

Uganda's unrelenting legislative efforts to criminalise same-sex relations: Implications for human rights

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Summary: *The first direct legal instrument promoting homophobia and aimed at criminalising all sexual acts of intimacy by LGBTI persons in Uganda was the 2009 Anti-Homosexuality Bill. The Bill was widely criticised by human rights groups, foreign governments and international organisations, and was eventually withdrawn in 2011. In 2013 the Ugandan Parliament passed a new version of the Bill, which was signed into law by President Yoweri Museveni but was later, in August 2014, overturned on technical grounds by the Ugandan Constitutional Court. In May 2023 the Ugandan Parliament passed a new Anti-Homosexuality Act, which is the focus of this article. This Act attracted world-wide condemnation as the harshest legislation ever against LGBTI persons. The article begins with a historical context of legislative efforts to criminalise same-sex relations in Uganda before focusing on the latest Anti-Homosexuality Act. In order to understand the human rights implications of the legislation, a discussion of certain aspects and contents of the Act is undertaken. The human rights implications of the legislation are then discussed, before concluding with some recommendations on how the rights of LGBTI persons in Uganda can be protected in the face of such legislative and societal hostility.*

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1 Introduction

There are a number of possible reasons for anti-gay sentiments in Uganda. First, many Ugandans are deeply religious and hold traditional beliefs that view homosexuality as immoral, unnatural, and contrary to the will of God.¹ These beliefs are reinforced by conservative interpretations of religious texts that condemn homosexuality. The second reason is political opportunism. Some politicians in Uganda have used anti-gay sentiments to rally support and distract from other issues.² Third, there is a general lack of education and awareness about homosexuality in Uganda. Many people have little understanding of what homosexuality is and view it as a foreign concept that is being imposed on Ugandan culture.³ Moreover, there is a perception among some Ugandans that homosexuality is a Western import that threatens traditional values and culture.⁴ This fear has been fuelled by the involvement of Western countries and organisations in promoting lesbian, gay, bisexual, transgender and intersex (LGBTI) rights in Uganda. Worse still, some Ugandans view homosexuality as a public health threat, linking it to the spread of HIV and other sexually-transmitted infections.⁵ This perception is fuelled by a lack of understanding of the causes of HIV and the role that discrimination and stigma plays in the spread of the disease.⁶

It is important to note that these reasons are not unique to Uganda and are often cited in other countries with anti-gay sentiments. Indeed, there is what is referred to as 'an epidemic of intolerance'

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- 1 J Ohayon 'Following the herd: The influence of religion and national identity on antigay sentiment in Uganda' (2018) 6 *International Human Rights Internship Programme: Working Paper Series* 13.
 - 2 N Manglos-Weber 'US talks sanctions against Uganda after a harsh anti-gay law – but criminalising same-sex activities has become a political tactic globally' *The Conversation* 22 June 2023, <https://theconversation.com/us-talks-sanctions-against-uganda-after-a-harsh-anti-gay-law-but-criminalizing-same-sex-activities-has-become-a-political-tactic-globally-206352> (accessed 23 August 2024).
 - 3 S Nyanzi 'Homosexuality in Uganda: The paradox of foreign influence' MISR Working Paper 14 March 2013, <https://mistr.mak.ac.ug/sites/default/files/publications/14Homosexuality%20in%20Uganda.pdf> (accessed 23 August 2024).
 - 4 K Tschierse & I Eisele 'Why is homophobia so strong in Uganda?', <https://www.dw.com/en/why-is-homophobia-so-strong-in-uganda/a-65393277> (accessed 23 August 2024).
 - 5 LJ Nakiganda and others 'Understanding and managing HIV infection risk among men who have sex with men in rural Uganda: A qualitative study' (2021) 21 *BMC Public Health* 1309.
 - 6 As above.

of LGBTI people in many African countries.⁷ For example, ‘same-sex relations remain illegal in 32 of 54 African countries and are still punishable by death in three countries: Mauritania, Somalia, and Nigeria (only in 12 northern states where Shari’a law is enforced)’.⁸ In Kenya, gay sex is a criminal offence, and is punishable by up to 14 years’ imprisonment.⁹ In Tanzania it is punishable by a minimum of 30 years and a maximum of life imprisonment.¹⁰

