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The Implications of the Anti-Homosexuality Bill 2009 on Uganda's Legal System

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THE IMPLICATIONS OF THE ANTI-HOMOSEXUALITY BILL 2009 ON UGANDA'S LEGAL SYSTEM

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1 Introduction

Uganda's Anti-Homosexuality Bill 2009 (AHB or the bill) was controversial right from the time of its inception. Its tabling in Uganda's parliament in October 2009 was greatly welcomed by some religious leaders and sections of the population, while at the same time, it was vehemently opposed by some human rights organisations in Uganda and abroad. Foreign governments including the United States, the United Kingdom and Sweden among others also weighed in threatening to suspend aid to Uganda if the bill was passed into law. The provisions of the bill pose a threat to the fundamental rights and freedoms of all persons in Uganda regardless of their sexual orientation, but far more so for Gay, Lesbian, Bisexual, Transgender and Intersex (LGBTI) persons. However, beyond the violations of human rights that are envisaged if the bill becomes law, the bill poses unique questions for lawyers and the legal system as regards its implementation and how it impacts on established principles of law and criminal justice.

This paper analyses the implications of the bill on Uganda's legal system. It discusses the contents of the AHB, traces its background as well as its current status, analyses the legal issues that are likely to arise if it becomes law, discusses the legal issues that are already arising with the bill still a bill, and finally discusses some of the positive aspects of the bill. Although the AHB is the main focus of this paper, it is by no means the only legal challenge faced by the LGBTI community in Uganda. This paper is thus part of HRAPF's broad legal advocacy strategy to have unfair laws which discriminate against LGBTI persons and other sexual minorities removed from the law books so that all persons can enjoy equality before and under the law that is espoused by Article 21 of the Constitution. To this end some recommendations are made.

2 The Anti-Homosexuality Bill (AHB): contents, background and current status

2.1 Contents of the bill

The Anti-Homosexuality Bill, 2009¹ was tabled in the parliament of Uganda as a private member's bill by Hon. David Bahati, Member of Parliament for Ndoorwa East Constituency, Kabale District in September 2009. The purpose of the bill as stated in its memorandum is:

To establish a comprehensive consolidated legislation to protect the traditional family by (i) prohibiting any form of sexual relations between persons of the same sex and (ii) the promotion or recognition of such relations in public institutions and other places through or with the support of any governmental entity in Uganda or any Non-Governmental Organization inside or outside the Country.²

The bill contains provisions that seek to achieve this purpose which include: the creation of the offence of homosexuality.³ Homosexuality is defined widely in the bill to include all penetration of the anus or mouth with a penis or any other sexual contraption⁴ or the use of any object or sexual contraption to penetrate or stimulate a sexual organ of a person of the same sex;⁵ or the touching of another person with the intention of committing the act of homosexuality.⁶ Homosexuality is punishable by life imprisonment.⁷ Indeed, the bill clearly regards homosexuality not as a sexual orientation but rather a sexual act. As such the homosexual is defined by what he/she does, not by his/her sexual attraction. Indeed, the preamble of the bill stresses that 'same sex attraction is not an innate and immutable characteristic.'⁸

The bill also creates the offence of aggravated homosexuality. This offence is committed where the 'victim' is a minor;⁹ or where the offender is a person living with HIV;¹⁰ or where the offender is a parent or guardian of the 'victim';¹¹ or where the offender is a person in authority over the 'victim';¹² and where the victim of the offence is a person with disability;¹³ or where the offender is a serial offender;¹⁴ or uses drugs or other substances to stupefy or overpower the victim so as to have same sex intercourse with him or her.¹⁵ The punishment for this is the death penalty.¹⁶ An HIV test is mandatory.¹⁷ This provision caused the most outrage and it earned the bill the nickname 'Kill the Gays bill'. However, it is important to note that it is in line with the 2007 amendment to the Penal Code Act which introduced the death

¹ The Anti-Homosexuality Bill, Bill No. 18 of 2009, Bills Supplement to the Uganda Gazette No. 47 Volume CII, 25th September 2009.

² *Ibid.*, memorandum to the bill.

³ *Ibid.*, clause 2.

⁴ *Ibid.*, clause 2(1)(a).

⁵ *Ibid.*, clause 2(1)(b).

⁶ *Ibid.*, clause 2(1)(c).

⁷ *Ibid.*, clause 2(2). It is important to note that though the bill purports to strengthen the existing law, all it does in this case is to widen the definition but the punishment remains exactly the same. Section 145 of the Penal Code also punishes 'carnal knowledge against the order of nature' by life imprisonment.

⁸ *Ibid.*, memorandum to the bill, para 1.1.

⁹ Clause 3(1)(a).

¹⁰ Clause 3(1)(b).

¹¹ Clause 3(1)(c).

¹² Clause 3(1)(d).

¹³ Clause 3(1)(e).

¹⁴ Clause 3(1)(f).

¹⁵ Clause 3(1)(g).

¹⁶ Clause 3(2).

¹⁷ Clause 3(3).

penalty for 'aggravated defilement' – which refers to the defilement of a child less than 18 years of age in all the above circumstances, except the age which is defined as below 14 years.¹⁸ However, in terms of implications, whereas defilement is clearly a criminal offence committed against a child below the age of 18 years, consensual same sex acts are victimless offences and cannot be equated to defilement, except where one of the parties is a child. The provision on repeat offenders, also potentially puts all homosexual persons at risk of arrest unlike defilers who indeed deserve a tougher punishment if they repeat the offence. Mandatory HIV tests also create more stigma against persons living with HIV/AIDS, and for LGBTI persons this could constitute double stigma.

