



**A LEGAL ANALYSIS OF THE BRUTAL POLICE RAID OF AN LGBTI PAGEANT ON  
4<sup>TH</sup> AUGUST 2016 AND SUBSEQUENT ACTIONS AND STATEMENTS BY THE  
POLICE AND THE MINISTER OF ETHICS AND INTEGRITY**

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## **Acronyms**

ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
ICCPR	International Covenant on Civil and Political Rights
IGP	Inspector General of Police
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
POMA	Public Order Management Act, 2013
UN-CAT	United Nations Convention Against Torture

## 1. Introduction

This is a legal analysis of the human rights violations, criminal liability and tortious liability that arose out of the 4<sup>th</sup> August 2016 Uganda Police raid of a nightclub where a Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Pride beauty pageant was being held, the stopping of the planned 2016 Uganda Pride parade and subsequent statements by government and police officials on these events. It is intended to guide lawyers and activists on some of the available avenues that can be taken to seek redress.

## 2. Statement of facts

On the evening of 4<sup>th</sup> August 2016 at about 11pm, members of the Uganda Police Force commanded by the District Police Commander (DPC) of Kabalagala Police Station, Isaac Mugerwa, raided Venom Night Club in Kabalagala, Kampala where an LGBTI beauty pageant was being hosted. The event was brought to an abrupt halt. The more than 200 attendees were locked in the venue for over an hour while the Police confiscated some people's phones and forced them to sit on the floor. Some of the participants were groped and beaten by Police officers and others had their hair pulled. The Police took photographs of some of the attendees without their consent and threatened to release identifying information to the public. One attendee jumped from a 4-storey window to avoid police abuse and he suffered serious injuries. Sixteen people; including activists, organisers and participants were arrested, dumped on police trucks and taken to Kabalagala Police Station. While at the station, two transmen and one transwoman were subjected to being groped and strip-searched by police officers. They were also beaten by the Police and other inmates. The sixteen were later released without charge.

The Police claimed that the pageant was dispersed because it had been held in violation of the provisions of the Public Order Management Act, 2013 as the organisers had not received police permission to hold it.<sup>1</sup>

Apart from the abrupt interruption of the Pride pageant, the Pride parade which was intended as the finale of the week's activities and was scheduled for 6 August 2016, was also stopped after the Minister of Ethics and Integrity, Hon. Rev. Fr. Simon Lokodo, stated during a meeting with lawyers representing the organisers that he would do everything in his power to prevent the Pride parade from taking place. He said that if the organisers did not stop the event, he would mobilise the public and the Police to storm the venue. Subsequent to this statement, the organisers decided that it would be in the interest of safety and security to postpone the Pride parade to a later date.

On 8<sup>th</sup> August 2016, the 'Government Position on the Activities of Lesbians, Gay, Bi-Sexuals & Transgender in Uganda' was released by Minister Lokodo.<sup>2</sup> He stated that the organisers

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<sup>1</sup> Statement by Deputy Police Spokesperson, Polly Namaye, 6 August 2016 available at <https://ugandamediacentreblog.wordpress.com/2016/08/06/polly-namaye-speaks-out-on-pride-event-as-per-the-provisions-of-the-public-management-act-such-an-event-would-require-that-the-organisers-notify-the-police/> accessed 13 August 2016.

of the Pride activities were advised to stop their activities immediately. The Minister claimed that 'the promotion of LGBT movement activities' is criminal in nature and 'offensive to the laws of the Republic of Uganda.' He vowed to continue the suppression of 'criminal' activities of the LGBTI movement.

In what follows, specific aspects of the Police action and government statements will be considered in light of Chapter four (Uganda's Bill of Rights) of the Constitution, Uganda's regional and international human rights obligations, as well as the criminal law and the law of torts.

### **3. Human rights violations arising out of these actions**

A number of actions were done during the raid which included: stopping the beauty pageant, arrest of activists, detaining people against their will for over an hour at the venue, groping of people's genitals and breasts and pulling out of people's hair. All these resulted into human rights violations as follows:

#### **3.1 The right to freedom of assembly**

The right to freedom of assembly arises in two situations in this case: the stopping of the beauty pageant and the stopping of the Pride parade. The stopping of the beauty pageant was done directly and that of the Pride parade and other activities indirectly.

