aggravating conduct under clause 3(1) of the Act, is tantamount to treating the individual as guilty of the offence prior to determination of any criminal charges against the standard of proof required by law.

Therefore, clauses 1, 2, 3, 4, 5(1), 8, 9 and 14 of the Anti-Homosexuality Bill would if passed into law contravene Article 28(12) and clause 3(3) would contravene Article (28(3) of the Constitution.

5.3 The right to privacy

Criminalisation of consensual same-sex relations as proposed in clauses 2, 3 and 4 violate the right to privacy. This right is protected in Article 27(2) of the Constitution, which provides that no person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property. The right to privacy is also provided for in Article 17 of the ICCPR and it covers the person, home, correspondence, communication or other property, including adult consensual sex in private. The essence of privacy is the privacy of the person regardless of their sexual orientation and/or gender identity.

Enforcement of the provisions would require the state interfering in the private lives of individuals who consent to same-sex relationships. In the case of *Kasha Jacqueline, Pepe Onzeima & David Kato Vs Giles Muhame and The Rolling stone Publication Limited*,³⁵ Hon. Justice V.F. Musoke Kibuuka ruled in a case where the names, identities and addresses of suspected LGBT persons were being revealed in a newspaper ostensibly for purposes of fighting homosexuality, that,

...With regard to the right of privacy under Article 27 of the constitution, court has no doubt again using the objective test that the exposure of the identities of the persons and homes of the applicants for the purpose of fighting gayism and the activities of gays as can easily be seen from the general outlook of the expunged publication, threatens the rights of the applicants to privacy of the person and their homes. They are entitled to that right ...

The UN Human Rights Committee, addressed prohibition of homosexuality and the attendant invasion of privacy in the case of *Toonen Vs Australia* above and observed that '*...It is undisputed that adult consensual sexual activity in private is covered by the concept of privacy...*'³⁶

The Court of Appeal of Botswana also found that adults have a right to 'a sphere of private intimacy and autonomy, which is not harmful to any person, particularly that is consensual.'³⁷

The enactment of the Anti-Homosexuality Bill with these provisions will therefore contravene the right to privacy of homosexuals in Uganda both under Article 17 of the ICCPR and article 27 of the Constitution of Uganda.

³⁵ *High Court Miscellaneous Cause No. 163 of 2010.*

³⁶ see page 9 UN Human Rights Committee; Communication No. 488/1992

³⁷ *Letsweletse Motshidiemang v Attorney General*, n 28 above, Para 151.

5.4 The right to dignity and freedom from cruel, inhuman and degrading treatment

Criminalisation of consensual same-sex relations among adults as proposed by clauses 2, 3 and 4 would violate the right to dignity and freedom from cruel, inhuman and degrading treatment, which is protected as a non derogable right by article 24 and 44(a) of the Constitution.

A key element of this right is respect for the autonomy and bodily integrity of persons, and the state is under obligation to refrain from enacting laws that jeopardise this right. The Court of Appeal of Botswana in confirming the High Court's striking down of laws criminalising consensual same-sex relations in 2019 found that criminalisation of consensual sexual relations between adults of the same sex is a violation of the right to dignity and freedom in the sense that denying individuals the right to sexual expression goes to the core of their self-worth and dignity as human beings.³⁸

The Anti-Homosexuality Bill, however, seeks to go beyond just criminalising consensual sexual relations, which is already provided for in section 145 of the Penal Code Act, to extend criminalisation to the very existence of LGBTIQ+ persons.³⁹

Clauses 3(3) prescribes compulsory HIV testing for *all* persons charged with aggravated homosexuality. Compulsory HIV-testing of an alleged offender without his or her consent and without a requirement of pre-test counselling is cruel, inhuman and degrading treatment.

Clause 5(1) of the Act creates the 'homosexual panic' defence. The defence created under the section is completely absolving, rather than merely mitigating, and this permits, and is likely to result in, homophobia-related fatal and non-fatal assaults in contravention of the right to dignity and freedom from torture, from cruel, inhuman and degrading treatment or punishment.

Therefore, clauses 2, 3, 4 and 5(1) of the Bill would contravene the right to dignity and freedom from torture, inhuman and degrading treatment contrary to article 24 of the Constitution.

5.5 The right to freedom of expression, conscience, religion and association

These rights are protected in Articles 29(1)(a), 29(1)(c), 29(1)(d) and 29(1)(e) of the Constitution, which protect the rights to freedom of speech, religion and conscience, assembly and association respectively.