The bill further provides for attempts to commit homosexuality or aggravated homosexuality,¹⁹ aiding and abetting of homosexuality,²⁰ conspiracy to commit homosexuality,²¹ procuring homosexuality by threats,²² detention with intent to commit homosexuality,²³ keeping of brothels,²⁴ same sex marriages,²⁵ promotion of homosexuality,²⁶ and failure to disclose the offence. It also provides for extra-territorial jurisdiction,²⁷ and extradition of offenders.²⁸ It also seeks to nullify all international instruments that 'promote' homosexuality.²⁹ What these proposed offences do is to elevate 'homosexuality' to become one of the most serious crimes in the country to the level of treason, murder and robbery.

2.2 Reactions to the bill

The tabling of the bill in parliament immediately courted controversy with overwhelming support from conservative religious leaders in the country and outright rejection and opposition from progressive human rights activists nationally and internationally. Its provisions were discussed the world over and world leaders like US President Barack Obama,³⁰ and UK Prime Minister Gordon Brown,³¹ South Africa's Archbishop Desmond Tutu all weighing in to condemn the bill.³² Civil society organisations in Uganda reacted by forming a coalition to oppose the bill. This was the Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL), an umbrella of over 45 sexual minority and mainstream human rights organisations coming together to oppose the affront to human rights and

¹⁸ Penal Code (Amendment) Act, 2007, section 2.

¹⁹ Punishable by up to seven years' imprisonment and life imprisonment for attempts to commit aggravated homosexuality (clause 4).

²⁰ Punishable by up to seven years' imprisonment (clause 7).

²¹ Punishable by up to seven years' imprisonment (clause 8).

²² Clause 9.

²³ Punishable by up to seven years' imprisonment (clause 10).

²⁴ Punishable with up to seven years' imprisonment (clause 11).

²⁵ Purporting to contract a same sex marriage will be punishable by imprisonment for life (clause 12).

²⁶ Clause 13 criminalised the procuring, production, reproduction of pornographic materials, funding or sponsoring activities to promote homosexuality, offering premises, uses of technological devices or acting as an accomplice to promote or abet. On conviction, the punishment is a fine of five thousand currency points (Ushs. 100,000,000 or US\$ 40,000) or a minimum of five years in prison and in the case of a body corporate the directors are liable to seven years' imprisonment and the cancellation of the certificate of registration. This clause would effectively mean the end of sexual rights advocacy in Uganda, as any human rights work could easily be regarded as promotion, and also funding for such work could be effectively cut.

²⁷ Clause 16 would even affect the commission of the homosexuality and other offences outside Uganda by a Ugandan citizen or permanent resident, or where the offence was committed partly in and partly outside Uganda.

²⁸ Clause 17 makes the offences under the bill extraditable. This thus elevates them to the same status as other extraditable offences like treason and misprision of treason.

²⁹ Clause 18 nullifies any 'international legal instrument' whose provisions are contradictory to the spirit and provisions of the bill. This implies that the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights, the International Covenant on Social, Economic and Cultural Rights, the Convention on Elimination of all forms of Discrimination against Women, and a host of other important human rights treaties that provide for equality for all would no longer be applicable in Uganda.

³⁰ 'Obama Condemns Uganda Anti-Gay Bill as "Odious"', *Reuters*, 4 Feb 2010, <http://reuters.com/article/2010/02/04/us-uganda-gays-obama-idUUSTRE6134EZ20100204>

³¹ Mangus, Rhonda, J. (2009) 'Brown Joins Harper against Uganda's Anti-Homosexuality Bill 2009', 28 Nov 2009, Now Public, <http://www.nowpublic.com/world/brown-joins-harper-against-ugandas-anti-homosexuality-Bill-2009>

³² Sapa-AFP (2012) 'Tutu likens Uganda Anti-Gay Bill to Apartheid Laws', Times Live, <http://www.timeslive.co.za/africa/2012/12/12/tutu-likens-uganda-anti-gay-Bill-to-apartheid-laws>

criminal justice posed by the bill.³³ All the opposition against the bill led to Ugandan President Yoweri Museveni asking members of parliament from his party to 'go slow on the bill' as it was a foreign policy issue.³⁴ Government began to increasingly distance itself from the bill with the Minister of Investment stating that it was bad for investment³⁵ and a Cabinet Sub Committee submitting a paper stating that the bill was not necessary as it simply replicated existing laws.³⁶

Nevertheless the Committee on Legal and Parliamentary Affairs to which the bill had been referred continued to collect views from stakeholders and prepared a report for the second reading of the bill.

Fortunately the 8th parliament came to an end before the bill was tabled. However, in an unprecedented move, the Speaker of the 9th parliament, Hon. Rebecca Kadaga allowed a motion to 'save' all bills from the 8th parliament. The Committee's report was presented to the 9th parliament together with the original text of the bill, which was reintroduced by a resolution of parliament on 31st October 2011. Thereafter, the AHB and other bills that had been pending were all referred back to the relevant committees for their reports. Despite the AHB appearing on the parliamentary order papers as part of business to follow, and despite the Speaker's vow to have the bill passed by December 2012 as a Christmas gift to Ugandans,³⁷ the bill still remains where it was in 2010 – with the Legal and Parliamentary Affairs Committee.

Four members of the Committee prepared and presented to the Speaker of Parliament a minority report departing from the recommendations of the main report in accordance with rule 194(1) of the Rules of Procedure of Parliament. The minority report calls for the bill to be dropped altogether reasoning that 'A citizen loses a right to his/her citizenry the moment the state intervenes in the affairs of his/her bedroom...'³⁸ which as the report further states contravenes Article 27 of the Constitution and that what two consenting adults do in the privacy of their bedroom should not be the business of parliament.

This state of affairs has yielded public confusion about the legal status of the bill with some quarters, even among law enforcement agencies, thinking and acting as if the bill is already law. This has been experienced first-hand by a number of HRAPF Legal Aid Lawyers who have had to explain countless times to members of the public and some Uganda Police Force officials that the bill has not yet been passed into law.

