



A LEGAL AND HUMAN RIGHTS ANALYSIS OF THE UGANDA CONSTITUTIONAL COURT'S JUDGEMENT IN THE CONSOLIDATED PETITIONS CHALLENGING THE ANTI-HOMOSEXUALITY ACT, 2023

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1. Introduction

The Anti-Homosexuality Act, 2023 (AHA) officially came into effect on the 31st of May, 2023. On that same day, Petitions 14 (*Hon. Fox Odoi-Oywelowo and 7 others v Attorney General*) and 15 (*Prof. Sylwia Tamale and 7 others v Attorney General*) challenging the constitutionality of the AHA were filed before the Constitutional Court of Uganda. These were later joined by Petition 16 (*Rutaro Robert and 4 others v Attorney General*) and Petition 85 (*Bishop James Lubega Banda v Attorney General*). The parties were subsequently joined by three other parties, Pastor Martin Sempa, Eng.

Stephen Langa, and Family Life Network - joining as respondents, and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS) as amicus curiae.¹

The petitions were all consolidated at the motion of the Court and with the consent of all parties since they dealt with substantially similar issues, and the matter was heard before the full bench in December 2023. On 3rd April, 2024, after 10 months of the Act being in force, the Constitutional Court delivered judgment on the petitions, which has had the impact of making some alterations to the law as enacted by Parliament. This is an analysis of the judgment itself, and more specifically its impact on the position of the Anti-Homosexuality Act, 2023.

2. Summary of the Court's decision on the petitions

The parties agreed on a total of 14 grounds, of which 5 concerned the procedure followed by Parliament in enacting the AHA 2023 while the remaining 9 grounds dealt with substantive issues with the content of the law. The Court, in a unanimous decision resolved these issues as follows:

- 1) ***Whether the enactment of the AHA 2023 amounted to alteration of previous decisions of the Courts:*** The Court found that the cases referred to (*Prof. J. Oloka Onyango and others v Attorney General*,² nullifying the Anti-Homosexuality Act, 2014; *Kasha Jacqueline and others v Rollingstone Ltd and Another*;³ challenging the actions of a media house in publishing names and faces of suspected LGBTQ persons and calling for their killing; and *Victor Juliet Mukasa and another v Attorney General*, challenging the actions of local area leadership and police against two suspected lesbian women;⁴ all dealt with substantially different issues and were between different parties from the petition in question, and as such found in the negative on this issue. In particular, Court highlighted that the judgment in the *Oloka-Onyango* case dealt only with the procedural issue of quorum and could therefore not bar parliament from reenacting a similar law through proper procedure.
- 2) ***Whether the Act imposed a charge on the consolidated fund:*** The Court found that in the first place, the petitioners had not proved that the enforcement of the Act would impose a charge on the consolidated fund other than those already foreseen and provided for in existing budgetary allocations, and in the second place, that the certificate of financial implications is not meant to give legislators detailed information about the economic

¹ Hon. Fox Odoi-Oywelowo, Frank Mugisha, Pepe Onziema, Jackline Kemigisa, Andrew Mwenda, Linda Mutesi, Kintu Nyago, Jane Nasimbwa, Prof Sylvia Tamale, Dr. Busingye Kabumba, Solome Nakaweesi Kimbugwe, Kasha Jacqueline Nabagesera, Richard Smith Lusimbo, Eric Ndaula, Williams Apako, Human Rights Awareness & Promotion Forum (HRAPF), Rutaro Robert, Musiime Alex Martin, Mutebi Edward, Nabuyanda John Solomon, Let's Walk Uganda Ltd, Bishop James Lubega Banda v Attorney General, Pastor Martin Sempa, Eng. Stephen Langa, Family Life Network Limited and The Secretariat Of The Joint United Nations Amicus Curiae Programme on HIV/AIDS (UNAIDS) (Amicus Curiae), Consolidated, Constitutional Petitions No. 14, 15, 16 and 85 of 2023.

² Constitutional Petition No. 8 of 2014 [2014] UGCC 14.

³ High Court Miscellaneous Cause No. 163 of 2010.

⁴ High Court Miscellaneous Cause No. 247 of 2006.

outlook so as to influence their vote on the Bill, and thus decided this issue in the negative as well.