Clauses 8 and 14 of the Bill are evidently aimed at criminalising the actions of persons who, through speech, printed matter, public fora and civic engagement, are involved in legitimate adult-to-adult debate and discussion on issues of homosexuality. Such debate or discussion in the public fora is part and parcel of the freedom of expression, thought and conscience, assembly and association. In *Irina Fedotova v Russian Federation*,⁴⁰ the UN Human Rights Committee considered the petitioner's display of posters affirming pride in her homosexuality as '*giving expression to her sexual identity and seeking understanding for it.*'

³⁸ Above, Para 127.

³⁹ Anti-Homosexuality Bill, Clause 2.

⁴⁰ UN Doc CCPR/C/106/ D/1932/2010.

Individuals and groups are free to voice views, opinions and ideas irrespective of their unpleasant or distasteful character. In *Charles Onyango-Obbo & Another v The Attorney General*,⁴¹ Mulenga JSC addressed the scope of the freedom under article 29(1)(a) of the Constitution as follows –

...[I]t is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information ... [A] person's expression or statement is not precluded from constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views. Indeed the protection is most relevant and required where a person's views are opposed or objected to by society or any part thereof, as 'false' or 'wrong'.

Therefore, while members of the public who regard homosexuality as immoral may be shocked, offended or disturbed, this cannot be the basis for suppressing the freedom to voice views and opinions on the subject by thought, expression and association or civic engagement. The views of the majority in society cannot, on their own, be the basis to validate the unconstitutional provisions of clauses 7, 8 and 13 of the Bill.

5.6 The right to access health care and services

Criminalisation of consensual same sex relations in clauses 2, 3 and 4 of the Bill as well as criminalisation of aiding and abetting and promotion of homosexuality in a blanket way in clauses 8 and 14 violate the right of access to healthcare (including HIV-related service provision) guaranteed under objective XIV and XX of the National Objectives and Directive Principles of State Policy, Articles 2(1) & (2) and 8A of the Constitution of the Republic of Uganda 1995.

Objective XIV and XX of the National Objectives and Directive Principles of State Policy read together with Article 8A and Article 45 of the Constitution makes the right to health a constitutionally protected right. The Constitutional Court expressly held so in *Health, Human Rights and Development (CEHURD) v Attorney General*.⁴² The Constitution mandates the government to ensure that all development efforts are directed at ensuring maximum social and cultural wellbeing including access to healthcare services.

Uganda is a state party to international instruments that protect the right to health of everyone. Article 12 of the International Covenant on Social, Economic and Cultural Rights protects the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires states Parties to take all appropriate measures to eliminate discrimination against women in the field of health care. Article 14(1)(a) of the Protocol to the

⁴¹ Constitutional Appeal No. 2 of 2000 [2004] UGSC 1.

⁴² Constitutional Petition No. 16 of 2011.

African Charter on Human and Peoples' Rights on the Rights of Women (The Maputo Protocol) enjoins states parties to ensure that the right to health of women, including sexual and reproductive health are respected and promoted, including the right to control their fertility.

The United Nations Committee on Social and Economic Rights, in General Comment No. 14 established that the right to health not only means the right to be healthy, but also to include both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive health, and the right to freedom from interference.

Criminalisation of consensual same-sex relations dissuades LGBTIQ+ people from accessing health services, while also dissuading service providers from providing them. The said provisions of the Act have additionally the effect of dissuading and preventing homosexuals, especially those affected by HIV, from engaging professional counsel and accessing HIV-related service provision and health services.

Therefore, clauses 2, 3, 4, 8, and 14 would if passed into law be unconstitutional in as far as they violate the right to health protected under objective XIV and XX of the National Objectives and Directive Principles of State Policy, Articles 2(1) & (2) and 8A of the Constitution of the Republic of Uganda 1995.

5.7 Violation of the right to liberty

The right to liberty is protected under article 23 of the Constitution. It is also protected in article 6 and 9 of the ICCPR and article 6 of The African Charter on Human and Peoples Rights (ACHPR). In *Omar Awadh Omar & 10 Others v. Attorney General*,⁴³ the Constitutional Court noted that the Ugandan Constitution largely echoes the provisions of the ICCPR and the ACHPR.

