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A LEGAL AND HUMAN RIGHTS ANALYSIS OF THE ANTI-HOMOSEXUALITY BILL, 2023 AS ENACTED BY PARLIAMENT

29th March 2023

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1. Introduction

The Parliament of Uganda enacted the Anti-Homosexuality Bill, 2023 on 21st March 2023. The enacted version of the Bill differs in some material respects from that which was tabled by Bugiri Municipality Member of Parliament, Hon. Asuman Basalirwa on 28th February 2023, and gazetted on 3rd March 2023. The enacted version now limits the offence of homosexuality to sexual acts between persons of the same sex and removes provisions on 'touching' and 'holding out' as a lesbian, gay, bisexual, transgender or queer person. The offence is punishable by life imprisonment, up from ten years. Aggravated homosexuality, which includes instances where one is a repeat offender, is now punishable by death, as it was in the original Anti-Homosexuality Bill, 2010. The 'homosexual panic' defence, which allowed 'victims' to commit any crimes when defending themselves against homosexuality, was also dropped, as well as provisions on aiding and abetting, conspiracy to commit homosexuality, and extradition. However, a new offence of 'child grooming' was added, and the obligation to report acts of homosexuality and intention to commit acts of homosexuality by all persons including parents, doctors and lawyers who are not advocates, was resurrected from the 2010 version. Promotion of homosexuality now attracts twenty years' imprisonment and/or a fine of one billion Uganda shillings.

The Bill currently awaits Presidential assent under the terms of article 91 of the Constitution of the Republic of Uganda, 1995 as amended.

HRAPF issued a legal and human rights analysis of the Anti-Homosexuality Bill on 8th March 2023, but because of these changes, a new analysis has been done to address the new issues raised by the Bill as enacted by Parliament.

2. Summary of HRAPF's position on the Bill

HRAPF's position is that the Anti-Homosexuality Bill, 2023 as enacted has not greatly changed, despite the extensive changes to the Bill, and it is as follows:

- 1) *The Bill is unconstitutional* because its provisions criminalising consensual same-sex relations among adults, the criminalisation of the 'promotion of homosexuality' and the overall spirit of the Bill contravene the constitutional protections of the rights to: equality and freedom from discrimination; privacy; dignity and freedom from inhuman and degrading treatment; fair hearing, freedom of expression, religion, conscience and association, liberty, work and exercise of one's profession 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). The justifications for the Bill

do not meet the qualifications in Article 43(2) of the Constitution which requires limitation made in public interest to be demonstrably justifiable in a free and democratic society.

- 2) *The Bill is retrogressive* and will worsen the HIV situation in Uganda as it would deny LGBTIQ+ persons, who are key populations, access to HIV services through its criminalisation of 'promotion of homosexuality' which would dissuade institutions from providing HIV and health services to LGBTIQ+ persons. It will also curtail research and academic freedom. The obligation placed on all persons, including health workers, to report all suspicions of homosexuality will also discourage LGBTIQ+ from seeking HIV/AIDS and other treatment/services for fear of being reported.
- 3) *Some provisions of the Bill are redundant* as they replicate existing laws and in some cases provide for punishments that are not in line with existing standards. Most of the provisions that are not unconstitutional replicate existing laws and in several instances promote persecution of LGBTIQ persons as they provide for penalties that differ from those already provided for similar offences under other laws. They are therefore unnecessary.
- 4) *Some of the punishments in the Bill are too harsh and disproportionate to the offences* as they are higher than those provided for the same conduct between persons of the opposite sex. The death penalty for repeat offenders raises homosexuality to be raised to the same level as the most serious crimes in the country which include rape, murder, aggravated defilement and treason! Incest which is punishable by imprisonment for seven years under section 149 of the Penal Code is punishable by death in the Bill!

3. Background to the Bill

The Anti-Homosexuality Bill, 2023 was passed by the Parliament of Uganda on 21st March 2023 in a packed and almost riotous sitting. The sitting, which was reportedly attended by over 380 MPs,¹ saw the majority of the legislators calling for even harsher penalties for the offences created under the Bill, including the offence of homosexuality, aggravated homosexuality and promotion of homosexuality – essentially making amendments on the floor of Parliament, which goes contrary to the principle of meaningful public participation since there was no opportunity to do public consultation, as the Constitutional Court held in *Male H Mbirizi & Ors v Attorney General*.² The Bill clearly had popular support within the house, with the minority voices instantly drowned out both during the debate and at the time of voting on the Bill.³

¹ Parliament of Uganda, 'Tough penalties for engaging in acts of homosexuality', March 22, 2023, <https://www.parliament.go.ug/news/6544/tough-penalties-engaging-acts-homosexuality>, accessed 27 March 2023.

² Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018.

³ Above. See also NBS TV, Anti Homosexuality Bill passed, March 21, 2023, <https://nbs.ug/2023/03/anti-homosexuality-bill-passed/>, accessed March 27, 2023.

It is important to note that this is not the first attempt by the legislature in Uganda to pass a law that further criminalises and penalises consensual same-sex sexual activity. On 3rd May 2021, the 10th Parliament enacted the Sexual Offences Bill, 2021, in which they sought to criminalise a wide array of sexual practices as unnatural, particularly between persons of the same-sex, further criminalise sex work and create a sexual offenders register with extensive reporting requirements, among others.⁴ This was the second attempt at a law that further criminalises same-sex sexual relations.

