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

Kampala,

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1. Introduction

On 25th April 2023, President Yoweri Museveni sent the Anti-Homosexuality Bill, 2023 back to Parliament with a request that they reconsider several clauses of the Bill. The Bill was referred to the Committee on Legal and Parliamentary Affairs to consider the President's suggestion. On 2nd May 2023, the Committee tabled its report and Parliament passed the Bill again with amendments to the clauses identified by the President and some more. HRAPF had prior to this change analysed the Bill as enacted on 21st March, 2023, and this legal and human rights analysis focuses only on the amendments made to the Bill by Parliament.

2. Clause by clause discussion of the amendments

Five clauses were amended by Parliament, that is, clause 2, 3, 9, 14 and 17. The specific amendments are as follows:

2.1 Clauses 2 and 3 – distinguishing between being a homosexual and actually engaging in 'acts of homosexuality'

These were amended by adding clause 2(5) and 3(5) which both read as follows:

For the avoidance of doubt, a person who is alleged or suspected of being a homosexual, who has not committed a sexual act with another person of the same sex, does not commit the offence of homosexuality under this section.

The amendment to clauses 2 and 3 does not add much to the Bill except as it proclaims – to avoid doubt. There was nothing confusing about this, apart from the apparent conflation of sexual orientation and sex practices. From the President’s letter to Parliament, it does appear that his criticism referred more to the use of the word ‘homosexuality’, traditionally understood more as an orientation than an action, to denote the prohibited act. In the first version of the Bill that was tabled before Parliament, self-identifying as LGBTQ was made an offence under the definition of homosexuality, which added another layer of confusion, but this was removed when the Bill was passed the first time. By not addressing either one of these two aspects, the amendment did not add any clarity on the elements of the provision.

There was however never any doubt that the clauses do not apply to persons who are ‘alleged or suspected of being homosexual.’ Clause 2(1) provides that ‘A person commits the offence of homosexuality if the person performs a sexual act on another person of the same sex or allows a person of the same sex to perform a sexual act on him or her.’ This is clear enough – that one only commits the offence if they perform a sexual act on a person of the same sex or allow someone to perform a sexual act on them by a person of the same sex.

The clarity is welcome, but it is also not important. From HRAPF’s research and observations as a legal aid service provider to LGBTQ persons for over thirteen years, LGBTQ persons are usually not arrested for specific sexual acts but rather based on how they are perceived by the police or the public, as deduced from how they appear, act or who they relate with.¹ In situations of consensual same-sex relations, it is almost impossible to get evidence of the sexual act as there is no complainant. This explains why many arrested persons are taken for demeaning and dehumanising anal examinations, which are of no evidential value, in the hope of finding some evidence of the sexual act. This will not stop just because clauses 2(5) and 3(5) make a clear distinction between the sexual act and being suspected of being a homosexual. In this respect, the amendment serves no practical purpose. Referring to the offence as ‘homosexuality’ will also continue to create the impression that the orientation of being a homosexual is criminalised in Uganda.

2.2 Clause 9 – Premises

Clause 9 was amended by amalgamating sub clauses 1 and 2 into one clause that now reads

A person who knowingly allows any premises to be used by any person for purposes of homosexuality or to commit an offence under this Act, commits an offence and is liable on conviction to imprisonment for a period not exceeding seven years.

¹ 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.

Parliament made this clearer as the offence is ‘knowingly’ allowing premises to be used for purposes of homosexuality or to commit an offence under the Act. The lower punishment under the provision of seven years was preferred to the one of ten years that was initially provided for under clause 9(1).

Despite this, the provision remains wide enough to still have the same undesirable impact as before, as it certainly would criminalise hotels providing space for LGBTQ people’s workshops or landlords renting space to organization that work on LGBTQ issues, since ‘promotion of homosexuality’ is maintained as an offence under the Act. The effect of this will be denying space to LGBTQ persons to associate or to do any work on protection of the rights of LGBTQ persons. Combined with the provision on promotion of homosexuality, this provision remains deadly to LGBTQ rights in Uganda. It also still affects the right to property for landlords/ property owners, who will have the onerous burden of investigating every tenant, every event and every customer to ensure that they are not ‘promoting’ or ‘normalising’ homosexuality, as per the rather ambiguous standards set in the Bill.

Restricting the use of premises by landlords has already created negative implications for LGBTQ persons even before the Bill becomes law. During the one-month period between 21st March 2023 when the Bill was first passed and 20th April 2023, HRAPF’s legal aid network documented a total of 54 cases involving LGBTQ persons, 40 of which were purely based on the real or presumed sexuality and/or gender identity of the victims. Of these, 15 were cases of evictions from rented property on the basis of real or presumed sexual orientation or gender identity.² There was only one such case in the equivalent period in 2022.

2.3 Clause 14 - Duty to report acts of homosexuality

Clause 14 was amended in subclause (3) to read as follows:

A person who, knowing or having reason to believe that a person has committed or intends to commit an offence against a child or vulnerable person, and does not report the matter to police, commits an offence and is liable, on conviction, to a fine not exceeding five thousand currency points or imprisonment for a period not exceeding five years.

Clause 14(1) as amended still imposes a duty on everyone ‘who knows or has reasonable suspicion that a person has committed or intends to commit the offence of homosexuality or any other offence under this Act’ to report to the Police. However, the amendment to clause 14 only provides a punishment for those who do not report such offences against a child or vulnerable person. The duty to report for all the other categories does not carry any penalty.

² Human Rights Awareness and Promotion Forum ‘Arrests, evictions and violence: Report of violations against LGBTQ Persons for the first month following the passing of Uganda’s Anti-Homosexuality Bill, 2023’ 21st April 2023 <https://hrapf.org/violation-reports/> (accessed 2nd May 2023).