The Constitution of the Republic of Uganda in Article 29(1)(a) protects the rights to freedom of assembly. This right is also recognised under numerous regional and international human rights instruments, which also protect the right to freedom of speech and expression.<sup>3</sup> In particular, these rights are protected under Article 20(1) of the Universal Declaration of Human Rights (Universal Declaration), Article 11 of the African Charter on Human and Peoples' Rights (ACHPR) and Article 21 of the International Covenant on Civil and Political Rights (ICCPR). This right applies to everyone without discrimination and therefore, LGBTI persons just like anyone else are entitled to the enjoyment of this right. Stopping a beauty pageant or a Pride parade would amount to a violation of this right.

This right is subject to the limitation clause in Article 43 of the Constitution. The limitation clause subjects the enjoyment of rights to the fundamental or other human rights and freedoms of others or the public interest. The public interest exception does not permit the limitation of the enjoyment of fundamental rights and freedoms beyond 'what is acceptable and demonstrably justifiable in a free and democratic society.' In the case of *Charles Onyango*

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<sup>2</sup> Directorate of Ethics and Integrity 'Government Position on the Activities of Lesbians, Gay, Bi-Sexuals & Transgender in Uganda' 8 August 2016

<https://ugandamediacentreblog.wordpress.com/2016/08/08/government-position-on-the-activities-of-lesbians-gay-bi-sexuals-transgender-lgbt-in-uganda/> accessed 14 August 2016.

<sup>3</sup> Uganda acceded to the UN Covenant on Civil and Political Rights, 1966 on 21 January 1987 and ratified the African Charter on Human and Peoples' Rights, 1981 on 10 May 1986. Article 287 of the Constitution of Uganda 1995, read together with objectives XIV and XXXVIII (i)(b) of the National Objectives and Directive Principles of State Policy and Articles 2, 8A and 45 recognise the treaties that Uganda entered into before the coming into force of the Constitution.

*Obbo and Andrew Mwenda v Attorney General*<sup>4</sup>(*Andrew Mwenda* case), the Supreme Court of Uganda while dealing with freedom of expression held that rights can only be limited in exceptional circumstances and even in the presence of such exceptional circumstances, only minimal impairment would be permitted. Further guidance can be found in international human rights instruments. Article 11 of the ACHPR provides that ‘... the exercise of this right [freedom of assembly] shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.’

Therefore, in terms of Article 43 of the Constitution and Article 11 of the ACHPR, the right to freedom of assembly can be limited. Both the Deputy Police spokesperson and the Minister referred to the Public Order Management Act, 2013 (POMA) as the basis for stopping the LGBTI beauty pageant. The POMA is intended to regulate the ‘exercise of the freedom to assemble.’<sup>5</sup> Its requirements are only triggered where public meetings are concerned. Section 4(1) of POMA defines a public meeting as ‘a gathering, assembly and procession or demonstration in a public place or premises held for the purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest.’ The beauty pageant was not organised to express any views on any matter of public interest. It was a purely a social event. Section 4(2)(d) of POMA explicitly excludes a meeting for a social purpose from the definition of a ‘public meeting’ under the Act. Therefore, the statement of the Police Deputy Spokesperson was inaccurate in as far as it states that the organisers of the Pride pageant were under the obligation to notify the Police about the planned event in terms of Sections 3, 4, and 5 of POMA and that the event was dispersed due to this non-compliance.<sup>6</sup> The POMA did not present a legitimate restriction to the exercise of the right to freedom of assembly in this case. The pageant, which was a social event and not a public meeting, could not be dispersed by the Police in terms of the Act on grounds that the Police were not notified in accordance with the POMA. As such the stopping of this event was a violation of the participants’ right to freedom of assembly.