The very first attempt was on 23rd December 2013, when the Parliament of Uganda enacted the Anti-Homosexuality Act, 2014. 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.'⁵ 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.⁶ Since then, there have been numerous threats by legislators over the years to retable the Bill.⁷

The passing of the new Anti-Homosexuality Bill, 2023 comes against a backdrop of a massive wave of homophobic rhetoric and violence, spurred equally by political and religious leaders. On 24th January 2023, the Deputy Speaker of Parliament, Hon. Thomas Tayebwa officially spurred parliamentary interest in the matter when he alleged on the floor of parliament that Kasese Municipal Council had passed a bylaw sponsored by a non governmental organisation (NGO) Human Rights Awareness and Promotion Forum (HRAPF), which would recognise homosexuals among marginalised persons. In his opinion, this was part of a well-funded campaign to promote homosexuality in Uganda and to promote the abuse of children in schools, and demanded investigations into the matter from the Ministries of Local Government and Internal Affairs.⁸ The NGO Bureau later stated in a leaked report that they later owned up to that 26 organisations were being investigated for promotion of homosexuality, which predictably include HRAPF.⁹ This was followed at various intervals by condemnation of homosexuality and of LGBTIQ+ people by President Yoweri Museveni,¹⁰ religious leaders including the Archbishop of the Church of Uganda,¹¹ the Supreme Mufti of Uganda¹² and

⁴ Human Rights Awareness and Promotion Forum, Analysis of the Sexual Offences Bill, 2021, May 2021, <https://hrapf.org/?mdocs-file=11250>, accessed March 28, 2023.

⁵ Long Title of the Anti-Homosexuality Act, 2014.

⁶ This was in the case of *Prof. J Oloka-Onyango & 9 Others v Attorney General* Constitutional Petition No. 008 of 2014 (Constitutional Court of Uganda).

⁷ See for example, '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.

⁸ 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)

⁹ 'Leaked report shows intent to criminalise gay activities' *Monitor*, 12 February 2023.

¹⁰ 'Museveni: Uganda won't support homosexuality' *Monitor*, 17 February 2023.

¹¹ See for example 'Uganda Archbishop Kazimba's message on homosexuality awakens old ghosts' *Red pper*, 14 February 2023 <https://redpepper.co.ug/uganda-archbishop-kazimbas-message-on-homosexuality-awakens-old-ghosts/127989/> (accessed 7 March 2023).

military personnel,¹³ among others. A section of religious leaders have also led marches ‘against homosexuality’ in different cities across the country.¹⁴

The Speaker of Parliament further fueled this debate when she promised that the Anti-Homosexuality Bill would be tabled and voted on by calling up names of MPs and asking their position on the matter so that Ugandans would know where every MP stood on this Bill.¹⁵ As such, the Bill was passed by Parliament less than two weeks after its first reading in a very public sitting of the house, with a great show made of taking note of the MPs who attended.

4. Commentary on provisions of the Bill

The Anti-Homosexuality Bill, 2023 as enacted by Parliament is an amalgamation of clauses taken from the Penal Code Act Cap 120, particularly the changes introduced by the Penal Code (Amendment) Act, 2007; the Anti-Pornography Act, 2014; the Computer Misuse Act, 2011, the nullified Anti-Homosexuality Act, 2014, the Sexual Offences Bill, 2021, the Anti-Homosexuality Bill, 2010, and the original version of the Anti-Homosexuality Bill, 2023 as tabled, with a few original additions. It is now almost a ‘one stop centre’ law for provisions concerning ‘homosexuality’ under the laws of Uganda. The Bill is divided into four parts, of which Part I is the interpretation section; Part II contains provisions on the prohibition of homosexuality; Part III provides for other related offences; and Part IV contains miscellaneous provisions. This section provides a discussion of the different clauses of the Bill as enacted by Parliament with commentary on their legal implications.

PART I

Clause 1: The Interpretation Clause

This section defines more terms used in the Bill than the version that was tabled, addressing some of the earlier criticisms around vagueness. Some of the key words defined include: homosexual, intersex person, female person, male person, imprisonment for life, organization, person in authority, sex, sexual organ, sex contraption, sexual orientation, victim and vulnerable person.

‘Homosexuality’ is defined to mean the performance of a sexual act by a person on another person of the same sex, while ‘homosexual’ is defined to mean ‘a person who engages in an act of homosexuality.’ ‘Sexual act is defined to mean the stimulation or penetration, however slight,

¹² ‘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).

¹³ Daily Monitor, ‘Do not treat homosexuals in our facilities, says Maj Gen Takirwa, February 7, 2023, <https://www.monitor.co.ug/uganda/news/national/don-t-treat-homosexuals-in-our-facilities-says-maj-gen-takirwa-4114502>, accessed 28 March 2023.

¹⁴ ‘Muslims march against homosexuality’ Monitor, 26th February 2023; UG Reports, Homosexuality in Kisoro: Voters want their MP to resign, 28 March 2023, <https://ugreports.com/homosexuality-kisoro-voters-want-their-mp-to-resign/>, accessed March 28, 2023; Daily Monitor, ‘Homosexuality is an abnormal lifestyle choice – Lango Chief’, March 6, 2023, <https://www.monitor.co.ug/uganda/news/national/homosexuality-is-an-abnormal-lifestyle-choice-lango-chief-4147478>, accessed 28 March 2023.

¹⁵ ‘Anti-homosexuality law to be tabled tomorrow - Speaker Among’ Monitor, 28 February 2023.

of a person's sexual organ, anus or mouth by a sexual organ, or a sex contraption, or by any part of the body of a person, of the same sex.

Definitions in the clause concerning sex all assert that sex is fixed at birth, and the sexual organs that someone is born with are the only determinants of sex. For example, sex is defined to mean 'the biological state of a person as either male or female and in the case of an intersex person, the status adopted by the intersex person as being dominant either naturally or through medical transition, but does not include sexual orientation.' A female person is defined to mean 'a person born with a female sex organ,' male person is 'a person born with a male sex organ', while intersex is 'a person who is born with both male and female sexual organs or is born with ambiguous genitalia.' It is however a positive development that the Bill recognises being intersex as part of sex, and uses non derogatory language in this respect.

The definition of victim has also been elaborated upon, with the Bill as enacted having a more comprehensive and reasonable definition than what was in the tabled version. Victims are defined as,

- a child against whom the offence of aggravated homosexuality has been committed,
- (a) a person suffering from mental illness or any other form of disability against whom the offence of aggravated homosexuality has been committed, or
- (b) any other person against whom the offence of homosexuality or aggravated homosexuality has been committed by means of threats, force, fear of bodily harm, duress, undue influence, through misrepresentation as to the nature of the act or intimidation of any kind, or while unconscious or in an altered state of consciousness due to the influence of medicine, drugs, alcohol or any other substance that impaired his or her judgment.