Under Article 23(1)(c), a person's liberty can only be deprived '*...for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda.*'

Unfortunately, for offences involving consensual same-sex relations, it is almost impossible to have evidence, since those involved are consenting adults. Consequently, the majority of arrests of LGBTIQ+ persons under the provisions of this law will continue to be premised on the appearance of the suspects, with persons being deprived of their liberty only on the ground that they 'look gay', a phenomenon that has been well-documented during the enforcement of the Penal Code Act.⁴⁴

Indeed, the UN Working Group on Arbitrary Detentions has established criteria for arbitrary detention and Category V of these is that detention is arbitrary if it 'constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social

⁴³ Consolidated Petition No. 55 and 56 of 2011.

⁴⁴ See generally, Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) & Human Rights Awareness and Promotion Forum (HRAPF) 'Protecting morals by dehumanising suspected LGBTI persons, a critique of the enforcement of laws criminalising same sex conduct in Uganda' March 2013.

origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings.’ Arrests under the provisions of the Bill would clearly be based on discrimination on sexual orientation grounds and will therefore be arbitrary. The Working Group recently applied this criteria to the detention of 19 suspected LGBT individuals in Uganda from a shelter in Wakiso, and found that ‘the perceived sexual orientation of the 19 individuals was a motivating factor in the arrest and treatment of those individuals’ and ordered remedies for them.⁴⁵

Most of the arrests of LGBTIQ persons are done from a perspective of discrimination without any evidence of commission of a crime, which violates the right to liberty.

5.8 Violation of the right to property

Clause 12 of the Anti-Homosexuality Bill, by classifying houses or rooms as brothels merely on the basis of occupation by homosexuals is in contravention of the rights to property guaranteed under Article 26 of the Constitution of the Republic of Uganda 1995. The right to property which is provided for under Article 26 of the Constitution also includes peaceful enjoyment of the right.

This provision in effect considers occupation or being upon premises by homosexual persons as criminal and therefore denies homosexual persons the right to use their property as they see fit as their occupation of such property or letting other homosexual people occupy such property is criminalised.

5.9 Violation of state obligations to respect, protect and promote the rights and freedoms of the individual and groups

The Government of Uganda is enjoined by international human rights law to respect and protect fundamental rights and freedoms of the individual and groups in Article 20(2) of the Constitution) and under Articles 2(1) & (2) of the Constitution of the Republic of Uganda 1995.

The *obligation to respect* requires the State to refrain from interfering with or curtailing the enjoyment or exercise of human rights. This is the *primary* obligation of the state as regards human rights and is negative in character. By enacting the Bill, Parliament would be actively engaged in infringing constitutionally-guaranteed rights. Further, it is encouraging homophobia and stigmatisation and is, in effect, engaging in institutionalised promotion of a culture of hatred.

The *obligation to protect* requires the State to protect individuals and groups against human rights abuses. This is a *secondary* obligation and includes a duty upon the Government to deter the infringement of human rights by third parties (including private citizens). Homophobia, as institutionalised by the Bill, is likely to foster attacks against the dignity and integrity of

⁴⁵ *In the Matter of 19 Individuals Citizens of the Republic of Uganda v. Government of the Republic of Uganda*,. A/HRC/WGAD/2021/20, 9 July 2021.

homosexuals and/ or persons perceived as homosexuals. Further, coupled with absolute defences such as the 'homosexual panic' defence under clause 5(1), the Bill underscores the likely failure and/ or omission on part of the government to dissuade and prosecute homophobic behaviour and homophobia-based violence.

These obligations are also imposed by international law and so the provisions of the Bill criminalising consensual same-sex relations would be in contravention of the obligations with regards to the rights guaranteed under international human rights instruments ratified or acceded by Uganda. Uganda acceded to the UN Covenant on Civil and Political Rights, 1966 and the UN Covenant on Economic Social & Cultural Rights, 1966 on 21 January 1987 and ratified the African Charter on Human and Peoples' Rights, 1981 on 10 May 1986. These instruments pre-date the Constitution. However, the rights and obligations therein are part of the law and Constitution (*objectives XIV and XXXVIII (i)(b) of the National Objectives and Directive Principles of State Policy and Articles 2(1) & (2), 8A, 45 and 287 of the Constitution*).⁴⁶

The rights and freedoms guaranteed under the international human rights instruments constitute obligations Uganda has agreed to as the human rights standards for its citizens. The instruments are also relevant to the interpretation or construction of provisions of Uganda's laws (including the Constitution).⁴⁷

Uganda is duty-bound to give effect to international human rights standards and refrain from adopting measures, including legislation, that are inimical to the exercise and enjoyment of the rights stipulated under those instruments. In criminalising consensual same gender sexual activity among adults, Uganda is in contravention of obligations with regards to the said human rights standards.