The punishment has been enhanced from six months' imprisonment to five years' imprisonment.

The Committee in their report seem to have intended to delete clause 14(1) or amend it to apply to only children and vulnerable persons, and this may be cured in the official draft to be presented to the President, but if it is not, then all persons who do not report people that they know or reasonably suspect to have committed an offence under the Act would have committed an offence, although there is no punishment provided for such an offence under the Act. The Penal Code Act in section 22 provides that where there is no punishment specially provided for any misdemeanour, it shall be punishable with imprisonment for a period not exceeding two years. However, that only applies to the Penal Code and there is no similar provision in the Bill, thus this current framing creates a gap in the law.

Unless this is clarified this change provides little relief as there will still be a legal obligation to report for all persons and for all offences under the Bill, which will affect counselors, medical doctors, lawyers who are not Advocates, parents and everyone else, something that would have a huge impact on demand and access to social services for LGBTQ persons. However, if clause 14(1) only applies to offences concerning children and vulnerable persons, then the impact of the provision would reduce in scope and would enable services to continue being provided to LGBTQ persons, subject of course to the applicability of clause 11 on promotion of homosexuality, which remains intact and would essentially also criminalise work done to 'normalise' homosexuality. There is a very real danger that health, legal or other service provision to LGBTQ people would qualify as 'normalisation' of prohibited conduct.

2.4 Clause 17 - repealing the penal code provisions

Parliament also voted to retain section 145(a) and (c) of the Penal Code which criminalise 'carnal knowledge against the order of nature.' These are the provisions under which consensual and nonconsensual same-sex relations are currently criminalised, and under which hundreds of real or suspected LGBTQ persons have been arrested before.³

Maintaining section 145 of the Penal code would amount to expanded criminalisation of consensual same-sex relations.⁴ This would go contrary to the stated motive behind the Bill which was to 'establish a comprehensive and enhanced legislation to protect the traditional family ...'⁵ The Bill was touted as a law consolidating all laws concerning homosexuality in Uganda, and retention of the criminalisation in the Penal Code Act clearly goes against this stated intention.

The Anti-Homosexuality Bill was intended to cure the defects in the Penal Code, one of which was the argument that the provision is vague. Vague provisions are dangerous in the

³ See HRAFP & CSCHRCL, n 1 above.

⁴ For a discussion of the concept of expanded criminalisation see, A Jjuuko & M Tabengwa 'Expanded criminalisation of consensual same sex relations in Africa: Contextualizing the recent developments' in N Nicol et al (eds) (2018) 'Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope' Institute of Commonwealth Studies, School of Advanced Study, University of London, 63.

⁵ See Memorandum to the Anti-Homosexuality Bill, 2023.

sense that one cannot be sure of what conduct is criminalised, and are to that extent unconstitutional. The existence of both laws at the same time means that whereas one can sufficiently know what to avoid under the Anti-Homosexuality Act, the vagueness of the Penal Code provision makes it difficult to be sure what is criminalised, and someone can still be arrested under the vague law.

HRAPF's experience with law enforcement shows that even if no single person has been convicted for consensual same-sex relations under the Penal Code in recent times, tens of persons are arrested every year under section 145 of the Penal Code simply based on their appearance.⁶ This amounts to persecution rather than prosecution.

Leaving section 145 in place creates the likely danger that the police will ignore clauses 2 and 3 of the Anti-Homosexuality Bill, which require evidence of the sexual act, and focus on persecuting LGBTQ persons under the vague section 145 of the Penal Code like they have always done.

Removing clause 17 shoots down the whole motivation behind the clarity recommended by the President for clauses 2 and 3, and which were adopted by Parliament to clearly show that persons who are suspected of being homosexual commit no offence unless they perform the sexual act. It is a classic case of 'giving with one hand and taking away with the other', presumably creating clarity and then returning a provision the Committee (and the mover of the Bill) have both criticised before for vagueness.

It is also important to note that the removal of clause 17 was never called for by the President. It was referred to by the committee as 'consequential amendment.' This implies that the Committee felt that clarifying the reach of clause 2 and 3 reduced the impact of clauses 2 and 3, rendering section 145 relevant once again. Section 145 is similar in import to clause 2 and 3 as it criminalises acts rather than identities, as was clearly held by Musoke Kibuuka J in the High Court case of *Kasha Jacqueline, Pepe Onziema & David Kato Vs Giles Muhame and The Rollingstone Publication Limited*.⁷ The repeal of section 145 should therefore have been the real consequence of the inclusion of clauses 2(e) and 3(e) in the Bill.

By considering clause 17, the Committee also went contrary to the rules of Procedure of Parliament. Rule 143(4) requires the Committee to restrict itself to the consideration of matters referred to by the President and not to re-open the entire Bill for reconsideration. Clause 17 was never referred to at all in the President's letter and should not have been interfered with.

3. Conclusion

The amendments made to the Anti-Homosexuality Bill, 2023 are not sufficient to cure the Bill of its unconstitutionality. The Bill remains in violation of Uganda's supreme law,

⁶ HRAPF, & CSCHRCL, n1 above.

⁷ High Court Miscellaneous Cause No. 163 of 2010.

international human rights instruments that are binding to Uganda, and will negatively impact on the fight against HIV/AIDs in Uganda.

4. Recommendations

HRAPF recommends that the President should send the Bill to Parliament advising them to drop the Bill or overhaul it in order to align with the Constitution. The Bill cannot be cured of its unconstitutionality as it is fundamentally discriminatory as it targets as specific group of people for sanctioning solely based on their sex, gender and/or sexual orientation. It can therefore only be saved by completely overhauling or shelving the Bill in favour of a more comprehensive law on protection of all persons from sexual exploitation, abuse and harassment, regardless of their sexuality.