This definition removes the more dangerous definition in the tabled version of the Bill, which essentially allowed anyone to be referred to as a 'victim' provided they reported first, regardless of whether they had consented to the acts or not.

PART II

Part II of the Bill is titled 'Prohibition of Homosexuality', and predictably contains clauses creating the offences of homosexuality and aggravated homosexuality.

Clause 2: The offence of homosexuality

This clause provides that it shall be an offence for a person to perform a sexual act on another person of the same sex or allow another person of the same sex to perform a sexual act on them.¹⁶ The penalty for this is imprisonment for the natural life of the offender without the

¹⁶ Anti-Homosexuality Bill, 2023, Clause 2(1).

possibility of release.¹⁷ An attempt to commit homosexuality attracts 10 years' imprisonment.¹⁸ The clause as stated in the Bill essentially criminalises all forms of sexual contact between persons of the same sex, specifically consensual adult sexual practices, without distinction on whether such acts occur publicly or in private. The offence is committed regardless of whether the persons involved are consenting or not.

Clause 3: Aggravated homosexuality

The Bill in this clause creates the offence of aggravated homosexuality, which is punishable by the death penalty, and by 14 years' imprisonment in case of an attempt. This is borrowed from the Penal Code's 'aggravated defilement' provision under section 129(3), which is also punishable by death. However, aggravated defilement only applies when a person has sex with a child below the age of 18 and there is another aggravating factor. For homosexuality having sex with any person of the same sex is already homosexuality, and aggravation happens if any of the listed circumstances, including the minority age of the victim exist, creating a situation of discrimination where the same act is punished in a completely different way just because the offender is a person of the same sex.

Aggravated homosexuality is also deemed to happen when one commits the offence of homosexuality on a person with disability or who suffers a disability as a result of the sexual act;¹⁹ or a person with mental illness or who suffers a mental illness as a result of the sexual act;²⁰ or where the person contracts a terminal illness as a result of the sexual act;²¹ or when the act is committed on a person of advanced age (75 years and above).²² It is also aggravated homosexuality where the offender is a parent, guardian or relative of the person against whom the offence is committed;²³ or a person in authority over such person.²⁴ It is also aggravated homosexuality where there is use of threats, force, fear of bodily harm, duress, undue influence, through misrepresentation as to the nature of the act or intimidation of any kind;²⁵ and when the person against whom the offence is committed was, at the time the offence was committed, unconscious or in an altered state of consciousness due to the influence of medicine, drugs, alcohol or any other substance that impaired his or her judgment.²⁶ Finally, it is aggravated homosexuality where the perpetrator is a 'serial offender' – a person convicted more than once of homosexuality.²⁷

¹⁷ Above, clause 2(2); Clause 1 (definition of imprisonment for life).

¹⁸ Above, clause 2(3).

¹⁹ Above, clause 3(2)(f).

²⁰ Above, clause 3(2)(g).

²¹ Above, clause 3(2)(c).

²² Above, clause 1.

²³ Above, clause 3(2)(b).

²⁴ Above clause 3(2)(e).

²⁵ Above clause 3(2)(i).

²⁶ Above, clause 3(2)(j).

²⁷ Above, clause 3(2)(d).

In effect, as regards children, this clause recriminalises defilement of children by persons of the same sex as the child, and considers all such defilement as aggravated even in the absence of any other factors listed under section 129(3) of the Penal Code Act (as amended). Defilement of children regardless of the sex of the perpetrator is already criminalised under section 129(1) of the Penal Code, with a gender-neutral provision, and the punishment is life imprisonment.²⁸ Clearly, providing the death penalty for the same exact offence in another law just because the perpetrator happens to be a person of the same sex is discriminatory and excessively harsh. Attempted defilement is punishable by eighteen years' imprisonment, while attempted aggravated homosexuality is punishable by up to 14 years' imprisonment.

Repeat offenders also face aggravated homosexuality. This seems to have been borrowed from Section 129(4)(e) of the Penal Code, which provides for aggravated defilement in circumstances of repeat offenders, a section that applies in case the victim is a minor. However, for consensual same-sex relations, it is problematic since many LGBT persons do not exactly have an option to express their love otherwise, and yet they have to face the death penalty for any subsequent convictions for the offence of homosexuality.

Aggravating the offence merely because one of the parties has a physical or mental disability or is an elderly person without due consideration of whether the person is capable of consenting rests on the assumption that such persons are not capable of consenting under any circumstances.

On a positive note, the provision which made the offender's HIV positive status an aggravating factor was removed. It was replaced with one where the 'person against whom the offence is committed contracts a terminal illness as a result of the sexual act.' This removes the stigma associated with HIV/AIDS and also makes it clear that just because the offender suffers from a terminal disease does not automatically mean that they passed it on to the other party.

Clause 4: Punishment of child homosexuality

This clause provides for the punishment in cases where the offender is a child (anyone below the age of eighteen years), requiring that, regardless of the penalty provided for the offence under the law, the child not be subjected to imprisonment for a term exceeding three years. This is in tandem with the provisions of the Children Act, which provides that children cannot be subjected to the sentence of death.²⁹

However, the Bill does not take into consideration the age of criminal liability, which is twelve years under the Children's Act.³⁰ Section 129A of the Penal Code already covers situations where the offender is a child below twelve years of age, as the matter is then handled under Part V of the Children's Act which provides for care and protection of children. Under section 129B of the Penal Code Act, where a male child and female child above the age of twelve

²⁸ See Section 2 of the Penal Code (Amendment) Act, 2007.

²⁹ Section 104, section 104A, Children Act, Cap 59 Laws of Uganda (as amended).

³⁰ Above, section 88(1).

commit the offence against each other, then they are to be dealt with as provided for under Part X of the Children's Act, which provides for children charged with criminal offences.