- 3) *Whether the AHA 2023 was enacted without meaningful and adequate public consultation and participation:* On this issue, the Court found that there had indeed been consultation in the form of submissions made before the Committee on Legal and Parliamentary Affairs, as well as through the legislators themselves as representatives of the people. While the Court recognised that there was no reason to deny the second and third petitioners audience before the Committee, it also held that given the overwhelming support for the Bill at Committee stage and in the House, there was no reason to believe that giving them audience would have changed the legislative outcome.
- 4) *Whether the conduct of the Speaker of Parliament during the enactment of the Anti-Homosexuality 2023 was inconsistent with articles 2(1) and (2) and 89(1) and (2) of the Constitution:* The Court found that, while the Speaker of Parliament might have exhibited partiality in her guidance to the House, this was more a breach of a rule of procedure rather than a constitutional violation, and that there was no reason to believe that her guidance substantially altered the resultant vote, given the overwhelming support the Bill already enjoyed in Parliament.
- 5) *Whether the procedure through which the constitutional proscription of same-sex marriage was introduced contravened articles 1(1), 44(a) and 94 of the Constitution:* On this issue, the Court found that there was no violation of Articles 1(1) and 94 of the Constitution as the mover of the motion to include article 31(2)(a) prohibiting same sex marriage was well within his rights to move such a motion, even if the Committee had not recommended it as part of the Constitutional Amendment Bill at the time being debated, and the house was at liberty to vote on it. About the violation of the right to dignity, the Court found that the petitioners had not proved that prohibition of same-sex marriages violates the dignity of anyone, and therefore answered this issue in the negative as well.

The Court then considered the substantive issues to do with the provisions of the Bill, having found in the negative on all procedural issues. The judgment of the Court on the nine substantive issues is summarised below:

- 6) *Whether sections 6, 7, 9, 11(1), 11(2) (a) – (e) and 14(1) and (2) are inconsistent with the principle of legality under Article 28(1) of the Constitution:* The Court found that the sections of the AHA that were argued against were all neither vague and ambiguous nor overbroad, and that the words in their ordinary meaning in English are sufficient to define the prohibited conduct. The Court thus upheld these sections.

7) *Issues 7 – 13*: The Court considered issues 7-13 jointly as the basis for the human rights arguments in the case, with these issues all focused on the impact of the different sections of the AHA on the right to equality and freedom from discrimination, the right to human dignity and protection from inhuman treatment, the right to privacy, the right to freedom of speech, expression, thought, conscience, belief and religion, the right to freedom of association and civic participation, the right to practice one’s profession and to carry on a lawful occupation, trade or business, the right to access health services, decent shelter, the right to property and general rights to social and economic development. In determining whether the different sections of the AHA contravene these rights as protected in the Constitution, the Court decided as follows:

- *Issue 7 on the right to equality and freedom from discrimination*: The Court held that sexual orientation was never intended by the framers of our Constitution to be one of the parameters in respect of which differential treatment is constitutionally prohibited.
- *Issue 8 on human dignity and freedom from degrading treatment*: The Court relied on the US Supreme Court decision in **Dobbs vs. Jackson Women's Health Organization**,⁵ in which that court held that it was time to return the permissibility of abortion and the limitations thereon to the people’s elected representatives as demanded by the US Constitution and the rule of law. Following this incident, the Court found that individual autonomy and dignity ought to be subjected to shared societal values, and that sections 2, 3 and 6 of the Act reflect the socio-cultural realities of the Ugandan society and are therefore not unconstitutional.
- *Issue 9 on the right to privacy*: Court found that section 14 (the duty to report) violates the privacy of individuals, the freedom of thought, conscience and belief, as well as the right to access health services. However, Court found that sections 1, 2, 3, 9 and 11(2)(d) of the AHA do not violate the right to privacy.
- *Issues 10 and 11 on the right to freedom of expression, thought and association*: The Court finding that the only section violating this right (conscience, belief, religion) was section 14, which was dealt with in issue 9.
- *Issue 12 on the right to practice a lawful profession, occupation, trade or business*: The Court found that none of the sections in the AHA 2023 violate this right.
- *Issue 13 on the right to health and property*: The Court found that section 3(2)(c) violates the right to health, and section 9 and 11(2)(d) violate the right to an adequate standard of living, but found the other sections of the law to be consistent with the constitutional provisions on health and property.
- *Issue 14 on remedies available to the parties*: The Court found that the Petitions substantially fail, but did declare sections 3(2)(c), 9, 11(2)(d) and 14 of the AHA to be unconstitutional, and ordered that parties to the Petitions bear their own costs.