³³ For more information visit www.ugandans4rights.org

³⁴ Olupot, M. and Musoke, C. (2010) 'Museveni Warns NRM on Homo Bill', *The New Vision*, 12 January 2010

³⁵ 'Uganda Minister Says Gay Death Penalty 'Unnecessary'', BBC, 8 Jan 2010, <http://news.bbc.co.uk/2/hi/africa/8448197.stm>

³⁶ 'Cabinet Wants Gays Bill Dropped', *The Daily Monitor*, 13 April 2010

³⁷ Biryabarema, E. (2012) 'Uganda Says Wants to Pass Anti-Gay Law as "Christmas Gift"', *Reuters*, Nov 13, 2012, <http://uk.reuters.com/article/2012/11/13/uk-uganda-homosexuality-idUKBRE8AC0VC20121113?feedType=RSS&feedName=oddlyEnoughNews>

³⁸ See Parliament of Uganda (2012) 'Minority Report by members of the Sectoral Committee on Legal and Parliamentary Affairs Committee on the Anti-Homosexuality Bill, 2009', <http://ugandans4rights.org/index.php/the-news/413-parliament-of-uganda-minority-report-by-members-of-the-sectoral-committee-on-legal-and-parliamentary-affairs-on-the-anti-homosexuality-Bill-2009.html>

2.3 Amended or not amended? The current status of the bill

Various statements to the effect that the bill has been amended to remove the death penalty and a number of other provisions have been attributed to the sponsor of the bill, Hon. David Bahati and other members of parliament.³⁹ The facts, however, indicate otherwise.

The 9th parliament in 'saving' the bill allowed Bahati to table the bill again together with the report of the Legal and Parliamentary Affairs Committee that had been written but never tabled before the 8th parliament. The Committee report proposed a number of changes to the bill which included: removal of offences to do with attempts to commit homosexuality and aggravated homosexuality reasoning that these offences will be too hard to prove leading to absurdities; recommendation to drop the provision on extra-territorial application and; deleting clause 18 on nullifying international treaties. The drawbacks of the recommendations included the retention of: the death penalty, the offences of homosexuality, aggravated homosexuality and promoting homosexuality. Overall the Committee recommended the passing of the bill and even expanded the offence on same sex marriages by adding, to the original criminalisation of parties to the marriage, a provision to cover persons and institutions which conduct such marriages.

During its re-introduction, Hon. Bahati stated that the bill incorporated the recommendations of the Legal and Parliamentary Affairs Committee but the text of the bill was not amended to incorporate the recommendations. This leaves the question as to what the exact text of the bill, which is currently before parliament is. Legally, a bill cannot be amended verbally and any amendments have to be incorporated in the bill in writing. The conclusion therefore is that the bill is still in its original text. In case a bill is amended the amended version has to be published in the *Uganda Gazette* and this has never been done. Efforts to get a copy of the 'amended' from parliament bill by the Civil Society Coalition on Human Rights and Constitutional Law received a written response from the clerk of parliament that the bill has never been amended.⁴⁰

HRAPF's opinion therefore is it that the bill has never been amended and remains as originally tabled.

2.4 Background to the bill

The origins of the bill can be traced from the introduction of English law in Uganda by the extension of the African Order in Council 1890 to Uganda. The African Order in Council 1890 introduced the law applicable in England to be applied to Uganda. These laws included the Criminal Law Amendment Act 1885 which had recriminalised male homosexuality in England.⁴¹ Later, the 1902 Order in Council under section 15(2) enabled the application to the Uganda protectorate of laws in the United Kingdom and its other colonies as they existed on or before 11 August, 1902. The 1909 Applied Indian Acts Ordinance made the Indian Penal Code 1860 applicable to Uganda until 1830 when Uganda got its first Penal Code which was modelled on the Griffiths Penal Code of Queensland, Australia. Homosexuality was arguably criminalised under the 'unnatural offences' provisions. The 1930 Penal Code was replaced by the 1950 Penal Code which is still in use today as Cap 120 of the Laws of Uganda, Revised Edition, 2000. The provisions criminalising homosexuality were never discarded and continue in use.

³⁹ See, for example, 'Uganda Anti-Homosexuality Bill: MPs Drop Death Penalty', BBC, <http://www.bbc.co.uk/news/world-africa-20463887>

⁴⁰ Letter on file with authors.

⁴¹ *Criminal Law Amendment Act 1885* (48 and 49 Vict. c.69).

Section 145(a) of the Penal Code of Uganda Cap 120 creates the offence of ‘unnatural offences’ which is described as having carnal knowledge against the order of nature and section 145(c) criminalises a person permitting another person to have carnal knowledge of him/her against the order of nature. Offenders in both cases are liable to a maximum imprisonment sentence for life. Sections 146, 147 and 148 create inchoate and other related offences of attempts to commit unnatural offences, indecent assault on boys under eighteen and indecent practices respectively. These provisions do not criminalise homosexuality *per se* but are not clearly defined and are thus subject to ‘...to other more obvious interpretations rather than homosexuality’.⁴² The promoters of the bill state that the current law is not strong enough to curb the ‘vice of homosexuality’ and thus the need for the bill. The bill therefore tries to remove the ambiguity in the current law by creating a clearly defined offence of homosexuality and related offences.

The bill was preceded by increased stigma towards homosexuality which was perhaps due to the nascent gay rights movement in Uganda led by among others Victor Mukasa. Indeed Victor Mukasa engineered the first LGBTI court success in Uganda in *Victor Juliet Mukasa and anor. v. Attorney General*⁴³ where she challenged the unlawful search of her premises, seizure of materials and public undressing and humiliation of her friend by local authorities. The High Court declared that there had been an invasion of the right to privacy and human dignity.