As for the Pride parade, this is by its very nature an event where opinions on matters of public concern are expressed and thus would qualify as a public meeting under the POMA. Section 5(1) of POMA requires of an organiser to give notice in writing of the intention to hold a public meeting. This should be in a specific format as prescribed under Section 5(2) and specific details have to be provided. A letter notifying the Police of the intended parade and requesting security at the event was addressed to the Inspector General of Police and delivered to his offices on 29 July 2016. The letter did not contain all of the required details in terms of Section 5(2) such as the time the meeting was to commence, its duration and estimated number of participants. Despite the fact that the letter did not comply with the specific requirements of the law, it was delivered way ahead of time and the Police could perhaps have advised them on how to strictly follow the guidelines in the Act. The organisers of the parade therefore endeavoured to comply with POMA’s notification procedures. Section 6 provides that an authorised officer shall notify the organiser of an

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<sup>4</sup> Constitutional Appeal No. 2/002 (SC).

<sup>5</sup> Public Order Management Act, 2013, section 2(1).

<sup>6</sup> n1 above.

event if it is not possible to hold the event at the proposed time or venue within 48 hours after receipt of the notification. The Police did not respond to the notification in terms of this requirement, despite the organisers making various calls to the Police leadership.

It appears, however, that the question of proper compliance with POMA is not at issue in respect of the parade. The real reason for stopping the parade was the threat by the Minister to call mobs to stop the activities. Minister Lokodo specifically addressed the issue of the parade and declared it illegal, not on the basis of the POMA but on allegations of 'promotion of homosexuality.' He said that

'Government will not condone the promotion of the illegal activities of the LGBT movement. Through the Uganda Police Force, Government worked to ensure that the criminal and illegal activities of the Gay community were halted and we will continue to suppress them. The organisers of the Gay parade which had been planned for 6<sup>th</sup> August 2016 are advised to stop their activities immediately. The public is called upon to refrain from joining and participating in Gay activities. The law is clear that the promotion of LGBT Movement activities is criminal in nature and intent, and offensive to the laws of the Republic of Uganda.'

It seems that Minister Lokodo locates the source of the restriction on the right to freedom of assembly in Uganda's laws which criminalise same sex conduct. The Minister is mistaken in his claim that the 'promotion of LGBT Movement activities' is criminal. Uganda's criminal laws do not prohibit the 'promotion of homosexuality' but only the act of 'having carnal knowledge against the order of nature,' which the judiciary has declared to be limited to specific sexual acts but not to being gay as a sexual orientation.<sup>7</sup>

A question, however, does arise as to whether Section 145 to 148 of the Penal Code Act provides a 'necessary restriction' to the exercise of the right to freedom of assembly in light of a recent High Court decision. In *Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema and Geoffrey Ogwaro v The Attorney General and Hon. Rev Fr. Simon Lokodo* (Lokodo case) the High Court held that the breaking up of a workshop by the Minister which had been organised and attended by members of the LGBTI community, and thus the limitation of the participants' right to freedom of assembly, was reasonable and justified. The Court held that the workshop was intended to encourage people to engage in same sex practices and reasoned that this amounted to incitement to commit a crime as well as conspiracy, criminalised under Section 21, 390 and 391 of the Penal Code Act. On the strength of this case, the incitement to commit a crime, and an 'unnatural offence' in particular, could provide a 'necessary restriction provided by law' to the exercise of the right to freedom of assembly. This case is currently on appeal. The factual finding that the workshop was intended to encourage attendees to engage in homosexuality is contested. Furthermore, the assumption that all meetings, workshops and events organised by and for members of the LGBTI community is intended to promote homosexuality is factually inaccurate. This case

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<sup>7</sup> Kibuuka Musoke J in *Kasha Jacqueline, Pepe Onziema & David Kato Vs Giles Muhame and The Rolling Stone Publication Limited* High Court Miscellaneous Cause No. 163 of 2010 addressed Section 145 of the Penal Code which criminalises carnal knowledge against the order of nature and stated that this is limited to specific sexual acts.

can also be distinguished on the basis of its facts from the current one. The Pride parade, in particular, is not intended to 'incite' others to commit the offences as provided in Section 145 to 148 of the Penal Code, but rather to celebrate the diversity of a minority group in society which is at best, ignored, but more often oppressed and despised. Furthermore, the mere fact that same sex conduct remains criminalised in Uganda is questionable in terms of constitutional and international human rights standards.