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

This provision protects victims of homosexuality, providing for their right to be heard at the appropriate times during the investigation and trial of cases in which they were victims; the provision also provides for the power of court to order compensation for the victim commensurate with the physical and mental harm they may have suffered as a result of the assault. This provision replicates section 129B of the Penal Code in all material particulars except that it only applies to persons of the same-sex, and that in this case victims go beyond children. Since, the definition of victim in clause 1 is now specific, this provision is now in line with the Penal Code provisions.

Clause 6: Consent to sexual act is not a defence

This clause provides that it shall not be a defence to an offence under the Act for a perpetrator to show that the person against whom they committed the offence consented to the act. Whereas this clause was amended to change the initial position in the Bill which provided that 'consent of the victim to the act' not be a defence, it still maintains the same flaw – that private consensual relations between adults remain criminal, and that one of the people involved in such acts can easily claim victim status and cause the prosecution of their colleague with very few consequences for themselves. It is however laudable that this version of the Bill tones down the potential disastrous impact of the 'gay panic defence' that had been created by the previous version of the Bill.

Clause 7: Confidentiality

This clause prohibits anyone from using any form of media for publishing or causing the publicity of the names and personal circumstances or any other information tending to establish the victim's identity without authority of the victim or court. Such persons commit an offence and are liable upon conviction to a fine not exceeding five million shillings. This is also laudable, although also standard in the case of such cases.

PART III

This part of the Bill, headed 'Related offences and penalties', is primarily focused on addressing what the memorandum of the Bill defines as practices that promote homosexuality, and to this end creates the offences of child grooming (to address the concept of 'recruitment' of children into homosexuality), same sex marriages, promotion of homosexuality and keeping of premises for the purposes of facilitating homosexuality.

Clause 8: Child grooming

This clause creates the offence of 'child grooming', which focuses on the initiation of children into same-sex sexual practices through various forms of abuse. These include trafficking

(recruiting, transporting, transferring, harbouring or receiving) children for purposes of homosexuality or any other prohibited conduct under the Bill; exposure of children to real or simulated sexual acts between persons of the same-sex, including through videos, photographs and literature; and performing or causing the performance of sexual acts in the presence of children. The penalty for this offence is proposed to be life imprisonment for trafficking in children and twenty years' imprisonment for the other aspects.

Trafficking in children for sexual purposes is already provided for under section 3(3) and 5 of the Prevention of Trafficking in Persons Act, 2009 and the punishment for it is the death penalty. Depicting sexuality explicit images to children is already criminalised under Section 23(2) of the Computer Misuse Act with a penalty of fifteen years' imprisonment or seven million two hundred thousand shillings or both punishments. The punishments in the Bill are heavier than those provided for similar conduct by heterosexuals and therefore discriminatory.

The Bill further seeks to criminalise gaining custody over a child for purposes of engaging them in same-sex sexual acts (akin to detention with sexual intent as defined in section 134 of the Penal Code Act, where the punishment is seven years imprisonment). This particular offence is also criminalised in section 3 of the Prevention of Trafficking in Persons Act of 2009 for all persons and punishable by fifteen years imprisonment.

While the protection of children from sexualisation is important, existing law already covers this, and specifically punishing those doing the same but being persons of the same-sex with a higher punishment is discriminatory and amounts to persecution.

Clause 9: Premises

Clause 9 of the Bill makes it a criminal offence, punishable by ten years' imprisonment, for a person to keep a house or room for purposes of facilitating the commission of the offence of homosexuality, as well as knowingly allowing one's premises to be used for purposes of facilitating the commission of the offence or normalisation of any conduct prohibited under the Bill. The change from the tabled version is that the word 'brothels' has now been removed and replaced with 'premises.'

This provision has far reaching implications beyond what would be regarded as brothels. It affects landlords of premises where LGBTIQ+ people rent, hotels where people are accommodated or even where meetings are held, as well as NGO spaces where meetings discussing the health or human rights of LGBTIQ+ persons are held as well as crisis shelters for LGBTIQ+ persons. It would also make all houses owned by LGBT persons to be houses kept for purposes of homosexuality. Essentially, this deprives LGBTI people of homes or spaces where they can stay or work.

Clause 10: Prohibition of marriage between persons of the same sex

In this clause, the Bill seeks to make it an offence for one to purport to contract a marriage with someone of the same sex as themselves; criminalises officiating at, organising or even witnessing such a ceremony, and the penalty for this is ten years' imprisonment. The clause further defines marriage as 'the union, whether formal or informal, between persons of the same sex'.

This clause apparently seeks to 'operationalise Article 31(2)(a) of the Constitution, which prohibits same sex marriages', and to 'expand the provision to apply to all persons who participate in a marriage or the marriage ceremony of persons of the same sex.'³¹

The phrasing of this clause creates some ambiguity as to what amounts to the crime of conducting, presiding over or witnessing a marriage, particularly as marriage is defined to differ significantly from the understanding of marriage under the Constitution and the Marriage Act by providing that it can be a formal or informal union. This section is likely to prejudice not only people who attempt to solemnise same-sex marriages but also other suspected LGBTIQ+ people who may be living together/ cohabiting. It also has the effect of making persons who are legally married outside of Uganda criminals as it subjects them to criminal sanctions. It will also mean that persons of the same-sex who live together in an arrangement that can be regarded as a marriage are also liable to arrest and prosecution.

Clause 11: Promotion of homosexuality

This clause seeks to criminalise the 'promotion of homosexuality', which is defined under the Bill to include: encouraging or persuading another person to perform a sexual act with someone of the same sex; advertising, publishing, printing, broadcasting or distributing material promoting or encouraging homosexuality; providing financial support to facilitate activities that encourage homosexuality or the observance or normalization of conduct that is prohibited under the Bill; leasing any house or building to anyone for purposes of undertaking activities that encourage homosexuality; and operating an organisation which promotes or encourages homosexuality or observance or normalization of conduct prohibited under the Bill. The penalty for the offence of promotion of homosexuality is twenty years' imprisonment for individuals or, in the case of corporate entities, a fine not exceeding one billion shillings, suspension of license for up to 10 years or cancellation of license/ operational permit.