Evangelical pastors led by Martin Ssempe of Makerere Community Church, Stephen Langa of Family Life Network and supported by American evangelical groups led by Scott Lively,⁴⁴ President of Abiding Truth Ministries launched a campaign to fight what they described as the western and unAfrican vice of homosexuality. They used the language of protection of children from homosexuality and preservation of the traditional family. This language later found its way into the bill.⁴⁵ In 2005 an amendment was included in the Constitution of Uganda 1995 which prohibited same sex marriages.⁴⁶ Various anti-gay marches were organised in Kampala drawing crowds onto the streets to denounce homosexuals as perverted individuals who were paid by Americans and Europeans to recruit schoolchildren into homosexuality. After an anti-gay conference which was facilitated by Scott Lively and two other Americans, the then Minister of Ethics and Integrity, Hon. Nsaba Buturo announced that a new ‘tough law on gays’ was in the offing.⁴⁷ Sure enough, the AHB was tabled shortly thereafter.

⁴² Jjuuko, A. (2008).

⁴³ High Court Misc. Cause No. 247 of 2006, (2008) AHRLR 248.

⁴⁴ In March 2009 he organised a conference in Kampala under the theme ‘The Gay Agenda — That Whole Hidden and Dark Agenda’ which was attended by many Ugandans including police officers, teachers and national politicians.

⁴⁵ Memorandum to the Anti-Homosexuality Bill.

⁴⁶ Article 31(2)A.

⁴⁷ Namutebi, J. (2009) ‘Anti-Gay Bill to be Tabled Soon’, *New Vision*, 1 July 2009.

3 Likely legal implications of passing the bill

The provisions of the AHB attack fundamental universal human rights that are enshrined in both international human rights instruments and under the Ugandan Constitution. Some provisions also replicate existing law. Generally, most provisions of the bill would pose great challenges in implementation if the bill became law, and finally many provisions contravene long-standing tenets and principles of law. All these categories of provisions are discussed below:

3.1 Violation of provisions of the Constitution

The Constitution is the Supreme law of the Republic of Uganda, and any law that is inconsistent or in contravention of the Constitution is null and void to the extent of its inconsistency.⁴⁸ The AHB contains a number of provisions that if passed into law would be inconsistent with the Constitution. The provisions of the Constitution that are likely to be violated are:

Article 21(1) on the right to equality and freedom from discrimination: Article 21(1) of the Constitution, which 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.’ Article 21(2) buttresses this provision by stating that ‘[w]ithout prejudice to clause (1) of this Article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.’ To discriminate is defined as the giving of preferential treatment only attributable to the above characteristics.

Though sexual orientation is not specifically mentioned in Article 21(2), the provision starts with recognising the broad reach of Article 21(1), which it does not limit. As such the prohibition on discrimination covers all persons. In the case of the *Victor Mukasa* case (discussed above), the High Court of Uganda stated that the rights in the Constitution apply to all Ugandans without discrimination. In violation of this constitutional guarantee of freedom from discrimination, the AHB seeks to punish persons for simply being homosexuals. Therefore all the clauses creating offences that are only targeted towards homosexuals would be unconstitutional.

Also the provision that makes homosexual relations with a disabled person to be aggravated homosexuality discriminates against disabled persons by regarding them as incapable of consenting to sex.

Article 27 on the right to privacy: Article 27 protects the sanctity of a person’s body, home, correspondence, communications or other property from unlawful search and interference. Consensual adult same sex activity in private is covered under the concept of privacy as was held by the UN Human Rights Committee in the case of *Toonen v. Australia*.⁴⁹ The Committee directed Australia to repeal the offending law.

In the *Victor Mukasa* case, court found that the search of the first applicant’s home without a warrant, and the taking away of her personal effects was a violation of the right to privacy, and the state’s assertion that they were looking for evidence of lesbianism could not stand. This case was cited with approval in the later case of *Kasha Jacqueline, Pepe Onziema and*

⁴⁸ The Constitution of the Republic of Uganda, Article 2.

⁴⁹ UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992), 9.

David Kato v. Giles Muhame and The Rolling Stone Publication Ltd, where Hon. Justice V. F. Musoke Kibuka 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.⁵⁰

Although the right to privacy is not absolute and is subject to the general limitation clause in Article 43(1) of the Constitution and indeed can be lifted for purposes of investigating crime under the Criminal Procedure Code Act Cap 117, the Magistrates Courts Act Cap 16 and a host of other laws governing the administration of criminal justice, monitoring private sexual matters and bedroom activity between consenting adults for purposes of collecting evidence to punish a victimless crime would not pass the test laid down by the Supreme Court in the case of *Charles Onyango Obbo & Anor v. Attorney General*.⁵¹ In that case, Mulenga JSC stated that the 'yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society.' Seeking to find evidence of a victimless crime using highly invasive measures would indeed not qualify under this test.

Article 29(1) on freedom of expression, assembly and association: Clause 13 of the bill which seeks to criminalise 'promotion of homosexuality' would also contravene Articles 29(1)(a), 29(1)(d) and 29(1)(e) of the Constitution, which protect the rights to freedom of speech, assembly and association respectively. This is because, among the actions listed as promoting homosexuality is funding homosexual activities, providing premises for the conduction of homosexuality and transmitting pornographic materials and electronics like internet and mobile phones for purposes of promoting homosexuality. The clause seeks to criminalise the activities of individuals or organisations that work on issues of human rights, sexual orientation and gender identity and also has ramifications for other actors working on HIV/AIDS programmes.⁵² It also targets donors, the media, institutions of learning, religious leaders, trade unions, political parties and private businesses as they are all covered by the breadth of this clause.

All these bodies, organisations and even individuals are protected under freedom of expression, assembly and association. Freedom of expression was held to be a fundamental right in the *Charles Onyango Obbo* case.⁵³ Mulenga JSC stated that the right:

is not confined to categories, such as correct opinions, sound ideas or truthful information. Subject to the limitation under Article 43, a person's expression or statement is not precluded from constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views. Indeed the protection is most relevant and required where a person's views are opposed or objected to by society or any part thereof, as false or wrong.