⁵ 19-1392, 597 US-2022

3. Summary of the nullified provisions

The nullified provisions were the following:

3.1 Section 3(2)(c)

Aggravated homosexuality

3(1) A person who commits the offence of homosexuality in any of the circumstances specified in subsection (2) commits the offence of aggravated homosexuality and is liable, on conviction, to suffer death.

(2) The circumstances referred to in subsection (1) are where –

...

(c) the person against whom the offence is committed contracts a terminal illness as a result of the sexual act.

The Court found this provision to be inconsistent with the right to health as protected under the Constitution of Uganda and at international law as it in effect criminalises unintentional transmission of HIV, and impedes the right of HIV+ persons to the highest attainable standard of physical and mental health.

3.2 Section 9

Premises

(1) A person who keeps a house, room, set of rooms or place of any kind for purposes of facilitating the commission of the offence of homosexuality commits an offence and is liable, on conviction, to imprisonment for a period not exceeding seven years.

(2) The owner, occupier or manager of premises who knowingly allows the 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 ten years.

The Court declared the entire Section 9 to be inconsistent with the Constitution on the grounds it violates the right to an adequate standard of living and the right to mental health as it denies homosexuals access to housing.

3.3 Section 11(2)(d)

11. Promotion of homosexuality

(1) A person who promotes homosexuality commits an offence and is liable, on conviction, to imprisonment for a period not exceeding twenty years.

(2) A person promotes homosexuality where the person- –

...

(d) knowingly leases or subleases, uses or allows another person to use any house, building or establishment for the purpose of undertaking activities that encourage homosexuality or any other offence under this Act.

This was also nullified on the same grounds as section 9.

3.4 Section 14

Duty to report acts of homosexuality

(1) A person who knows or has a reasonable suspicion that a person, has committed or intends to commit the offence of homosexuality or any other offence under this Act, shall report the matter to police for appropriate action.

(2) A person who is otherwise prevented by privilege from making a report under subsection (1) shall be immune from any action arising from the disclosure of the information without the consent or waiver of privilege first being obtained or had.

(3) A person who knows or has reason to believe that a person has committed or intends to commit an offence under this Act, 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.

(4) A person who makes a report referred to in this section shall be treated as a whistleblower in accordance with the Whistleblowers Protection Act, 2010 and shall be protected from victimisation.

(5) This section shall not apply to an advocate under the Advocates Act.

The Court nullified this entire provision on the basis that the section amounted to a violation of the right to privacy for suspected LGBTQ persons, and also impacted on the rights to access health services and freedom of conscience, thought and belief.

4. Position of the law in the aftermath of the decision

Provision of the law	Description	Conduct that is criminalised	Punishment	Impact of the Court decision on the section
Section 2	Homosexuality	Performing a sexual act on a person of the same sex Allowing a person of the	Imprisonment for the entire natural life of the offender	The judgment did not touch this section; it remains as

		same sex to perform a sexual act on one	without the possibility of release	it was.
Section 2(3); section 2(4)	Attempted homosexuality	Taking steps to implement the intention of engaging in a sexual act with a person of the same sex without actually completing the act	Up to 10 years imprisonment	The judgment did not touch this section; it remains as it was.
Section 3	Aggravated homosexuality	Performing a sexual act with a person of the same sex in circumstances that amount to incest, rape or defilement, or with a person who has a physical or mental disability, or with a person above the age of 75, or with a person who later develops a physical or mental disability as a result of the act, or with a person who develops a terminal illness as a result.	Death penalty	This section was only affected by the removal of section 3(2)(c) on the victim contracting a terminal illness, but otherwise remains as was.
Section 3(3), 3(4)	Attempted aggravated homosexuality	Taking steps to implement the intention of engaging in a sexual act with a person of the same sex where one of the aggravating factors exist, without actually completing the act	Fourteen years' imprisonment	This section was only affected by the removal of section 3(2)(c) on the victim contracting a terminal illness, but otherwise remains as was.
Section 7	Breach of confidentiality	Reporting on the individual identity of a victim of homosexuality without the victim's express permission or authority of the Court	A fine of 5,000,000/-	This did not change
Section 8	Child grooming	Trafficking children and recruiting children into homosexuality,	Life imprisonment for 'recruitment' and trafficking children for	This did not change