There is no shortage of literature on the violation of the human rights of LGBTI persons in Uganda and legislative efforts to criminalise same-sex relations. In *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation*¹¹ Jjuuko and Nyanzi explored ‘the increasing significance of the LGBT debate in Uganda showing why there is increased contestation and the politics around LGBT rights’.¹² The authors also discussed ‘how both sides of the LGBT divide have used the courts of law to further their ends and what influences the choice of court cases and other legal actions taken’.¹³

In *Protecting the human rights of sexual minorities in contemporary Africa*¹⁴ Ambani carefully outlined ‘the winding walk toward popular anti-homosexuality legislation’¹⁵ in Uganda, highlighting the country’s manifestation of a ‘chronic allergy to the rights of sexual minorities’.¹⁶ Ambani also highlighted judicial decisions that have occasionally exhibited the capacity to protect the human rights of LGBTI persons despite a few that have failed to do so – concluding that those progressive cases that protect LGBTI rights serve as ‘exhibits of the potential of the judicial forum in Uganda to serve as an effective bastion of the rights of sexual minorities’.¹⁷ Related

7 V Rouget ‘Tolerance still in short supply for LGBT rights in sub-Saharan Africa’ *Control Risks/Social Risk and Compliance* 5 July 2021, <https://www.controlrisks.com/our-thinking/insights/tolerance-still-in-short-supply-for-lgbt-rights-in-sub-saharan-africa> (accessed 27 July 2023).

8 As above.

9 T Mhaka ‘Homophobia: Africa’s moral blind spot: It is high time for African leaders to accept LGBTQ rights are human rights’ *Al Jazeera* 6 May 2022, <https://www.aljazeera.com/opinions/2022/5/6/homophobia-africas-moral-blind-spot> (accessed 27 September 2023).

10 Sec 154 Penal Code of 1945 (as revised by the Sexual Offences Special Provisions Act, 1998).

11 A Jjuuko and others (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022).

12 A Jjuuko & S Nyanzi ‘Court focused lawfare over LGBT rights: The case of Uganda’ in Jjuuko and others (n 11) 145-146.

13 As above.

14 S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017).

15 JO Ambani ‘A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective’ in Namwase & Jjuuko (n 14) 43.

16 As above.

17 Ambani (n 15) 49.

to this is the 'homosexuality versus culture' debate in Uganda. This was discussed in detail by Namwase who analysed how the right to culture has been interpreted and applied in specific rulings by Ugandan courts, while also exploring the jurisprudential implications of these decisions on the debate surrounding homosexuality and cultural values in Uganda.¹⁸

Other commentators that have written about the criminalisation of same-sex relations in Uganda include Ssenyonjo who explored the criminalisation of private, consensual same-sex relationships, focusing specifically on the Anti-Homosexuality Act 2023 and its effects on human rights such as the right to life, privacy, human dignity, personal integrity, freedom, personal security, equality, non-discrimination, health, and the freedoms of association, expression and peaceful assembly.¹⁹ They also include Johnson and Falcetta who examined the Official Report (Hansard) to critically assess the Ugandan Parliament's activities concerning homosexuality since 2014.²⁰ They explored how parliamentarians perceive the 'problem' of homosexuality and the claims they make about homosexuals. The study found that calls for increased regulation of homosexuality are largely based on problematic assertions about two related issues: the so-called 'promotion' of homosexuality in Uganda and the imagined 'recruitment' of Ugandan children into homosexuality.²¹ The authors concluded that reducing parliamentary support for anti-gay legislation and preventing the enactment of new anti-gay laws require Ugandan parliamentarians to speak out against homophobia.²²

However, the focus of this article is on the human rights implications of Uganda's unrelenting efforts to criminalise same-sex relations, culminating in the opprobrious Anti-Homosexuality Act that was passed in May 2023. The Act, which was signed into law by the President on 26 May 2023, attracted world-wide condemnation.²³ This article begins with a historical context of legislative efforts to criminalise same-sex relations in Uganda before focusing on the

18 See S Namwase 'Culture versus homosexuality: Can a right "from" culture be claimed in Ugandan courts?' in Namwase & Jjuuko (n 14) 52-78.