As such even messages advocating safe sex, condemning persecution and even those expressing access services for LGBTI persons would be protected.

⁵⁰ High Court Miscellaneous Cause No. 163 of 2010.

⁵¹ *Charles Onyango Obbo v. Attorney General* [1997] UGCC 7.

⁵² Amnesty International Uganda (2010) *Anti-Homosexuality Law Inherently Discriminatory and Threatens Broader Human Rights*, <http://www.amnesty.org/en/library/asset/AFR59/003/2010/en/befd26d0-8051-469b-af76-b76858c423ff/afr590032010en.pdf>

⁵³ *Ibid.*

The same persons are also free to assemble in pursuance of their objectives. In the case of *Muwanga Kivumbi v. Attorney General*, the Constitutional Court found that freedom of assembly was a fundamental right that can only be restricted under the provisions of Article 43(1). Applying the test laid down in *Charles Onyango Obbo*, the court found that a law giving the Inspector General police powers to prohibit the convening of a public assembly was unconstitutional. It went beyond what is reasonably justifiable in a free and democratic society. Byamugisha JA stated that ‘maintaining the freedom to assemble and express dissent remains a powerful indicator of the democratic and political health of a country.’ As such, stopping meetings in the name of suppressing the promotion of homosexuality may not pass as a justifiable limitation on freedom of assembly especially in light of the intended aim of protecting morals, since morality is not a defined concept and there is no agreed Ugandan view of what is moral and what is not. The case of *Kasha Jacqueline, Frank Mugisha, Geoffrey Ogwaro and Pepe Julian Onziema v. Attorney General and Hon. Simon Lokodo* is challenging the stopping of a skills training workshop organised by LGBTI persons by the Minister of Ethics and Integrity Fr. Simon Lokodo on the pretext that it was promoting homosexuality.⁵⁴ It is still pending before court. The decision in this ruling will put this matter to rest.

The right to freedom of association concerns the formation and joining of groups for any ‘ideological, religious, political, economic, social, cultural, sports or other purposes’.⁵⁵ Even organisations whose views may be contrary to the views of the majority are protected. The human rights standards applicable especially where the majority in a society disapprove of a given association or group have been declared in some jurisdictions and regional institutions. For example in *Sidiropoulos and ors. v. Greece*, the European Court of Human Rights found that the Macedonian minority could form an organisation in Turkey despite the majority’s disapproval.⁵⁶ The case concerned the refusal to register a Silesian ethnic minority. Though no such court declaration has been made a Ugandan court to date, it helps us to understand the scope of the right to freedom of assembly and association in Article 29 of our Constitution as far as minorities are concerned.

Article 40(2) on the right to work: Under Article 40(2), ‘Every person in Uganda has the right to practice his or her profession and carry on any lawful occupation, trade or business.’

Unfortunately, under clause 14 of the bill, ‘persons in authority’ who fail to report the commission of an offence under the Act within 24 hours of first having had knowledge of such offence are liable to prosecution. Authority is defined under the bill to mean ‘having power and control over other people because of your knowledge and official position; and shall include a person who exercises religious, political, economic or social authority’. Under this definition, lawyers, medical doctors and other medical personnel, counsellors, religious leaders, traders, social workers, human rights activists and many other professionals are all affected by clause 14.

This imposition of liability flies in the face of the right to work, as professionals will have to watch their backs or prohibit the admission of persons who may identify as LGBTI or be forced to break the duties of confidentiality owed to clients.

Article 287 on adherence to Uganda’s treaty obligations: Under Article 287 of the Constitution, Uganda is obliged to fully subscribe to all its international treaty obligations ratified prior to the passing of the 1995 Constitution. This means that these treaties remain binding on the country.

⁵⁴ Misc. Application. No 33 of 2012.

⁵⁵ Commonwealth Secretariat ‘Best Practice: Freedom of Expression, Association and Assembly’ 2003, 12.

⁵⁶ *Sidiropoulos and ors. v. Greece*, 57/1997/841/1047.

Clause 18 of the bill, however, seeks to nullify all treaties, protocols, declarations and conventions that are inconsistent with the bill. This includes those that were ratified prior to the passing of the Constitution, which goes contrary to Article 287.

Legal issues arising: The legal issue that arises here is what happens in the event that the bill is passed with these provisions that violate the Constitution. The first scenario is that before passing the bill, the various Constitutional provisions are amended to accommodate the AHB provisions, and the second one is that they are declared unconstitutional by the Constitutional Court.

The first option is indeed the most unlikely one, for amendment of the Constitution is done through a special procedure. Chapter 4 in which most of the provisions are can, apart from Article 44 as well as Article 287, be amended by an Act of parliament solely aimed at amending the Constitution and which has been passed by not less than two-thirds of all members of parliament at both the second and third readings.⁵⁷ Practically this is rather difficult and in its 18-year history the Ugandan Constitution has only been amended twice in 2005. Again, even if it was amended, the amendments would have to go contrary to established international standards on human rights as well as Uganda's obligations under international law. Therefore this option is not practicable.

The second option is the more likely option and indeed the one that has some chance of having the provisions upheld. This is because the provisions do not become unconstitutional automatically but have to be declared unconstitutional by the Constitutional Court under Article 173. The Constitutional Court has to be moved, and so if no one challenges the laws, they will remain valid. Even challenging them does not guarantee that the Court may declare them unconstitutional as this depends on the judges sitting on the court, the prevailing political climate among other factors. Nevertheless, the likelihood of the provisions going unchallenged is remote, and so at the very least a judgment of the Constitutional Court on the provisions will have to be made adding to the country's constitutional law and human rights jurisprudence.