		Otherwise involving children in acts of homosexuality, or exposing them to literature or videos or photographs that indicate gay porn collectively defined as child grooming)	purposes of engaging them in homosexuality 20 years' imprisonment for other aspects of the offence of child grooming	
Section 9	Premises	Allowing one's premises to be used for purposes of homosexuality	7 years' imprisonment	This section was nullified by the Court
Section 10	Same sex marriage	Attempting to contract a marriage with a person of the same sex; attending or otherwise facilitating or witnessing such a marriage	10 years' imprisonment	This did not change
Section 11	Promotion of homosexuality	Encouraging or persuading another person to engage in a sexual act with a person of the same sex Knowingly publishing material that encourages or promotes homosexuality Providing financial support for activities that encourage homosexuality or the normalization or observance of prohibited conduct Knowingly providing premises for activities that encourage homosexuality Operating an organisation which promotes or encourages homosexuality	20 years' imprisonment for individuals Fine of Ug Shs 1,000,000,000	Only subsection 2(d) referring to premises was nullified. The rest of the provision stands Operating or funding LGBTQ support organisations remains (potentially) illegal
Section 12	Disqualification from employment	A person who has been convicted of an offence under the Act is disqualified	No penalty	This section did not change

		from employment in a child care institution or other position of authority over children and other vulnerable persons unless a welfare officer attests to their having been rehabilitated.		
Section 13	Disclosure of sexual offences record	A person who has been convicted of an offence under the Act is required to disclose this to potential employers while seeking employment in child care institutions or in any other position of authority over children or other vulnerable persons	2 years' imprisonment in case one fails to disclose this	This did not change
Section 14	Duty to report	All persons required to report anyone they reasonably suspect of being involved in acts of homosexuality, or any other offences under the Act	5 years' imprisonment for anyone who fails to report these offences against a child	This entire section was nullified
Section 15	False sexual allegations	A person who falsely accuses another of homosexuality without reasonable suspicion commits an offence	Up to 1 year's imprisonment	This section remained the same

5. Legal and human rights impact of the judgment

5.1 Positive legal and human rights impact

While the Petitions substantially failed, the provisions declared unconstitutional are effectively off the law books, and this has some positive legal implications as follows:

- i) *The law treating all offenders equally regardless of their HIV status:* The original version of the Bill had HIV as a factor that made the offence of homosexuality aggravated. This would increase the punishment from life imprisonment to

death. The danger with this was promoting stigma against persons living with HIV/AIDS. Despite the fact that the wording was changed from HIV to 'terminal illness', Court still found that the provision targeted HIV+ persons, and nullified the provision. Now, HIV status is not an aggravating factor in the offence of homosexuality.

- ii) *Renting premises to suspected LGBTQ persons is no longer a criminal offence:* An immediate impact of the law as it was previously was to empower landlords to evict their tenants for no other reason rather than their sexual orientation, arguing that not doing so would amount to promotion of homosexuality and providing premises for homosexuals. Indeed, HRAPF documented a rapid increase in cases of evictions of tenant by landlords since the law came into force on 31st May 2024. For example in June 2023, HRAPF recorded 19 cases of evictions compared to 2 in 2022;⁶ and in February 2024 it was 27 cases compared to only 2 cases in February 2023.⁷
- iii) *Freeing relatives and other ordinary persons from the reporting obligations:* The duty to report suspected LGBTQ people no longer exists. The implications of this is that ordinary people can only report real or suspected homosexuals if they so wish, without any reward or active encouragement. Not reporting has no legal implication whatsoever. This implies that ordinary persons, relatives, parents, friends and neighbour of LGBTQ persons do not have a special obligation to report persons they know to be engaged in offences criminalised in the Act, which significantly reduces risk levels for LGBTQ persons that have come out to their friends and families.
- iv) *Improving access to health services for LGBT persons:* Removing the reporting obligation from health workers means that more LGBTQ persons are likely to seek services without the fear of being reported. Doctors and other health professionals have a duty to protect the confidentiality of their clients. Section 14(2) had actively encouraged professionals to breach confidentiality and be rewarded by immunity from legal implications arising out of this breach, in addition to other incentives under the Whistle Blowers' Protection Act. As such, following this judgment, professionals who breach professional obligations in order to report suspected LGBTQ persons, including health workers, can be subjected to legal and disciplinary action for the breach of privacy/confidentiality. This should make LGBTQ people more confident to seek health

⁶ See Human Rights Awareness and Promotion Forum (HRAPF) 'One month after: Increasing cases of violence and violations based on real or presumed sexual orientation and gender identity in the first month of the enforcement of the Anti-Homosexuality Act, 2023' 14th July, 2023 <https://hrapf.org/violation-reports/#> (accessed 4th April 2024).