This section specifically targets individuals and non-governmental organisations viewed as promoting homosexuality. The terms 'encourages,' 'persuades,' 'material promoting or encouraging homosexuality or the commission of an offence under this Act' and 'encourage homosexuality or 'observance' or 'normalisation of conduct' are clearly vague and not specific. For example, is asserting that LGBTI persons are entitled to human rights normalisation of homosexuality? Is teaching in a university that sexual orientation is a normal part of human sexuality normalisation of homosexuality? What of research on the same? What of bringing a

³¹ Parliament of Uganda, 'Report of the sectoral Committee on Legal and Parliamentary Affairs on the Anti Homosexuality Bill, 2023, March 2023, 15.

case asserting the same to court? This vagueness puts at risk work on the human rights of LGBTIQ+ persons, including legal defence, research and academic work.

According to the Report of the Committee on Legal and Parliament Affairs, the reason for this clause is to cover 'all acts done with the aim of encouraging observance' of prohibited conduct, and to prohibit acts that 'encourage homosexuality or the normalisation of acts that are prohibited under the Act'.³² This perhaps would be achieved by the provision but at what cost? 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, 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 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 key populations groups, including men who have sex with men (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.

It will also further curtail civic space and critical engagements with the government as organisations that do so will be targeted for closure. Thus far, the National Bureau for Non Governmental Organisations (NGO Bureau) has already earmarked NGOs that it believes are promoting homosexuality including HRAPF. The work that HRAPF does is legal aid service provision, research, legal advocacy and human rights trainings. So if this is promotion of homosexuality, then no work on LGBTIQ+ rights is protected.³³

It is also critical to note that this clause seeks to criminalise property owners who let out properties to persons or entities engaged in activities viewed as promoting homosexuality or normalising homosexuality under the Bill, subjecting them to a similar penalty of 20 years' imprisonment. This is bound to affect even people within the general community who let out properties for residential or office purposes to LGBTIQ+ persons and organisations, but will also greatly affect access to housing and shelter for LGBTIQ+ people across the country.

PART IV: Miscellaneous

This part of the Bill deals with miscellaneous matters in the implementation of the law, including the provisions for powers of the courts to order the rehabilitation of convicts, the duty to report suspected homosexuals to the police, etc.

³² Above, 17.

³³ National Bureau of NGO 'Status report on NGOs suspected to be involved in the promotion of lesbian, gay, bisexual, intersex and queer (LGBTIQ) activities in the country' January 2023 (on file with HRAPF).

Clause 12: Rehabilitation of homosexuals

This clause provides for the power of the courts to order the rehabilitation of homosexuals who have been convicted, through the prison system or the probation, social and welfare officers in their areas/ the area where one is to serve their sentence. The underpinning idea of this clause appears to be, as stated in the Memorandum of the Bill, that homosexuality is not an innate and immutable characteristic, and that homosexuals can therefore be rehabilitated/ taught to not be homosexuals anymore. It therefore suggests the institutionalisation of conversion therapy programmes.

Clause 13: Disqualification from employment upon conviction

This clause provides that people who have been convicted of 'homosexuality' and 'aggravated homosexuality' should not be employed in any positions that put them in authority over children or other vulnerable persons. This condition ceases to apply once a probation, social or welfare officer has ascertained that the person (convict) is fully rehabilitated and is no longer a danger to a child or other vulnerable person. The rationale of this seems to be the protection of children and vulnerable persons from sexual abuse from the convicted persons, although it is important to note that the provision does not make any distinctions between persons who were convicted for having consensual sex with adults and persons convicted of defilement or rape of persons of the same-sex.

This blanket provision therefore seems to suggest that LGBTIQ+ people are inherently dangerous or sexual predators from whom the society ought to be protected – even without proof of such abuse.

Clause 14: Disclosure of sexual offences record

This clause builds upon the previous clause, providing that a person convicted of an offence under the Bill (regardless of the actual offence) is required to disclose such history prior to taking on a position that would put them in authority of a minor or other vulnerable person, further emphasising the erroneous view that LGBTIQ+ people are inherently dangerous persons. A person who fails to disclose this information is liable to imprisonment for two years.

Clause 15: Duty to report acts of homosexuality

This clause makes it an offence for one to fail to report knowledge or suspicion of acts of homosexuality that have happened or are likely to happen within their vicinity. This requirement also applies to professional service providers like health workers and mental health specialists, and counselors who are exempted from the professional rules of conduct requiring them to hold client information as confidential, for any disclosures under the Bill without the client's explicit consent.

This essentially means that every single Ugandan is required to report to the police whenever they suspect that someone 'intends' to commit the offence of homosexuality, or has committed it, regardless of their connection to the said act. A person who fails to do this faces

imprisonment for a period of up to six months, and it is particularly worrying that health workers are also expected to abide by this requirement, a provision that will in all likelihood end access to health services for LGBTIQ+ people.

The only professionals that are excused from this reporting requirement are advocates, who are not required to report their clients.³⁴ However, lawyers who are not advocates as well as their paralegals and other staff are not exempt. Since advocates do not work alone in law firms or organisation, this exemption of advocates serves no real purpose.

Clause 16: False sexual allegations

This clause makes it an offence to deliberately make false, malicious or misleading allegations that another person has committed or intends to commit acts of homosexuality, with a penalty of up to a year's imprisonment.

Clause 17: Repeals

Clause 17 provides that sections 145(1)(a), which creates the offence of having carnal knowledge of a person against the order of nature, and section 145(1)(c), which creates the offence of allowing a male person to have carnal knowledge of one against the order or nature, be repealed. This essentially means that these parts of the offence of having carnal knowledge against the order of nature will no longer constitute offences as they will have been effectively replaced by the new law.

Clause 18: Regulations

This clause simply authorizes the Minister in charge of Ethics and Integrity to make regulations for the better implementation of the provisions of the Act.

Schedule

The Bill also has one schedule, which simply provides for the value of a currency point for purposes of properly quantifying suggested fines and penalties under the Bill.