19 M Ssenyonjo 'Sexual orientation and the criminalisation of private consensual sexual acts between adults of the same gender' (2023) 12 *International Human Rights Law Review* 143-212.

20 PJ Johnson & S Falcetta 'Beyond the Anti-Homosexuality Act: Homosexuality and the Parliament of Uganda' (2021) 74 *Parliamentary Affairs* 52-78.

21 As above.

22 As above.

23 OHCHR 'Uganda: UN experts condemn egregious anti-LGBT legislation' *Press Release* 29 March 2023, <https://www.ohchr.org/en/press-releases/2023/03/uganda-un-experts-condemn-egregious-anti-lgbt-legislation> (accessed 30 August 2023).

2023 Anti-Homosexuality Act. In order to understand the human rights implications of the legislation, a discussion of certain aspects and contents of the Act is undertaken. The human rights implications of the legislation are then discussed, before concluding with some recommendations on how the rights of LGBTI persons in Uganda can be protected in the face of such legislative and societal hostility.

2 Context and background

As in several other African countries, such as Kenya, Nigeria, Egypt and Botswana, male homosexual relations were quite common in pre-colonial Ugandan society.²⁴ Homosexuality, therefore, has a long history in Uganda. Although there is some contestation around the claim, it is alleged that Kabaka Mwanga II, who succeeded his father, Kabaka Mwanga I, in 1884, 'murdered tens of Christian Baganda men ... because they refused to sleep with him. They refused because of their faith and the encouragement of the missionaries.'²⁵ It is now well known that 'in 1964, 22 of the men were canonised and are now regarded as saints'.²⁶ They are commonly and famously referred to as the 'martyrs of Uganda'.

The genesis of Uganda's anti-gay legislative expression can be traced to the 1950 Penal Code Act,²⁷ which in section 145 provides for 'unnatural offences'. It states the following:

Any person who –

- (a) has carnal knowledge of any person against the order of nature;
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.

The 1950 Penal Code Act does not explicitly specify any sexual acts related to the LGBTI community. Nevertheless, the Act consists of provisions that have the potential to be interpreted in a discriminatory manner. Moreover, the Act criminalised attempts to carry out what it refers to as 'unnatural offences'.²⁸ Additionally, law enforcement

24 K Christensen 'A legacy of homophobia: Effects of British colonisation on queer rights in India and Uganda' (2022) *Capstone Projects and Master's Theses* 1413, https://digitalcommons.csumb.edu/caps_thes_all/1413 (accessed 31 August 2024).

25 See 'The gay king of the Buganda' *Medium* 30 October 2015, <https://medium.com/@Owaahh/the-gay-king-of-the-buganda-876a392adbe6> (accessed 28 July 2023).

26 As above.

27 The Penal Code Act (Cap 120) 1950.

28 Sec 146.

officials could exploit another provision in the Act to deprive LGBTI individuals of their sexual rights. This provision states:²⁹

Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years.

In 2000 the Penal Code was amended to introduce stiffer penalties for 'carnal knowledge against the order of nature'.³⁰ Under section 140 the offence was punishable by life imprisonment and, under section 141, 'attempted homosexuality' was specifically made a criminal offence.

In 2009 an 'Anti-Homosexuality Bill', which sought to criminalise same-sex relationships more explicitly, was introduced in the Ugandan Parliament. The Bill proposed the death penalty for 'aggravated homosexuality' (defined as same-sex activity involving a minor, a person with disabilities, or someone infected with HIV) and life imprisonment for other same-sex relationships. The Bill was widely criticised by human rights groups, foreign governments and international organisations and was eventually withdrawn in 2011 due to international pressure.