⁷ See Human Rights Awareness and Promotion Forum (HRAPF) 'Report on violence and violations based on real or presumed sexual orientation or gender identity during the month of February 2024' 13th March 2024 <https://hrapf.org/violation-reports/#> (accessed 4th April 2024).

services, knowing that health workers cannot report them due to the requirement for confidentiality.

- v) *Improving access to justice:* Although advocates were excluded from the reporting obligations under section 9(5), other lawyers were not, which limited the capacity of law firms and legal aid clinics to work at capacity with LGBTQ clients. With this requirement removed, law firms and legal aid services organisations can provide services to LGBTI persons without being required to report. HRAPF was among the affected organisations, and had to restrict meeting of LGBTQ clients to only advocates and not lawyers or paralegals to avoid the reporting obligations.⁸ It is expected that this would also make LGBTI persons more confident to bring legal matters affecting them before lawyers, thus increasing demand for and access to justice.
- vi) *Enabling research on LGBTQ issues:* For researchers, the removal of the obligation to report implies that they can freely engage in research on these groups. During the subsistence of section 14, the Uganda National Council for Science and Technology (UNCST) had written to all Research Ethics Committee reminding them of the need to ensure compliance with the law – that is the requirement to report all persons whom the researchers get to know are engaged in conduct prohibited under the Act.⁹ With this requirement now removed, there will be no need for such reporting, and therefore research on social justice and health issues for LGBTQ persons can now continue without risk to participants, or risk of researchers breaching the law.
- vii) *Enabling religious leaders to provide services to LGBTQ persons:* Removing the reporting obligations also makes it possible for religious leaders to do their work of counselling and hearing confessions of LGBTQ persons without the obligation to report. This is helpful for the mental and spiritual wellbeing of LGBTQ persons, and will reaffirm the right of LGBTQ persons.
- viii) *Reducing on impunity:* The fact that the Court nullified a few provisions will go a long way in helping to remove the impression that anything can legally be done to LGBTQ persons. It is now clear that LGBTQ persons have the right to access health services, can rent houses freely, and no one is required to report them just because they suspect them to be LGBTQ. There was a general feeling before that LGBTQ persons are completely not acceptable in Uganda and therefore everyone could do whatever they want to them and get away with it, as even the Police would focus more on their homosexuality rather than the offences committed against them. It is hoped that this judgment will contribute to changing that.

⁸ See Human Rights Awareness and Promotion Forum (HRAPF) 'Position on HRAPF's work involving LGBTI issues in light of the Anti-Homosexuality Act, 2023' 30th May 2023 (on file with the authors).

⁹ Letter from UNCST Acting Secretary titled 'Guidance on research in relation to the Anti-Homosexuality Act, 2023' 27th October 2023 (on file with authors).

5.2 Negative legal implications of the judgment

Legally, the judgment leaves the Anti-Homosexuality Act, 2023 in place. It therefore affirms that LGBTQ persons are not protected from discrimination and neither are their rights to dignity, privacy and association protected. This has huge implications within the legal system as discussed below:

- i) *No legal obligation upon health workers to treat LGBTQ persons and an actual risk of arrest for promotion of homosexuality for health workers:* Although the law does not impose an obligation on health workers to report persons suspected to be LGBTQ, it does not impose one upon them to actually provide services to them, and neither does it allow room for LGBTQ people to be treated fully and fairly. Laws that promote access to services would clearly state so, and require non-discrimination during treatment, but the AHA does not do that, and neither does the judgment make provision for this. Indeed, maintaining section 11 on promotion of homosexuality is instead a big deterrent to health workers and their employers from providing services. By providing services, they run the risk of being arrested for promotion of homosexuality. A clear scenario is the provision of sexual health consummables like lubricants and condoms to persons that a health worker knows to be LGBTQ, which has in the past led to the arrest of at least one health worker in a well-documented incident: Does this pass the test in section 11(2)(a) of ‘encouraging’ a person to commit crimes under the Act? And how does their institution survive a charge of promotion in that case, considering how exorbitant the fine for the offence is? Displaying of materials on safe sex, which is important under the right to health, might also constitute promotion of homosexuality, which attracts imprisonment for 20 years or a fine of one billion shillings for organisations and suspension of operational permit for ten years, and this is a huge deterrent. It is also important to note that, for organisations in health service provision whose political identity is already tainted with homophobia, this is the perfect excuse not to provide services to LGBTQ persons, and the law does not prohibit this.
- ii) *Further justification for closure of LGBTI organisations and service provider organisations:* The judgment has paved the way for the NGO Bureau to close down organizations that it perceives to be ‘promoting homosexuality.’ The Court of Appeal upheld the refusal of the Uganda Registration Services Bureau (URSB) to register Sexual minorities Uganda on grounds that this would be promoting homosexuality less than a month ago.¹⁰ Organisations providing support services to LGBTQ persons, including health and legal services, those that bring together LGBTQ persons to meet and discuss issues affecting them and those that provide shelter and other emergency services to homeless LGBTQ persons may be further curtailed from doing their work as a result of the court’s decision affirming this law. Indeed, 26 of them, including HRAPF, are