The statement by Minister Lokodo also suggests that a 'necessary restriction' on the right to the exercise of freedom of assembly is the traditional and cultural values of the Ugandan society. In the case of *Alekseyev v Russia*,<sup>8</sup> (*Alekseyev* case) the European Court of Human Rights held that the Russian Government's refusal to allow a Gay Pride parade to take place in Moscow was a violation of the organisers' right to free assembly as protected under Article 11 of the European Convention of Human Rights. The Court rejected the Government's argument that the parade would have caused public disorder and violence, which could only be addressed by refusing to let the march take place. The Court importantly stated that the right to freedom of assembly of a minority could not be limited on the basis of the majority's religious views and moral values. On the basis of the *Alekseyev* case, the fact that the majority of Ugandan citizens hold traditional and religious values that are opposed to homosexuality is not a 'necessary restriction' on the right of the LGBTI community to freely assemble.

### **3.2 The right to equality and freedom from discrimination**

The stopping of the beauty pageant and the pride parade was also a violation of the right to equality and freedom from discrimination. Article 21 of the Constitution provides that '(a)ll people 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) continues that '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.' Although sexual orientation is not listed among these grounds, it is argued that this list is inclusive.<sup>9</sup> In the cases of *Victor Mukasa & Yvonne Oyo v. Attorney General*<sup>10</sup> (*Victor Mukasa* case) and *Kasha Jacqueline, Pepe Onziema & David Kato Vs Giles Muhame and The Rolling Stone Publication Limited, (Rolling Stone case)*<sup>11</sup> which all concerned the rights of LGBTI persons, the High Court made it clear that the rights in the Constitution apply equally to everyone regardless of their sexual orientation.

In international law, the right is protected in Article 2 of the ACHPR, Articles 1, 2, and 7 of the Universal Declaration and Articles 2(1) and 26 of the ICCPR. Both the ACHPR, ICCPR as well as the Universal Declaration do not explicitly list sexual orientation and gender identity among the protected grounds,<sup>12</sup> but nevertheless the African Commission on Human and

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<sup>8</sup> Application Nos 4916/07,25924/08, 14599/09, 21 October 2010 (ECHR).

<sup>9</sup> See Human Rights Awareness and Promotion Forum 'A Guide to the Normative Legal Framework on the Human Rights of LGBTI Persons in Uganda' (2015), 16-17.

<sup>10</sup> High Court Miscellaneous Cause No. 247 of 2006.

<sup>11</sup> High Court Miscellaneous Cause No. 163 of 2010.

<sup>12</sup> See Article 2 and 3 of the ACHPR; Articles 1, 2 and 7 of the Universal Declaration and Article 2(1) and 26 of the ICCPR.



Peoples' Rights (African Commission) as well as the Human Rights Committee of the United Nations have interpreted the relevant provisions to extend to sexual orientation and in the case of the ACHPR, also to gender identity.<sup>13</sup>

In the *Alekseyev* case, the European Court of Human Rights held that the Russian government's refusal to allow the Pride parade to take place also violated the right to equality and non-discrimination. The Court held that where a difference in treatment is based on sexual orientation alone, this will amount to discrimination. As in the *Alekseyev* case, the main reason for stopping the Pride parade from taking place was because the parade was held by LGBTI persons in the furtherance of this community's particular concerns which the government sought to suppress. The organisers and participants are prevented from exercising their right to freedom of assembly due to discrimination based on their sexual orientation. As discussed under 3.1 above, the existing grounds of non-discrimination under the ACHPR and international instruments can be interpreted to include 'sexual orientation' as a prohibited ground.

The government's release of a statement of their position on the activities of LGBTI Ugandans as part of the conversation about the raid and the parade made it abundantly clear that the reason for the stopping of the event was the fact that it was hosted and attended by members of the LGBTI community and not the alleged non-compliance with POMA.<sup>14</sup> The Minister does mention in the statement that 'police clearance' was not obtained for the holding of the meeting though the meaning of this requirement is unknown since POMA only requires *notification* of public meetings to the Police and does not make mention of *police clearance*. The fact that a meeting would be interrupted and dispersed for the reason that it had been convened and attended by members of the LGBTI community amounts to differential treatment on the basis of sexual orientation and gender identity and has the effect of impairing the equal enjoyment of the rights to freedom of assembly, speech and expression by this group.