3.2 Replication of existing law

Many provisions of the AHB are a replica of existing laws. These provisions are:

Clause 2 which seeks to criminalise homosexuality: The acts sought to be criminalised are already covered under section 145 of the Penal Code Act, which criminalises carnal knowledge against the order of nature. The difference is that section 145 does not define what 'carnal knowledge against the order of nature' means but traditionally, the provision has been understood to refer to same sex activities. Both section 145 and clause 2 do not draw a distinction between consensual adult same sex acts in private and rape, defilement or other forms of non-consensual same sex acts. The punishment is the same. Therefore replacing one with the other makes no big difference.

Clause 3(1)(a) which proposes the death penalty for homosexuality with a person below 18 years of age: This is already covered under the 2007 amendment to the Penal Code, which creates the offence of aggravated defilement but for a child under fourteen years of age. Sexual acts with a minor constitute defilement regardless of the sex or sexual orientation of the offender. The reference to 14 years in the Penal Code Amendment is because defilement is an offence against minors and so it can only be aggravated regarding age when the age is reduced. As such, clause 2 does not add much and is simply redundant.

⁵⁷ *Ibid.*, Articles 259 and 262.

Clause 4 which seeks to criminalise attempt to commit homosexuality: This replicates section 146 of the Penal Code Act which criminalises attempts to commit carnal knowledge against the order of nature. The only difference is the direct reference to homosexuality which section 146 does not, as it uses language referring to ‘carnal knowledge against the order of nature’.

Other clauses are: clause 5 on protection, assistance and payment of compensation to victims; clause 6 on confidentiality; clause 7 on aiding and abetting homosexuality; clause 8 on conspiracy to engage in homosexuality; clause 9 on procuring homosexuality by threats; clause 10 on detention with intent to commit homosexuality; clause 11 on brothels; clause 12 on same sex marriage; clause 15 on extra-territorial jurisdiction; and clause 17 on extradition, which are already covered by the Penal Code Act especially under the provisions on prostitution. They would simply require simple amendments to the existing law in order to make them applicable to homosexuality.

Legal issues arising: The main issue that arises is why is there a need to reproduce existing laws under a new title and package. Indeed this is not illegal, but nevertheless questionable. It also puts parliament into disrepute as to why it has to pass laws whose provisions can be adequately covered under existing law.

3.3 Having provisions that are nearly impossible to implement

Most of the offences created by the AHB will be very difficult for the state’s prosecutions team at the Directorate of Public Prosecutions to prove to the satisfaction of the criminal standard of beyond reasonable doubt envisaged by Article 28 of the Constitution. This will make implementation equally difficult. The same can be said of section 145 of the Penal Code, the foundational section for most provisions in the AHB, which has widely been used to slap charges of unnatural offences and sodomy on suspects but with no case ever going for full trial. The provisions include:

Clause 2 which seeks to criminalise homosexuality: The acts that are sought to be criminalised require evidence of sexual acts in the ways specified in order for a conviction to be secured. Collection of evidence of adult, consensual same sex conduct in private is difficult since there will be no complainant and the police in most cases will have to act on their own initiative to find persons involved in the said acts. The only way of collecting evidence would be to use intrusive means including illegal searches as it was in the *Victor Mukasa* case, invasive bodily examinations like anal examinations, use of cameras planted in people’s bedrooms and such similar conduct which is problematic as regards human rights. This perhaps explains why no single conviction or even record of a full trial exists for consensual, adult same sex conduct.

Clause 4 which seeks to criminalise the attempt to commit homosexuality: Since the acts do not even take place in this case, it will be even more difficult to find evidence on such offences than if the act took place.

Clause 14 which imposes reporting obligations: These obligations are imposed on persons in authority who have to report anyone whom they know to be homosexual within 24 hours. It is also nearly impossible to implement due to the need for the person reporting to have knowledge that a person has committed the offences listed.

Legal issues arising: The key consequence of having laws that are difficult to implement will be using the law to intimidate, oppress, extort and harass targeted individuals, groups and organisations, not just sexual minorities but members of the public that the authorities find disagreeable. Using the law in this way is not new in Uganda. An example is the offence of sedition which for long was used to harass journalists but because the offence itself was vague and impossible to prove there were hardly any convictions on record. Striking it down

in the case of *Charles Onyango Obbo v. Attorney General*⁵⁸ the Supreme Court stated that 'the section does not define what sedition is. It is so wide and catches everybody to the extent that it incriminates a person in the enjoyment of one's right of expression of thought.'

3.4 Having provisions that are inconsistent with established principles of law

The AHB also contains provisions that contravene well established principles of law. These include:

Imposition of criminal liability on a corporate entity and its directors: Under clause 13(2), where the offender is a corporate body or a business or an association or a non-governmental organisation, on conviction its certificate of registration shall be cancelled and the director or proprietor or promoter shall be liable on conviction to imprisonment for seven years.⁵⁹ This is an affront on the long-standing company law principle that a company as a body corporate is a person in law with a separate existence from its members and directors and can sue or be sued in its own name. Further, this clause targets individual activists and human rights advocates.

Proportionality of punishments: Under criminal law, the punishments imposed are usually in accordance with the seriousness of the offence. Victimless offences usually attract lesser sentences. For the bill, however, despite homosexuality being a victimless offence, it attracts the punishment of life imprisonment which ranks it among serious offences like manslaughter. This is disproportional.

Extradition should be for serious offences: Extradition is often reserved for the most serious offences too and yet clause 16 proposes that a Ugandan citizen or any permanent resident who engages in homosexual activities outside the borders of Uganda should be extradited back to the country for punishment. This elevates the crimes provided for under the bill to the same level as terrorism, treason and misprision of treason, and are disproportionate to the behaviours they seek to criminalise.