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

The majority of the provisions in the Anti-Homosexuality Bill, 2023 as enacted by Parliament on 21st March 2023 violate rights guaranteed under the Constitution. Whereas Article 79(1) of the Constitution grants the power to make laws on any matter for peace, order, development and good governance, it strictly requires that this power be exercised subject to the Constitution. The Bill of Rights as part of the Constitution would limit this power of Parliament, and as such parliament cannot pass laws that violate the Bill of Rights in the Constitution. Unfortunately, several clauses in the Bill as passed by Parliament violate rights guaranteed in the Constitution, as elaborated in the section below.

³⁴ The Anti-Homosexuality Bill, 2023, clause 15(5).

5.1 The constitutionality of the provisions of the Bill

Clauses 1, 2, 3(1) and (2)(d), (e), (f), (g), and (h), 6, 9, 10, 11, and 14 in as far as they criminalise consensual same-sex relations among adults are unconstitutional. This is based on the following grounds:

5.1.1 The right to equality and freedom from discrimination

Article 21 of the Constitution provides for the right to equality and freedom from discrimination.

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 the state to ensure equal protection and treatment for all persons without discrimination, and Article 21(2) and (3) prohibit discrimination on the basis of personal characteristics, such as, inter alia, 'sex'.³⁵ The differential treatment in the above clauses is based on same sex/gender sexual preference or sexual orientation and is therefore unacceptable.³⁶

Similar provisions on non-discrimination are provided for under Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), both of which prohibit discrimination on the same grounds as Article 21 of the Ugandan Constitution, as well as 'other status', which is not there under article 21 of the Ugandan Constitution. The United Nations Human Rights Committee has however found 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.³⁷

³⁵ See *Uganda Association of Women Lawyers & 5 Others v Attorney General*, Constitutional Petition No. 2 of 2003; [2004] UGCC 1).

³⁶ See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128.

³⁷ UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992.

This position was also upheld by the Court of Appeal of Botswana, when it ruled that sexual orientation is included into the prohibition of discrimination based on sex in section 3 of the Constitution of Botswana.³⁸

Criminalising consensual same-sex relations amounts to 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*,³⁹ 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, 2007 was unconstitutional partly because it was '*legislating the discrimination of persons said to be immoral, harmful and unacceptable*.' The provision had been inserted on the floor of Parliament to prevent 'homosexuals and the like' from claiming marginalisation.⁴⁰

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.⁴¹

While some efforts have been made by Parliament to frame the law in such a way as to appear to apply to everyone without discrimination, the fact remains that the entire Bill both in its framing and the tone it takes (including defining such matters as a sexual act or marriage to apply only to same-sex sexual relationships), is discriminatory and targeted purely at LGBTQ persons, including LGBTQ organising (targeted under Clause 11 on promotion of homosexuality, part of which prohibits the 'normalisation' of prohibited conduct, that is, same sex sexual activity). Therefore, 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 all 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

³⁸ *Letsweletse Motshidiemang v Attorney General* [2019] MAHGB-000591-16, para 157 – 159.

³⁹ *Constitutional Petition No 1 of 2009*.

⁴⁰ The amendment was proposed by Hon. Jalia Bintu and supported by Hon. Syda Bumba, the then Minister of Gender, Labour and Social Development. See Parliament of Uganda 'Hansard, December 12 2016'. For a full discussion of the process leading to the inclusion of the provision, see S Tamale 'Giving with one hand, Taking away with the other: The Uganda Equal Opportunities Commission Act, 2007' in Human Rights Awareness and Promotion Forum (HRAPF) *Still Nowhere to Run: Exposing the deception of minority rights under the Equal Opportunities Commission of Uganda* (2010) 19-22. <http://hrapf.org/?mdocs-file=1604&mdocs-url=false> (accessed 30 March 2023).

⁴¹ *Victor Juliet Mukasa and another v Attorney General*, High Court Miscellaneous Cause No. 247 of 2006.

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.

Another aspect of discrimination exists under clause 3(2)(f) and (g) in as far as they do not consider the capacity of persons with disability or persons with mental illness to consent to sex. This perpetuates the stereotype that People with Disabilities (PWDs) are inherently victims in human sexual relationships. This is differential and unequal legal treatment to PWDs. Further, the Constitution enjoins recognition of the right of PWDs to respect and human dignity, which this bill tramples over by seeking to ignore their right to bodily autonomy and choice.⁴²

Therefore the provisions criminalising consensual same-sex activities, and related acts as well as the general spirit within which the Bill was passed all indicate discrimination based on sex and sexual orientation, which is contrary to article 21 of the Constitution.

5.1.2 *The right to privacy*

Criminalisation of consensual same-sex relations violates the right to privacy. This right is protected in Article 27(2) of the Constitution, which provides that no person shall be subjected to arbitrary 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 sexual relations in private. The essence of right to privacy is the privacy of the person regardless of their sexual orientation and/or gender identity.

Enforcement of several provisions of this Bill 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*,⁴³ where the names, identities and addresses of suspected LGBTIQ+ persons were being revealed in a newspaper ostensibly for purposes of fighting homosexuality, Hon. Justice V.F. Musoke Kibuuka ruled 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 ...

⁴² See objective XVI of the National Objectives and Directive Principles of State Policy, Article 35 of the Constitution.

⁴³ *High Court Miscellaneous Cause No. 163 of 2010.*

The UN Human Rights Committee, while addressing prohibition of homosexuality and the attendant invasion of privacy in the case of *Toonen v Australia* above and observed that ‘...It is undisputed that adult consensual sexual activity in private is covered by the concept of privacy...’⁴⁴

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.’⁴⁵

If the Bill becomes law, with these provisions, it will contravene the right to privacy of homosexuals in Uganda both under Article 17 of the ICCPR and article 27 of the Constitution of Uganda.

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

Criminalisation of consensual same-sex relations would violate the right to dignity and freedom from cruel, inhuman and degrading treatment, which is protected as a non-derogable right by articles 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.⁴⁶

Therefore, the Bill would contravene the right to dignity and freedom from torture, inhuman and degrading treatment contrary to article 24 of the Constitution if passed into law with provisions criminalising consensual same-sex relations.