Therefore the stopping of the Pride pageant is furthermore a violation of the attendees', participants' and organisers' right to equality before and under the law in all spheres of life as well as their right to non-discrimination on the basis of their sexual orientation and gender identity.

### **3.3 The right to freedom of association of LGBTI organisations**

The Minister declared the activities of the LGBTI movement to be illegal, and made it clear that they would be suppressed. This directly threatened the right to freedom of association.

The right to freedom of association is anchored in Article 29(1)(e) of the Constitution and in Article 10(1) of the ACHPR, Article 20(1) of the ICCPR and Article 22(1) of the Universal Declaration. The right is not absolute and can be limited if the people seeking to exercise do

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<sup>13</sup> See African Commission on Human and Peoples' Rights *Resolution on the Protection Against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity* Adopted by the African Commission at its 55<sup>th</sup> Ordinary Session held in Luanda, Angola in 2014 and *Toonen v Australia* Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

<sup>14</sup> Government position on LGBTI activities, n2 above.

not abide by the law, and also under the provided limitations in Article 43 of the Constitution. However as discussed earlier, the *Andrew Mwenda* case in the Supreme Court provides a limitation within a limitation, which essentially means that even when limiting a right, the limitation should not take precedence over the enjoyment of the right.

By claiming that the activities of the LGBTI movement are illegal, the Minister baselessly threatens the work of organisations defending the rights of the LGBTI community. As already stated, there is no law that criminalises ‘the promotion of homosexuality or homosexual activities.’ Confusion surrounding the criminality of ‘the promotion of homosexuality’ has been ushered in through the enactment of the Anti-Homosexuality Act, 2014 which did create such an offence. The Anti-Homosexuality Act was, however annulled by the constitutional court in 2014,<sup>15</sup> and the legality of the action of passing such an Act with such a provision is still being challenged at the East African Court of Justice.<sup>16</sup>

By threatening the future existence of organisations which promote and protect LGBTI persons, the Minister is suggesting that a vulnerable minority may be rendered without an organising mechanism which allows it to participate in the democratic process. The European Court of Human Rights held in the case of *Gorzelik and Others v Poland*<sup>17</sup> that ‘it is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively’. The threat to the freedom of association of LGBTI persons also renders them more vulnerable to a host of other human rights violations. The Minister’s threats must be viewed within the context of the broader clampdown on Uganda civil society.

### **3.4 The right to liberty**

During the raid, 16 persons were arrested, and more than 200 participants detained inside the building for more than one hour. They were thus deprived of liberty. Liberty is protected as a right under the Constitution and under international law. Article 23(1) of the Constitution protects the right to liberty and provides that the right can be limited in only a few exceptions including ‘for the purpose of bringing that person before a court in execution of an order of a court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence.’ Article 6 of the ACHPR and Article 9 of the ICCPR both specifically provide that no-one may be arbitrarily arrested or detained. Arbitrary arrests occur when there is no legal justification of the arrest. Considering that the persons arrested were detained for three hours and then released without any charge clearly indicates that there was no intention on the part of the police to prosecute the arrestees. In contravention of Article 23(3) of the Constitution, the arrestees were not informed of the reasons for their arrest immediately or as soon as possible thereafter.

The police, under the circumstances could not be said to have suspected the activists and organisers of committing a crime or of being about to commit a crime. This is because as

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<sup>15</sup> In the case of *Prof. J Oloka Onyango & 9 Others v Attorney General*, Constitutional Petition No.6 of 2014.

<sup>16</sup> In the case of *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda*, Reference No. 6 of 2014.

<sup>17</sup> Application No 44158/98, 17 February 2004 (ECHR).

earlier discussed, the pageant was a social event that required no notification of police as claimed in a multitude of police statements. If there were any such suspicions, these should have been removed by the actual realisation that the event that was being held was a social event, after the officers raided the place. Be that as it may, from the above discussed events, it was clear that police carried out the arrests because the event was organised by LGBTI persons. No law in Uganda criminalises being identifying as LGBTI and it is therefore not a lawful ground for arrest. The arrests were therefore a blatant abuse of the right to liberty as guaranteed in the Constitution and various other international and regional instruments.