Legal issues arising: Going contrary to the established principles of law will mean the creation of new exceptions under Ugandan law for many of the established principles. This would indeed be a departure from most other common law jurisdictions.

⁵⁸ [1997] UGCC 7.

⁵⁹ This is as regards the offence of promotion of homosexuality.

4 Current legal implications arising from the bill

HRAPF has been documenting cases of violations of the rights of LGBTI persons since the introduction of the bill. The trends indicate that despite the fact that the bill is still a bill, its impacts on the legal system are already being felt. This is in the following ways:

Charges of homosexuality: HRAPF has recorded incidences where the police have charged persons arrested with the offences of 'homosexuality', and 'promotion of homosexuality' even though these offences do not exist under the laws of Uganda, but are rather in the AHB. This can be seen as an indirect influence of the AHB on the psyche of police officers.

Detaining persons beyond 48 hours: The AHB has also been used to hold persons beyond the mandatory 48 hours. Under Article 28 of the Constitution, an arrested person is to be presented to court within 48 hours. This is backed up by section 25 of the Police Act, which requires that the person be presented before court within 48 hours or be released on police bond. Unfortunately, police officers seem to feel justified to hold persons arrested for 'homosexuality' or 'promotion of homosexuality' for more than 48 hours. In January 2013, PM was detained at Kira Police Station in Kampala for close to two weeks. Applications for police bond were repeatedly denied and demands to have him taken before a magistrate ignored. According to the Officer in Charge of the Criminal Investigations Department (OC CID) and the Officer in Charge of the Station (OC station), the reason for this denial was because the accused had committed a very serious offence of 'homosexuality'. A court order to have him presented before court was granted by the Chief Magistrates Court at Nakawa. When the order was served on the OC CID at Kira she ridiculed it and insisted she would not release him. He was only taken to court after the order had been served upon CID headquarters. PM was finally released on bail by the magistrate.

While critics can dismiss this as a one-off incident, it evokes fears of the human rights abuses which will be meted out to individual suspects should the bill be passed into law.

Stopping workshops for LGBTI persons: As mentioned earlier, Minister Fr. Lokodo had closed down two workshops which were skills building workshops for LGBTI persons. The first was the meeting organised by Freedom and Roam Uganda (FARUG) and the second was organised by the East and Horn of Africa Human Rights Defenders Project (EHARDP). There is no law at the moment criminalising 'promotion of homosexuality' and so the minister was clearly invoking the provisions of the AHB.

Threatening to close organisations 'promoting homosexuality': The AHB has repeatedly been used by the Minister of Ethics and Integrity and the police to threaten organisations working on human rights issues. The minister threatened to close down 38 organisations for 'promoting homosexuality'.⁶⁰

Private citizens 'dealing with' LGBTI persons: Since the AHB, a number of cases of assault and batteries, evictions from homes, dismissal from employment, threats of violence and banishment from villages have been reported. These are cases that were rare before. Many Ugandans consider the bill as an already passed law, and use it to justify these kinds of conduct against LGBTI or suspected LGBTI persons.

⁶⁰ 'NGO Gay Plans Leak, Govt Furious', *The Observer*, 27 June 2012.

5 Legal strategies employed to oppose the bill

Another impact of the AHB has been on the legal strategies taken to oppose it. New and innovative ways have been employed. These are:

Coalition building: When the bill was tabled in parliament in September 2009, Civil Society organisations immediately reacted by creating the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL). The Coalition was formed to provide a legal response to the bill. One of the organs of the Coalition is the Legal Committee which advises the Coalition on legal strategy. This Committee is currently chaired by HRAPF. Joint advocacy against the bill was seen as a strategy that would rally support across the different divides in the country against the AHB. The Coalition currently has over 50 members from different movements – the women’s rights movement, sex workers movement, HIV/AIDS movement, refugee rights movement, LGBTI movement and mainstream organisations. The Coalition represents the first time that other movements joined the LGBTI movement to fight a cause that was largely seen as against LGBTI persons and organisations.

Promoting awareness of the bill: The Coalition ensured that the contents of the bill beyond its title were known by a wide range of people in Uganda and beyond Uganda. This was done through press releases, media statements, presentations at conferences, engagement with the UN human rights bodies and publication of materials on the bill. Further, there have been various efforts to engage members of parliament and sensitise them on the legal and social implications of the bill. The Coalition members have at various times met the Chair of the Legal and Parliamentary Affairs Committee and the Clerk to Parliament to lobby and advocate against the bill. In addition on 26 March 2013 a parliamentary symposium was organised to enlighten the parliamentarians on the merits of voting against the bill in case it comes up for a vote in the house.

Submissions to parliament about the bill: The Coalition prepared a 20-page memorandum on the AHB and its unconstitutionality and redundancy and presented it before the Legal and Parliamentary Affairs Committee of parliament during the public hearings on the bill. The memorandum was a clause by clause analysis of the bill. Though the Coalition’s prayer to have the bill discarded as a whole was not realised, some of the recommendations were included in the Committee’s report that was later attached to the AHB when the 9th parliament resumed. The views were also reflected in the minority report prepared by four members of the Committee, including the need to drop the bill as a whole.

Challenging laws and actions that violate the rights of LGBTI persons: A more subtle but equally strategic approach has been to challenge actions and laws which violate rights of LGBTI persons in courts with a view to indirectly bringing down clauses of the bill one by one. This approach, dubbed ‘the incremental approach’, has so far given rise to two court actions of strategic importance. *Jaqueline Kasha and ors. v. Rolling Stone and anor.*⁶¹ has been decided in favour of the LGBTI community and the other, *Jacqueline Kasha v. Attorney General and Fr. Simon Lokodo*⁶² is pending in the High Court. There is also a constitutional petition awaiting judgment in the Constitutional Court of Uganda in the matter of *Jjuuko Adrian v. Attorney General*.⁶³ The petition challenges the constitutionality of section 15(6)(d) of the Equal Opportunities Commission Act, 2007 which bars access to the Commission by

⁶¹ High Court Miscellaneous Cause No. 163 of 2010 (unreported), http://www.refugeelawproject.org/others/court_ruling.pdf

⁶² Currently pending in the High Court of Uganda and yet to be heard.