The provisions of the Anti-Homosexuality Bill, and the spirit of the Bill as a whole, are tantamount to the State, by legislation, promoting and encouraging homophobia and, in effect, a culture of hatred against homosexuals, which is a violation of the State's obligations under Article 2(1), 2(2) and 20 of the Constitution and Uganda's obligations under international law to foster the right to equality without discrimination on the basis of sexual orientation⁴⁸ and the right of privacy with respect to same sex/ gender relationships.⁴⁹

5.9 The Bill's justifiability in a free and democratic society

Article 43 imposes limitation on human rights including in the public interest. The movers of the Bill allege that they are acting in the public interest by protecting morals. For avoidance of doubt, the whole provision is reproduced here:

General limitation on fundamental and other human rights and freedoms

⁴⁶ See *Uganda Law Society & Another v Attorney General* Constitutional Petition Nos 2 & 8 of 2002; [2009] UGCC 2.

⁴⁷ See *Attorney General v Susan Kigula & 417 Others* Constitutional Appeal No. 3 of 2006; [2009] UGSC 6).

⁴⁸ See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128).

⁴⁹ See *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992.

- 1) *In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*
- 2) *Public interest under this article shall not permit –*
 - a) *political persecution*
 - b) *detention without trial*
 - c) *any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.*

(Emphasis Ours)

Article 43(2) has been regarded as a ‘limitation within a limitation’ by restricting application of article 43(1) limitation to specifically stipulated circumstances. The Supreme Court has been emphatic that the limitation on the right or freedom must be acceptable and demonstrably justifiable in a free and democratic society. Further, the limitation must be about a danger that is not remote, conjectural or far-fetched. In *Charles Onyango Obbo and Another vs Attorney General*,⁵⁰ the Supreme Court observed) that;

However, the limitation provided for in clause (1) is qualified by clause (2) which in effect introduces a “limitation upon a limitation”. It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable misuse or abuse of the provision in clause (1) under the guise of defence of public interest.

On the conflict between protection of human rights and limiting them, the Supreme Court explained;

...protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in exceptional circumstances that give rise to the secondary objective.

The court in the *Adrian Jjuuko* case above, also considered the limitation clause in Article 43 and noted that the rights protected should always be given priority ahead of the limitation, even if the limitation is meant to protect the public from future harm,

In a society governed by the rule of law, and according to human rights principles, steps to protect the public from potential future harm - no matter how potentially serious it may be - should always take place within a framework which also protects the human rights of the individual whom it is feared may be capable of doing such harm.

In *Muwanga Kivumbi vs. Attorney General*,⁵¹ the Constitutional Court pronounced that once a petitioner has established a prima facie violation of a constitutionally guaranteed right, the burden shifts to the government to demonstrate that the restriction is a justifiable limitation of

⁵⁰ Constitutional Appeal No 2 of 2002.

⁵¹ Constitutional Petition No 9 of 2005.

rights as envisaged under article 43. Discharging this burden is not a matter of making speculative allegations. It has been explained that the burden is quite high, though not as high as proof beyond reasonable doubt.⁵²

Court must employ a well-established process for determining whether the respondent or culprit is equal to the task of ensuring that a restriction of or limitation of human right is valid. The process takes the form of a three-part test; that is, any such restriction must be prescribed by law, serve a legitimate purpose and must be *necessary* to achieve the prescribed purpose.

The justification for the law seems to be morality. The morality referred to as a limitation to human rights under constitutional law is not popular morality but rather constitutional morality. The Indian Supreme Court in *Navej Singh Johar & Ors. versus Union of India thr. Secretary Ministry of Law and Justice*, stated that:

The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.⁵³

Therefore, severely restricting the rights of LGBTI persons on the basis of morality is unconstitutional. As such clauses 1, 2, 3, 4, 5(1), 8, and 14 of the Bill would if passed into law be unconstitutional for they are an unjustifiable limitation on human rights of LGBTIQ persons.

6. Redundancy due to duplication of existing laws

As already noted above, the majority of the provisions of the AHB 2023 do in fact exist as part of Uganda's criminal law under the Penal Code Act, and indeed carry more effectively deterrent sentences therein than proposed in the Bill. For instance, what the AHB defines as homosexuality is merely an expanded definition of the offence of having carnal knowledge against the order of nature as defined in section 145 of the Penal Code Act, with the sole (and unconstitutional) addition of a sub-clause criminalising the identity of LGBTIQ+ persons in Uganda.