¹⁰ *Frank Mugisha & 2 Others v Attorney General*, Civil Appeal No 223 of 2018.

already actively being investigated by the NGO Bureau.¹¹ Armed with section 36 of the Companies Act on undesirable names, section 30 of the NGO Act on refusal to register NGOs and section 44 of the NGO Act on organisations doing work that is prejudicial to the interests of Uganda and the dignity of the people of Uganda, the *Frank Mugisha* court decision¹² and now the *Fox Odoi Oywelowo*¹³ court decision, the NGO Bureau and the Uganda Registration Services Bureau have more than enough ammunition to go against any NGO doing work related to LGBTQ rights, including those doing legal work and health work.

- iii) *Further closing of the shrunken civic space*: Homosexuality has always been used as a political weapon against political opponents in Uganda.¹⁴ The court judgment in this case is no exception. Already, opposition politician Kyagulanyi Ssentamu (Bobi Wine) and his National Unity Platform have been labelled as gay sympathizers. This could easily turn into a criminal charge on promotion of homosexuality or homosexuality. The judgment has affirmed both offences based on very vague grounds. The same treatment can apply to any organisation, individual or entity that speaks out against government excesses. The judgment is therefore another weapon in the hands of those who want to crack down on the already shrunken civic space. Its potency also lies in the overwhelming public support for the crackdown on gay sympathizer and ‘promoters’.
- iv) *Closing the space for expression of LGBTQ persons and allies*: The confirmation of the criminalisation of promotion of homosexuality is essentially a total gag order against LGBTQ activism and expression in Uganda. The heavy punishments for non-compliance will ensure that organizations and individuals do self-censorship and cut down on advocacy and activism. The same also applies to allies, including academics and researchers.
- v) *Affirming discriminatory legal provisions*: The court judgment affirms different punishments of the exact same sexual conduct when done between persons of the same sex and when done by/ against a person of the opposite sex. For example, where, section 129(1) of the Penal Code punishes defilement of a child by a person of the opposite sex with life imprisonment, the Act punishes the same act by a person of the same sex with the death penalty.¹⁵

¹¹ ‘Leaked report shows intent to criminalise gay activities’ Monitor, 12 February 2023.

¹² n 10 above.

¹³ n 1 above.

¹⁴ See for example S Nyanzi & A Karamagi ‘The social-political dynamics of the anti-homosexuality legislation in Uganda’ *Agenda*, 2015 29:1, 24-38, 32 -35.

¹⁵ Anti-Homosexuality Act, section 3(2)(a).

5.3 Negative human rights impact of the judgment

Unfortunately, by upholding the majority of the provisions the Act, the general context of homophobia in which the judgment was couched, including reliance on unsubstantiated claims of recruitment of children into homosexuality, asserting that criminalisation was necessary to reduce HIV among LGBTQ persons and denying them the fundamental rights to dignity, equality and privacy makes the positive gains to immediately pale into insignificance. This section will discuss the negative human rights concerns from the judgment:

- i) *Further violations of the right to health:* Although the nullification of the few provisions heavily relied on the right to health, the judgment as a whole is not friendly to the right to health. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) imposes obligations on states parties to respect, protect and fulfill the right to health. The Committee on Economic, Social and Cultural Rights (CESCR) has made it clear that at the core of the right is protection from discrimination. In General Comment 22, the Committee makes it clear that states should at the very least 'ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.'¹⁶ Although the judgment seems to suggest that LGBTQ people can access health services as it removes the reporting obligations and the discrimination against people living with HIV, the judgment also affirms criminalisation of same-sex relations, which just pushes LGBTQ persons further underground and negatively affects access to essential health services.¹⁷ Health workers reporting LGBTQ persons is just a small component of what can go wrong in an environment that criminalises consensual same-sex relations, particularly when a big part of the right to health, specifically access to clear and accurate information on sexual and reproductive health, is likely to be seen as promotion of homosexuality under section 11, which remains intact. Section 11(2)(a) -(c) and (e) which remain on the law books criminalise 'encouraging' persons to engage in homosexuality, publication of materials on homosexuality, providing financial support to 'facilitate activities that encourage homosexuality or the observance or normalisation of conduct prohibited under the Act' and operating an organisation that promotes homosexuality respectively, all of which are things that can easily be said to be done by a hospital or organisation providing health services. Therefore, nullifying section 14 without nullifying section 11 and sections 2 and 3 is not likely to provide a complete solution to the access to health challenges that the AHA imposes on LGBTQ persons, and the right to health therefore remains illusory for LGBTQ persons.

¹⁶ Committee on Economic, Social and Cultural Rights (CESCR) 'The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' General Comment No. 14 (2000), E/C.12/2000/4.

¹⁷ Global Commission on HIV and the Law, HIV and the Law: Risks, Rights & Health, Supplement 2018, https://hivlawcommission.org/wp-content/uploads/2020/06/Hiv-and-the-Law-supplement_EN_2020.pdf, accessed April 5, 2024.

- ii) *Violation of the right to equality and freedom from discrimination:* Maintaining the criminalisation of consensual same-sex relations legalizes discrimination against LGBTQ persons. The Constitutional Court clearly departed from its earlier decision in *Adrian Jjuuko v Attorney General*¹⁸ and created a class of ‘misfits’ worthy of discrimination. In that case, the Court found section 15(6)(d) of the Equal Opportunities Commission Act, 2007 to be unconstitutional for *inter alia* violating article 21 by ‘*legislating the discrimination of persons said to be immoral, harmful and unacceptable.*’¹⁹ This latter judgment makes it clear that LGBTQ persons are second class citizens who deserve to be imprisoned because of who they love. The Court makes it clear that sexual orientation is not a protected ground from discrimination under the Constitution, a radical departure from the UN Human Rights Committee’s decision in *Toonen v Australia*²⁰ which made it clear that sexual orientation is protected as part of ‘sex’ in articles 2(1) and 26 of the ICCPR. The Court of Appeal of Botswana has also held that the grounds for non-discrimination within the Constitution of Botswana were not closed, and declared that sex included ‘sexual orientation’.²¹ In Kenya, the Supreme Court held that ‘an interpretation of non-discrimination which excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination.’²² The Constitutional Court’s decision in the *Fox Odoi Oyvelowo* case is a huge departure from all these established human rights principles.
- iii) *Affirming the continued violation of the right to dignity and freedom from degrading treatment:* The Court made it clear that this was the most important right in the petition, and discussed it at length, but then drew the conclusion that criminalisation of consensual same-sex relations does not violate the right to dignity. This is another critical departure from established jurisprudence in comparable jurisdictions where it has been found that to criminalise adult consensual same-sex sexual activity in private is to diminish the dignity and worth of those individuals in the society who identify by the particular affected sexual orientation. Indeed, to find a violation of the right to health without finding one of the right to dignity is an oxymoron. In *P.A.O & 2 Others v Attorney General*,²³ it was held that the right to health, life and human dignity are inextricably bound. In *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & 2 Others*,²⁴ the Constitutional Court of South Africa held that a law that prohibits same sex sexual conduct is not only an invasion of the right to privacy of gay persons but also a violation of their right to dignity.

¹⁸ Constitutional Petition No 1 of 2009.

¹⁹ Above, paras 370-380.

²⁰ *Toonen v Australia*, UNHRC Communication No. 488/1992.

²¹ *Letsweletse Motshidiemang v Attorney General* MAHGB-000591-61.

²² *Eric Gitari v NGO Co-ordination Board & 3 others*, Petition No. 16 of 2019, Para 79.