5.1.4 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) entrenches the principle of legality, which requires criminal offences to be clearly defined. Clause 11 on promotion of homosexuality contains terms such as ‘encourages,’ ‘persuades,’ ‘material promoting or encouraging homosexuality or the commission of an offence under this Act’ and ‘encourage homosexuality or ‘observance’ or ‘normalisation of conduct’ which terms are clearly vague, wide sweeping and not specific. These provisions create offences that are overbroad, vague, uncertain and ambiguous as regards the proscribed acts. In effect, these provisions would penalise the provision of professional counsel on issues of

⁴⁴ UN Human Rights Committee; Communication No. 488/1992, 9.

⁴⁵ *Letsweletse Motshidiemang v Attorney General*, n 38 above, Para 151.

⁴⁶ Above, Para 127.

homosexuality on the part of, among others, medical, religious and legal professionals. Filing cases in court may easily be deemed promotion, for instance, as may selling a newspaper with a report about rights of homosexuals, or a hotel offering a venue for a seminar discussing HIV/health service provision for homosexuals.

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.⁴⁷

In *Francis Tumwesige Ateenyi v Attorney General*,⁴⁸ 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 is a constitutional imperative that a criminal offence is defined and what this means is that it must be specifically defined that us should [be] clear to all what its elements are. The said elements must not be ambiguous, vague or too broad as to defy specific definition.

Therefore, the above provisions if they are part of the Bill when it becomes law would be unconstitutional as they contravene Article 28(12) of the Constitution.

5.1.5 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 expression, religion and conscience, assembly and association respectively.

Clauses 9 and 11 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*,⁴⁹ for instance, 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.*'

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*,⁵⁰ 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

⁴⁷ See *Charles Onyango-Obbo & Another v The Attorney General*, Constitutional Appeal No. 2 of 2002; [2004] UGSC 1).

⁴⁸ Constitutional Petition No. 36 of 2018.

⁴⁹ UN Doc CCPR/C/106/D/1932/2010.

⁵⁰ Constitutional Appeal No. 2 of 2000 [2004] UGSC 1.

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 the Bill.

5.1.6 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).

Article 23(1)(c) provides for one of the circumstances under which a person's liberty may be limited, and this is '*...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 such laws as section 145 of the Penal Code Act are 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,⁵¹ and that will in all likelihood plague the enforcement of this Bill as well, should it pass into law.

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 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 LGBTIQ+ individuals in Uganda from a shelter in

⁵¹ 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.

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.⁵²

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.

5.1.7 The right to property

Clause 9 of the Anti-Homosexuality Bill, by classifying houses or rooms as ‘premises that facilitate homosexuality’ 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 must necessarily include peaceful enjoyment of the property in question. However, this provision of the Bill 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, since their occupation of such property or letting other homosexual people occupy such property is criminalised. It also curtails the free enjoyment of property by landlords, hotel owners and others, therefore violating the right to property protected in Article 26 of the Constitution.

5.1.8 The right to practice one’s profession

The obligation to report in clause 14 as well as criminalisation of promotion of homosexuality in clause 11 affects the right to work and exercise one’s profession by professionals. Under Article 40 (2) of the Constitution, *‘Every person in Uganda has the right to practice his or her profession and carry on any lawful occupation, trade or business.’*

Professional practice in all professions is guided by professional ethics and codes of conduct clearly specified and one of the basic tenets of professional practice is the doctrine of confidentiality by which a professional is bound not to divulge information acquired from a client by virtue of their professional relationship. Despite the Bill purporting to take away liability for those who breach their duty of confidentiality, the damage still remains that such a professional cannot be trusted, which greatly affects the practice of their professions as it removes trust, which is the foundation of the professional – client relationship and thereby violates the right to practice a profession. The provision clearly undermines the right to engage in lawful occupations, trade or business that may directly or indirectly have a link with client’s sexuality. Medical doctors and personnel, lawyers, counselors, religious leaders, traders of sex products, social workers, human rights activists and many other professionals are affected. This is unfortunate in a liberalised market economy, supported very much by the private sector that is grounded on the right to practice one’s profession and carry on any lawful occupation, trade or business.

⁵² *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.

Whereas there are exceptions to the strict adherence to the doctrine of confidentiality, such as; defense of the professional in court proceedings instituted by the client, furtherance of the interest of the client and disclosure by compulsion of the law, compulsion such as under clause 14 of the Bill violates the right to practice one's profession.

The same is true of clauses 12 and 13, which restrict convicted LGBTIQ+ persons from certain professions and areas of work as a potential danger to children and other vulnerable persons, even when one was convicted of consensual sexual relations and has no history of sexual abuse or abuse of minors.

5.1.9 The right to access health care and services

Criminalisation of consensual same sex relations and provision of services to LGBTIQ+ persons violates 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*.⁵³ 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 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,

⁵³ Constitutional Petition No. 16 of 2011.

especially those affected by HIV, from engaging professional counsel and accessing HIV-related service provision and health services.

Therefore, if the Bill becomes law with these provisions, they would 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.

5.2 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 homosexuals and/or persons perceived as homosexuals.

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 to by Uganda. Uganda acceded to the UN Covenant on Civil and Political 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 of the 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*).⁵⁴

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).⁵⁵

⁵⁴ See *Uganda Law Society & Another v Attorney General* Constitutional Petition Nos 2 & 8 of 2002; [2009] UGCC 2.

⁵⁵ See *Attorney General v Susan Kigula & 417 Others* Constitutional Appeal No. 3 of 2006; [2009] UGSC 6).

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 orientation⁵⁶ and the right of privacy with respect to same sex/ gender relationships.⁵⁷

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

Article 43 imposes limitation on human rights in the public interest, and in the interests of protecting the rights of others. The movers of the Bill argue that they are acting in the public interest, specifically protecting morality, culture and the 'traditional heterosexual family'.⁵⁸ For avoidance of doubt, the whole provision is reproduced here:

General limitation on fundamental and other human rights and freedoms

- 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*,⁵⁹ the Supreme Court observed) that;

⁵⁶ See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128).

⁵⁷ See *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992.

⁵⁸ The Anti Homosexuality Bill, 2023, Memorandum.

⁵⁹ Constitutional Appeal No 2 of 2002.