Under aggravated homosexuality, the Bill considers acts such as committing the offence of homosexuality with a victim below the age of 18 (which is defined clearly under section 129 of the Penal Code, and with an appropriate penalty), and administering drugs or other substances with sexual intent, also defined as procuring defilement of a child under section 132(1)(c) or rape under section 123 of the Penal Code Act.

The offences of conspiracy to engage in homosexuality and procuring homosexuality by threats are both sufficiently dealt with under the Penal Code definition of rape, and are thus redundant, except that the provision in the Bill would offer less protection to victims of this kind of abuse in same-sex couplings than in heterosexual pairings because the Penal Code Act provides for more stringent penalties for both offences.

⁵² See *Charles Onyango Obbo and Another v Attorney General (Constitutional Petition No. 15 of 1997)* [2000] UGCC 4 (21 July 2000), 17.

⁵³ AIR 2018 SC 4321.

7. Retrogressive law as regards protection of children and victims of nonconsensual sexual assaults

Uganda has made strides towards protection of children and other persons from sexual violence and assaults. This Bill on the other hand will undo this progress as it provides for far less punishments than existing laws. This case has already been made out for the offence of defilement which carries the death penalty under section 129 of the Penal Code, and would only be punishable by ten years' imprisonment under this law.

Also it would be retrogressive in the fight against HIV/AIDS. The provisions of the Bill would increase stigma and violence against LGBTIQ persons, which would certainly send them more into hiding and put them and the general population more at risk of HIV. The Global Commission on HIV and the Law found that criminalisation of same-sex conduct further pushes people away from testing, and treatment thus worsening the pandemic.⁵⁴

The Uganda AIDS Commission in its Legal Environment Assessment for HIV and AIDS in Uganda in 2022 concluded that sections in the Penal Code Act which criminalise the act of 'having carnal knowledge against the order of nature' and the lack of legal recognition of transgender persons who are rendered invisible by the Registration of Persons Act, among other laws fuel stigma against the affected People Living HIV/AIDS (PLHIV) and Key Vulnerable Populations (KVPs) as they discourage HIV testing and disclosure of test results, disproportionately disadvantage women and girls, provide a basis for arbitrary arrest and/or harassment by law enforcement, legitimise inequitable treatment of PLHIV and KVPs to deny them a fair hearing or trial, and violate the right to privacy, confidentiality, and personal dignity. That 'social stigma in turn fuels physical and verbal assault towards these groups and discourages them from seeking and utilising HIV services.'⁵⁵ They therefore recommended review and reforms on section 145 of the Penal Code in order to decriminalise same sex relationships.⁵⁶

Therefore, the bill would only lead to backtracking in the fight against HIV/AIDS.

8. Recommendations

In light of the foregoing, HRAPF recommends the following:

1. Parliament should not enact the Bill into law as this would violate the Constitution of the Republic of Uganda which guarantees and protects key human rights for all, including the nonderogable rights to dignity and freedom from torture, inhuman and degrading treatment, and the right to a fair hearing. Article 79(1) does not give Parliament powers to pass laws that contravene the Constitution.

⁵⁴ Global Commission on HIV and the law 'Final report of the Global Commission on HIV and the law' 9 July 2012, 45-48.

⁵⁵ Uganda AIDS Commission 'Legal Environment Assessment for HIV and AIDS in Uganda' February 2022, 108 -109.

⁵⁶ Above, 112.

2. There is no need for the Bill as the provisions are all already existing in other laws including the criminalisation of same-sex relationships. The hurdles in implementing the existing law will still be the same hurdles affecting the implementation of the new laws. It is a waste of resources and time to legislate on something that is already legislated upon.
3. If Parliament wants more laws to protect children from sexual abuse as well as to address sexual violence generally, a non-discriminatory law would be the way to go, that is, a law that protects all persons regardless of their sexual orientation and gender identity. Such a law would only criminalise non-consensual sexual relationships. This is the law that would protect children and victims more.
4. Parliament should not pass a law that is retrogressive as regards Uganda's fight against HIV/AIDS. The Uganda AIDS Commission is recommending decriminalisation of consensual same-sex relations as a way of addressing stigma and increasing uptake of HIV services. We should listen to the professionals and the science and not enact a law that takes the fight against HIV/AIDS many leagues back.
5. Civil society actors and partners, including other governments and UN mechanisms, should engage Parliament and other organs of the Government of Uganda not to enact this law that is unconstitutional, would lead to violation of human rights and yet it is redundant and retrogressive in the fight against HIV/AIDS.