²³ *High Court of Kenya*, Petition No. 409/2009 (2012) eKLR

²⁴ (CCT 11/98) [1998] ZACC 15; 1999 (1) SA 6,

iv) *Affirming the continued violation of the right to privacy:* Another important right that the court swept under the rug is the right to privacy. Although the Court found that the duty to report under section 14 of the Act constitutes undue interference with the privacy of individuals, it somehow failed to find criminalization to have the same effect. The Anti-Homosexuality Act, 2023 allows interference into the most private aspects of people's lives by criminalising consensual sexual relations between adults of the same sex. A person's sexual orientation is a private matter, and sexual life of individuals is protected under the constitutional protection of the right to privacy. The UN Human Rights Committee has observed that

*"... it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy' ..."*²⁵

The Court of Appeal of Botswana in *Letsweletse Motshidiemang v Attorney General*²⁶ nullified sections 164(1) and (c) of the Penal Code of Botswana which criminalised consensual same-sex conduct *inter alia* on the basis of the right to privacy. The Court stated that adults have a right to 'a sphere of private intimacy and autonomy, which is not harmful to any person, particularly that is consensual.'²⁷ The State should therefore have no right to legislate in relation to *private sexual conduct of consenting adults*.²⁸

v) *Affirming the violation of the right to freedom of expression, thought and association:* Maintaining section 11 on 'promotion of homosexuality' affirms the continued violation of the rights to freedom of expression, thought and association. The Court in deciding this issue held that the AHA 2023 cannot be voided for violating the right to freedom of expression, thought and association. While the Court specifically recognised that parts of section 11 of the Act limit the right to freedom of expression, thought and association, the Court also stated that '*...the objective of the Anti-Homosexuality Act is of such critical importance to the Ugandan society that its claim to legitimacy is unassailable.*' The Court therefore found that the limitation placed on these rights by the AHA is reasonable and acceptable, and thus resolved this issue in the negative. The Court also considered the limitation of academic freedom under section 11(1) and 11 (2)(b) of the Act and held that the restriction is reasonable and commensurate with the objective of the AHA 2023.

vi) **Violation of state obligations to respect, protect and promote the rights and freedoms of the individual and groups:** The judgment was a missed opportunity by the state to abide by its obligations under human rights law. The Government of Uganda is enjoined by international human rights law to respect and protect fundamental

²⁵ *Toonen v. Australia*, UN Doc CCPR/C/50/D/488/1992.

²⁶ Above.

²⁷ Para 151.

²⁸ See *Lawrence v Texas* (2003) 539 US 558; *McCuskar & Another v The State* [2005] FJHC 500.

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. By Parliament enacting the law and Court affirming it, the state is failing in its obligation to respect human rights. The *obligation to protect* requires the State to protect individuals and groups against human rights abuses. This is a duty upon the Government to deter the infringement of human rights by third parties (including private citizens). Homophobia, as institutionalised by the Act and the judgment, 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. 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).²⁹ By interpreting the Constitution in a way that entrenches violation of human rights, the Constitutional Court failed to discharge Uganda's obligations under the Constitution and international law.

6. Conclusion

Despite the positive aspects of the judgment, the Court in large part did not in any way address the core challenge of this piece of legislation, which is the criminalisation of consensual same-sex sexual relations amongst adults and the criminalization of civic activity, research and publication in favour of advancement of LGBTQ rights. Precautions that had earlier on been put in place to avoid conflict with this law therefore must stay in place as the law remains substantially the same. It is however laudable that the further criminalization of HIV status has been nullified, and that the Court has nullified the criminalization of renting premises to LGBTQ people. One would hope that this would resolve the persistent challenge of homelessness among LGBTQ persons as a result of rampant evictions driven by section 9 and section 11(2)(d) of the law, of which 231 cases affecting 315 persons have so far been recorded at HRAPF in the first 10 months of the AHA's implementation.³⁰ In addition, the obligation to report suspected homosexuals to the police authorities in section 14 has been removed, and the professional responsibility of health workers to maintain the confidentiality of their patients' records, identities, proclivities and any other information they come by in the course of rendering services has been restored. This should substantially contribute to safe healthcare settings, and thus boost health seeking behavior, which had suffered greatly in the last 10 months. It will also lighten the load on legal aid service providers, who can now freely work with all legal professionals besides advocates in the work of providing much needed legal support to the LGBTQ community. However, it remains to be seen how these positive pronouncements translate into actual real change on the ground, given the status of the law as it still is.

²⁹ See *Attorney General v Susan Kigula & 417 Others* Constitutional Appeal No. 3 of 2006; [2009] UGSC 6).

³⁰ HRAPF, n 7 above.