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*,⁶⁰ 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 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.⁶¹

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 however not popular morality but rather constitutional morality. The Indian Supreme Court in *Navtej Singh Johar & Ors. versus Union of India* thr. *Secretary Ministry of Law and Justice*, aptly put it 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.⁶²

⁶⁰ Constitutional Petition No 9 of 2005.

⁶¹ See *Charles Onyango Obbo and Another v Attorney General* (Constitutional Petition No. 15 of 1997) [2000] UGCC 4 (21 July 2000), 17.

⁶² AIR 2018 SC 4321.

Therefore, severely restricting the rights of LGBTIQ+ persons on the basis of morality is unconstitutional. As such clauses 1, 2, 3(1) and (2)(d), (e), (f), (g), and (h), 6, 9, 10, 11, and 14 would if passed into law be unconstitutional for they are an unjustifiable limitation on human rights of LGBTIQ+ persons.

6. Retrogressive law as regards prevention and management of HIV/AIDS

Uganda has made strides towards global targets on ending HIV/AIDS as a public health threat by 2030 as well as the 90-90-90 targets, mostly because of government and civil society efforts to address the vulnerabilities of key and priority populations as defined by the Ministry of Health. This Bill would however 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.⁶³

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.'⁶⁴ They therefore recommended review and reforms on section 145 of the Penal Code in order to decriminalise same sex relationships.⁶⁵

This Bill takes the complete opposite track, however, introducing further facets of criminalisation and targeted harassment, and would therefore only lead to backtracking in the fight against HIV/AIDS.

7. Replication of existing law with punishments that differ from those provided for under provisions criminalising the same conduct

Some of the provisions in the Bill that may not be unconstitutional replicate laws that already exist on the law books, and yet they provide for punishments that differ from those that are

⁶³ Global Commission on HIV and the law 'Final report of the Global Commission on HIV and the law' 9 July 2012, 45-48.

⁶⁴ Uganda AIDS Commission 'Legal Environment Assessment for HIV and AIDS in Uganda' February 2022, 108 -109.

⁶⁵ Above, 112.

provided for under those earlier laws. An outstanding example is Clause 9(1), which essentially provides for trafficking of children for sexual purposes which is already covered under section 3(3) and 5 of the Prevention in Trafficking in Persons Act, 2009 with the death penalty for breach, yet the Bill provides for life imprisonment for the same offence. Depicting sexuality explicit images to children under clause 8(1) (b) and (c) attracts twenty years imprisonment, yet under section 23(2) of the Computer Misuse Act, 2011, the same attracts a penalty of 15 years' imprisonment or seven million two hundred thousand shillings or both punishments. Sections 129A and B of the Penal Code already specifically provide for child to child sex and child sexual offenders, which provisions are reproduced in the bill specifically for same-sex offences.

Whereas section 39 of the Interpretation Act recognises that it is possible for an offence to be provided for under two or more laws, and that this would not be irregular as long as one is not penalised for than once for the same offence, it is also important to note that such replication can cause confusion especially where, as in the instant case, the provisions vary materially either in definition of the offences or in the penalties imposed.

In addition, replicating existing law serves no purpose, and instead takes away certainty when it comes to legal interpretation by the courts, as well as creating room for the law to be used as a tool for persecution of a specific group.

8. Harshness of the punishments in the Bill

It is a cardinal principle of fairness that the punishment for the offence should be proportionate to the harm that results from such conduct/ the harm the punishment is meant to deter.⁶⁶ However, some of the punishments for victimless offences such as homosexuality are so harsh and therefore disproportionate to the conduct that they seek to punish. For example the offence of 'homosexuality' is punishable by life imprisonment, which is the same punishment for defilement of children. The difference between consensual same-sex relations and non-consensual relations such as those involved in defilement of children is huge. In the former instance, the offence is victimless as it is committed by consenting adults with each other, and in the later case, children are incapable of consent to sex. The two offences therefore cannot and should not have the same punishment. Aggravated homosexuality, which means repeat offenders for homosexuality which would include almost all LGBTIQ+ persons if they get arrested and convicted attracts the death penalty. The death penalty in Uganda is limited to very serious crimes such as aggravated defilement, rape and treason. This essentially puts homosexuality at the same level as these offences. The punishment for 'promotion of homosexuality' which includes advocacy for LGBTIQ+ rights is imprisonment for 20 years and for organisations a hefty fine of one billion shillings. This is overkill compared to the nature of the offences. At the same time, opposite sex conduct does not attract any punishments whatsoever. This makes the offences and penalties discriminatory.

⁶⁶ Von Hirsch, A, *Proportionality in the philosophy of punishment*, in M. Tonry (Ed.), *Crime and Justice: A Review of Research*, Volume 16 (1992) pp. 55-98.

In addition, the Bill replicates the penalties that were provided for in the original version of the Anti-Homosexuality Bill, 2009, which was also criticised variously for being draconian.⁶⁷ Seeking to reproduce those penalties more than a decade later is a regressive move on the part of the legislature which ought to be reconsidered.

9. Recommendations

In light of the foregoing, HRAFP recommends that the President of the Republic of Uganda should not sign the Anti-Homosexuality Bill, 2023 into law as the provisions and spirit of the Bill violate key rights that are protected in the Constitution of Uganda. Existing laws already adequately achieve the aims of the Bill and there is no need for such an unconstitutional law.

In the alternative, HRAFP recommends that the President move Parliament to instead consider a more comprehensive law on sexual offences that adequately protects actual victims of sexual offences, abuse, exploitation and harassment without targeting a specific group of people or criminalising victimless consensual sexual activity among adults.

⁶⁷ Oxford Human Rights Hub, 'Uganda's Draconian Anti-Homosexuality Bill 2023', <https://ohrh.law.ox.ac.uk/ugandas-draconian-anti-homosexuality-bill-2023/>, accessed March 30, 2023. See also A Jjuuko and F Tumwesigye, 'The Implications of the Anti-Homosexuality Bill 2009 on Uganda's Legal System', in Evidence Report No. 44, Sexuality, Law and Poverty, Nov 2013.