⁶³ Constitutional Petition No. 1 of 2009.

persons whose behaviour is regarded as 'immoral and socially harmful' or 'unacceptable' by the majority of the cultural groupings and social communities in Uganda.⁶⁴

The Coalition is preparing a legal challenge to be filed in the Constitutional Court to challenge the constitutionality of the resulting Act, should the bill pass into law.

⁶⁴ Section 15(6)(d).

6 Not all is gloom: the positive side of the bill

Despite the negative provisions of the bill, it has ironically been very instrumental in progressing the fight for equality of LGBTI rights in Uganda. It has made LGBTI persons visible as human beings, and has brought out the issues concerning LGBTI persons into the public and out of the dark. In this respect Uganda has progressed far more than some other African states. Issues of homosexuality can now be openly discussed on the streets and even on radio and TV stations which was not the case before the AHB.

Again, the bill brought international attention to Uganda and its human rights record. Some well-respected international human rights organisations have been part of the opposition to the bill. Amnesty International for example published a memorandum on the legal implications of the bill entitled *Uganda, Anti-Homosexuality Law Inherently Discriminatory and Threatens Broader Human Rights*.⁶⁵

Not only that, international donors, including the nation's key development partners the US and the UK, issued warnings to cut aid to Uganda if the bill was passed. In response the president declared it a foreign policy matter and it was shelved, temporarily at least.

The AHB has enabled recognition of the key role played by LGBTI human rights defenders in the struggle for equality and non-discrimination. The first Coordinator of the Coalition Julius Kagwa won the Human Rights First Award for Human Rights Defenders in 2010, then the leader of SMUG Frank Mugisha won the Rafto Prize 2011 and the RFK Award 2011, Jacqueline Kasha the Executive Director of FARUG won the Martian Ennals Award for Human Rights 2011. The CSCHRCL capped the awards trend by winning the US Human Rights Defenders Award 2011. It was handed over to the Coalition by US Secretary of State Hilary Clinton in Kampala in August 2012. All these prestigious awards made the work of activists in Uganda internationally known, and the movement very visible and stronger.

In terms of the law, it has helped to set precedents that clearly show that LGBTI persons are entitled to the same rights as everyone else. The *Rolling Stone case* above was one milestone in limiting the devastating effect of using the AHB as a cover to violate the rights of LGBTI persons. The other cases that are pending also promise to build on this precedent to further uphold the rights of all.

The AHB has also led to invigorated efforts for access to justice for LGBTI persons in Uganda. HRAPF operates a specialised legal aid clinic for LGBTI persons, which has so far helped many LGBTI persons to access justice following violations.

⁶⁵ Amnesty International Publications (2010).

7 Recommendations

Dropping the bill altogether is the most viable course of action available. Four members of the Legal and Parliamentary Affairs Committee of Parliament who authored a draft minority report recommended as much with a stern warning: 'A citizen loses a right to his/her citizenry the moment the state intervenes in the affairs of his/her bedroom...'.⁶⁶

The Parliament of Uganda and the Uganda Law Reform Commission need to revise the country's criminal laws especially chapter 14 of the Penal Code which is titled 'Offences against Morality' to repeal all offences which are discriminatory against sexual minorities including section 145 (natural offences), section 146 (attempts to commit unnatural offences) and section 148 (indecent practices), to mention a few.

Civil society actors and LGBTI rights activists should engage and sensitise governmental authorities such as police and prison officials, judiciary staff and prosecutors and state attorney on the rights of all persons in Uganda including LGBT persons and other sexual and social minorities. Ignorance of the law on the part of the police was a key concern noted by the Chairperson of the Uganda Human Rights Commission Mr Meddie Kagwa in his annual report to parliament.⁶⁷

Lastly, international support for human rights in Uganda is key to the recognition and protection of the fundamental rights of all persons. The country's international partners, both governments and private individuals and organisations should always demand accountability and respect for human rights, the strategy of which has been quite effective in the fight against the AHB.

⁶⁶ *Ibid.*

⁶⁷ 'Some Police Officers have not seen the Constitution and Other Relevant Laws they have to Implement while Executing their Duties. They should be Equipped with the Relevant Compendium of Laws', <http://www.parliament.go.ug/new/index.php/about-parliament/parliamentary-news/190-rights-commission-reports-decline-in-human-rights-violations>

8 Conclusion

Whichever way the battle ends, the implications of the AHB on Uganda's legal landscape will always remain visible. It has re-energised the use of the courts to protect marginalised groups, it has brought Uganda at logger heads with the international community, and threatened to nullify international instruments using national law. This would indeed be novel, and if the AHB becomes law, it promises to further develop the jurisprudence on constitutionalism and human rights in Uganda.

Its role in bringing civil society organisations together to do joint advocacy and lobbying cannot be underestimated. Its threats to fundamental human rights are immense. Its controversial provisions have been the subject of great international debate, and its passing threatens to cast Uganda as a pariah state. The aid cuts which might follow will be a blow to the nation's fight against poverty, illiteracy, diseases and the fight against the HIV/AIDS pandemic. It is one of the few bills whose effects can already be felt even before it becomes law, and thus one can only anticipate what would happen if the bill became law. Despite the more than four years of fighting the bill, the battle is not yet over, and if anything it seems to be just beginning. Moreover, the AHB is only one facet of the struggle for equality and non-discrimination which involves advocacy against some of the existing laws, culture, religion and attitudes. It is one bill that has helped to shape the landscape of Uganda's legal system.

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