Also, the detention of the over 200 attendees at the venue for over an hour was in violation of the right to liberty. This deprivation of liberty was arbitrary and not undertaken for 'reasons or conditions previously laid down by law.'<sup>18</sup>

### **3.5 The right to privacy**

The Police took pictures of participants without their consent, and also threatened to share them with the public. They also groped the genitals and breasts of participants claiming to be determining their sex. All these acts amounted to invasion of privacy. The right to privacy is protected under Article 27 of the Constitution. Article 27(2) of the Constitution provides that '(n)o person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property'. This right has been interpreted in Ugandan courts in consideration of LGBTI rights. In the *Rolling Stone* case the publication of the names, home addresses and photographs of 100 people with the headline 'HANG THEM; THEY ARE AFTER OUR KIDS!!!! Pictures of Uganda's 100 top homos leak' was challenged in the High Court of Uganda held at Kampala, Miscellaneous Cause 163 of 2010. The High Court ordered a permanent injunction, restraining the newspaper from future publication of the identities of the persons or homes of the applicants in that case and homosexuals generally. The High Court in that case also held that the publication of the photographs along with a headline calling for the hanging of homosexuals who are 'after our children' threatened the rights of the applicants to human dignity and protection from inhuman treatment and the right to privacy of the person and home. He stated that the applicants were entitled to the right to privacy.

As regards groping and fondling of people, the *Victor Mukasa* case is instructive. In that case,<sup>19</sup> a woman was arrested, forcibly undressed and suffered the fondling of her breasts by the Officer in Charge of the police station in an 'examination' intended to determine her sex. The High Court held that these actions violated among others her right to privacy. Article 43 of the Constitution also limits the right to privacy. However, it was made clear in the *Rolling Stone* case that 'fighting gayism and the activities of gays' could not be a proper justification for the violation of this right.<sup>20</sup> Therefore these actions of the Police were in violation of the right to privacy.

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<sup>18</sup> Article 6 of ACHPR.

<sup>19</sup> (2008) AHRLR 248 (UgHC 2008).

<sup>20</sup> n7 above.

### **3.6 The right to freedom from torture, inhuman and degrading treatment**

The transgender persons who were among those arrested and those at the venue were groped by the police officers who stated that they wanted to ascertain their sex. The individuals who were taken to the police station were beaten by fellow inmates in the cells, and they were also forced to 'bathe' in dirty water and were subjected to taunts from police officers and inmates. Article 24 of the Constitution demands respect for human dignity and provides that 'no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.' Article 5 of the ACHPR is similar to this provision and freedom from torture, cruel, inhuman and degrading treatment is also guaranteed under the ICCPR and the Universal Declaration.<sup>21</sup> This right is non-derogable under Article 44 of the Constitution. In the *Victor Mukasa* case, humiliating actions similar to those suffered by the arrested persons in question, were found to violate the right to dignity.

Therefore in conclusion, the actions of the Police and the Minister of Ethics and Integrity violated the rights of the victims to: freedom of assembly; freedom of association; equality and freedom from discrimination; privacy; torture and inhuman and degrading treatment.

## **4. Criminal liability arising out of the actions of the Police and the Minister of Ethics and Integrity**

The actions of the Police and the Minister can give rise to criminal liability. In what follows, the offences which have arguably been committed will be discussed:

### **4.1 Assault and assault occasioning actual bodily harm**

Section 235 of the Penal Code Act creates the crime of common assault in the following terms: '(a)ny person who unlawfully assaults another commits a misdemeanour, and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year.' The Penal Code Act also criminalises assault causing actual bodily harm in Section 236 which provides: 'Any person who commits an assault occasioning actual bodily harm commits a misdemeanour and is liable to imprisonment for five years.' The people who were arrested from the night club were slapped and beaten by the police which actions caused injury and interfered with their health and bodies. The Policemen who committed these acts can therefore be charged with assault causing actual bodily harm.

### **4.2 Indecent assault**

Section 128 of the Penal Code provides that:

'(1) Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years, with or without corporal punishment.

...

(3) Any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object,

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<sup>21</sup> See Article 5 of the Universal Declaration; Article 7 of the ICCPR and Article 1(1) and 2(1) of the United Nations Convention Against Torture (UN-CAT) which Uganda ratified in 1986.

intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl, or intrudes upon the privacy of such woman or girl, commits a misdemeanour and is liable to imprisonment for one year.'

The police officers touched women on the pretext of establishing their sex. This would amount to indecent assault under Section 128(1) especially since they were neither resisting arrest nor was there a reasonable law enforcement justification for doing this. The humiliating taunts by the Police officers also amount to a crime under Section 128(3).

#### **4.3 Threatening violence**

Section 81(a) of the Penal Code Act provides for the offence of threatening violence. It provides that 'any person who with intent to intimidate or annoy any person, threatens to injure, assault, shoot or kill any person, or to burn, break or injure any property' commits an offence and is liable to imprisonment for a period not exceeding four years. The Minister's statement about not only mobilising police forces to clamp down on the parade and other LGBTI activities, but also mobilising mobs to attack LGBTI persons and carry out acts of violence against them was intended to intimidate the LGBTI community, organisers of the parade and activists into cancelling the events, with threats of injury. These statements therefore amount to the offence of threatening violence.

#### **4.4 Hate speech**

Hate speech is generally understood to mean speech that denigrates people on the basis of their membership to a group. Article 20(2) of the ICCPR requires of states to prohibit '(a)ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Uganda does not have an act of Parliament in place which prohibits hate speech in accordance with this standard. Minister Lokodo's statement, during a meeting with LGBTI activists and human rights lawyers on the day after the raid of the Pride pageant, that he would mobilise members of the public to storm the Pride parade if it were to go ahead, and also calling upon the public to shun LGBTI events amount to hate speech.

### **5. Tortious liability arising from the actions of the Police and the Minister**

The circumstances also give rise to tortious liability. The torts that were committed are:

#### **5.1 Battery**

The tort of battery occurs when there is a direct and intentional application of force to another person. Black's Law Dictionary defines this tort as: 'any unlawful beating or other wrongful physical violence or constraint inflicted on a human being without his consent.' In the process of arresting people at the pageant, the Police beat and slapped many of the participants, which amounts to battery. According to the case of *Wilson v Pringle*,<sup>22</sup> any 'hostile touching' of a plaintiff by a defendant in a way in which he is known to object

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<sup>22</sup> (1986) CA.

would constitute battery. The pulling out of some of the participants' hair by the Police would thus also constitute this tort. Arrestees and attendees of the pageant who suffered beating, slapping and the pulling out of their hair by the Police are thus entitled to damages.

## **5.2 Assault**

The tort of assault is defined by Black's Law dictionary as 'the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.' The Police's display of force and pointing of guns in the club where the pageant was hosted constituted assault. The attendees and participants of the pageant were kept in fear without knowing what they had done wrong or what their fate would be. The 200 people in the club had 'reasonable apprehension of imminent harmful or offensive contact' seeing that the Police were pointing guns at them and all around them some of the attendees were, seemingly indiscriminately, beaten and indecently assaulted by the Police. Harm was feared to such an extent that it caused one of the attendees to risk his life by jumping from the fourth storey of the building in order to escape the police.

## **5.3 False imprisonment**

False imprisonment is defined in the case of *Bird v Jones*<sup>23</sup> as 'a restraint on the liberty of a person without lawful cause either by confinement in prison, stocks, houses ... or even by forcibly detaining the party in the streets, against his will.' It is thus the restraint of a person's body, which is not authorised by law. The acts of the Police in locking 200 people in the club for over an hour by pointing guns at them and forcing them to sit on the floor constituted false imprisonment. The participants were not told that they were under arrest and there was no lawful ground for their detention.

# **6. Remedies and avenues of redress available**

## **6.1 Enforcement of rights (Section 50 of the Constitution)**

Article 50(1) of the Constitution allows any person whose rights have been violated to go to the High Court for enforcement. Article 50(2) allows for any other person to go to court to enforce the rights of another person. In light of the myriad of violations of constitutional rights suffered by the attendees, organisers and participants of the Pride pageant as well as the LGBTI community in general through the Police raid of the event and subsequent statements by the Police and Government officials, the High Court can be approached for the enforcement of fundamental rights in terms of Article 50 of the Constitution. The Attorney General can be cited a respondent to speak for the actions of the police and Minister Lokodo can be cited in his personal capacity.

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<sup>23</sup> (1845) 7 QB 742.

## **6.2 Enforcement of rights at the Uganda Human Rights Commission**

An alternative to instituting proceedings for the enforcement of fundamental rights in the High Court, a complaint can be laid with the Uganda Human Rights Commission (UHRC) alleging the same rights violations as listed above. The complaint shall ideally be heard by the UHRC Tribunal and the Tribunal can award the complainants compensation or any other legal remedy or redress, such as a declaration of rights, in terms of Article 53(2) of the Constitution.

## **6.3 Constitutional interpretation**

In terms of Article 137(1) of the Constitution, any question as to the interpretation of the Constitution shall be heard by the Court of Appeal sitting as a constitutional court. The constitutional court can be petitioned on whether the criminalisation of same sex relations under Section 145 of the Penal would justify an infringement of constitutionally entrenched rights.

## **6.4 Civil actions at the High Court (for torts)**

The arrestees and attendees of the pageant who suffered battery when they were beaten, slapped, groped and had their hair pulled out by the Police can institute a civil suit against the Attorney General and are entitled to damages.

The attendees of the pageant who suffered assault due to the Police's display of force and the causing of an apprehension of imminent harm can institute a civil suit against the Attorney General and are entitled to damages.

The 200 attendees who were falsely imprisoned in the club by the Police for over an hour can institute a civil suit against the Attorney General and are entitled to damages.

## **6.5 Filing criminal charges (including private prosecutions)**

The following criminal charges can be filed:

- 1) The Police officers who beat and slapped people in the course of arresting them can be charged with assault causing actual bodily harm in terms of section 236 of the Penal Code Act and will be rendered liable to five years imprisonment.
- 2) The Police officers who groped, fondled and crudely taunted female arrestees can be charged with indecent assault and they are liable to imprisonment for a period of one to fourteen years.
- 3) Minister Lokodo can be charged with the offence of threatening violence in terms of Section 83 of the Penal Code Act and is liable to imprisonment for a period of up to four years.

The Director of Public Prosecutions should look into the prospects of charging the police officers and Hon. Lokodo with offences under these provisions.

## **7. Conclusion**

There were many human rights violations that were committed during the raid on the LGBTI pageant. The actions of the police and those of the minister give also give rise to both criminal and tortious liability under Ugandan law. It is therefore possible to take court action to enforce these rights and seek redress by the attendees, the organisers and the activists against the Attorney General, individual police officers and the Hon. Simon Lokodo in his personal capacity. The Director of Public Prosecutions is encouraged to take the required criminal action as he has the powers to prosecute. Crime and impunity cannot go unchallenged.



## References

### International Instruments

- International Covenant on Civil and Political Rights, 1966.
- International Covenant on Economic Social and Cultural Rights, 1966.
- Universal Declaration of Human Rights, 1965.
- United Nations Convention Against Torture, 1987.

### Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- African Commission on Human and Peoples' Rights *Resolution on the Protection Against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity* Adopted by the African Commission at its 55<sup>th</sup> Ordinary Session held in Luanda, Angola in 2014.

### Legislation

- Constitution of the Republic of Uganda, 1995
- Penal Code Act of 1950.

### Case law

- Alekseyev v Russia* Application Nos 4916/07,25924/08, 14599/09, 21 October 2010 (ECHR).
- Bird v Jones* (1845) 7 QB 742.
- Gozelik and Others v Poland* Application No 44158/98, 17 February 2004 (ECHR).
- Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda* Reference No. 6 of 2014.
- Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema and Geoffrey Ogwaro v The Attorney General and Hon. Rev Fr. Simon Lokodo* High Court Miscellaneous Cause 33 of 2012.
- Kasha Jacqueline, David Kato Kisuule and Patience Onziema v Rolling Stone Ltd and Giles Muhame* High Court Miscellaneous Cause 163 of 2010.
- Prof. J Oloka Onyango & 9 Others v Attorney General*, Constitutional Petition No.6 of 2014.
- Mukasa and Another v Attorney General* (2008) AHRLR 248 (UgHC 2008).
- Toonen v Australia* Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

*Wilson v Pringle* (1986) CA.

### **Reports**

Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation (2015), *Uganda Report on Violations based on Gender Identity and Sexual Orientation* (2015).

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