In 2013 the Ugandan Parliament passed a new version of the Anti-Homosexuality Bill, which criminalised the 'promotion of homosexuality', as well as same-sex relationships. The Bill imposed harsh penalties on anyone who 'funds, sponsors, or abets homosexuality' or 'counsels or procures another to engage in homosexuality'. The Bill was signed into law by President Yoweri Museveni but was later overturned by the Ugandan Constitutional Court in August 2014 on technical grounds,³¹ although it is widely believed that the decision was influenced by international pressure.

On 21 March 2023 the Ugandan Parliament passed a new Anti-Homosexuality Bill. As will be seen further below, this Bill entrenched the criminalisation of same-sex conduct and created new offences that would curtail any activism on LGBTI issues. It created harsher sentences for those identified as LGBTI persons and attempted to eradicate them from any form of social engagement in Uganda. The

29 Sec 148.

30 Penal Code Amendment (Gender References) Act 2000.

31 *Oloka-Onyango & 9 Others v Attorney-General* Constitutional Petition 8 of 2014 [2014] UGSC 14 (1 August 2014).

Bill was signed into law by the President on 26 May 2023. In order to understand the gravity of this legislation and the implications it carries for human rights, it is important to have an understanding of its drafting history, particularly focusing on the debates and discussions that informed its passing. We now turn our attention to that aspect.

3 Drafting history

Understanding the drafting history of the anti-homosexuality legislation in Uganda is important for an appreciation of its human rights implications. As mentioned earlier, anti-homosexuality sentiments have their legislative genesis in the Penal Code Act of 1950. They also found expression in other subsequent statutes such as the Equal Opportunities Act.³² This Act established the Equal Opportunities Commission with powers to act as a tribunal in all cases of discrimination against marginalised groups. However, the Commission could not investigate any matter involving behaviour, which could be considered '(i) immoral and socially harmful, or (ii) unacceptable by the majority of the cultural and social communities in Uganda'.³³ Clearly, this provision was deliberately targeted at LGBTI persons. It was later successfully challenged in court.³⁴ Other anti-LGBTI statutes include the Public Order Management Act (POMA),³⁵ which contains provisions that have been used to restrict LGBTI individuals' rights to peaceful assembly and expression, and the HIV and AIDS Prevention and Control Act,³⁶ which criminalises the intentional transmission of HIV but has also been used to target LGBTI individuals.

POMA has been used by Ugandan authorities to prevent or shut down gatherings of LGBTI individuals. For instance, in 2016 Ugandan police raided a gathering organised by Sexual Minorities Uganda (SMUG) to celebrate Pride Week.³⁷ The police cited POMA as justification for the raid, claiming that the gathering was an illegal assembly, even though the organisers had notified the authorities as required by law.³⁸ This action effectively suppressed

32 Act 2 of 2007.

33 Sec 15(6)(d) Equal Opportunities Act.

34 *Adrian Jjuuko v Attorney-General* Constitutional Petition 1 of 2009.

35 Act 9 of 2013.

36 Act 1 of 2015.

37 See HRAPF 'A legal analysis of the brutal police raid of an LGBTI pageant on 4th August 2016 and subsequent actions and statements by the police and the minister of ethics and integrity' 16 August 2016, <https://hrapf.org/?mdocs-file=1792&mdocs-url=false> (accessed 23 August 2024).

38 As above.

the LGBTI community's right to peaceful assembly. The HIV and AIDS Prevention and Control Act has been used as a tool to harass and prosecute individuals based on their sexual orientation. For example, there have been cases where LGBTI individuals have been accused of intentionally transmitting HIV, without substantial evidence, leading to their arrest and prosecution.³⁹

The first most direct legal instrument promoting homophobia and specifically aimed at criminalising all sexual acts of intimacy of LGBTI persons in Uganda, however, was the 2009 Anti-Homosexuality Bill. As mentioned earlier, the Bill sought to criminalise same-sex relationships more explicitly. It proposed life imprisonment or even the death penalty for homosexuality. Besides its controversial content and intent, the Bill had many shortcomings. For example, it did 'not contain a clear definition of the offence of homosexuality and thus offended the principle of legality, which requires that for a person to be convicted of an offence, it should be clearly defined by law'.⁴⁰ Second, the scope of the Bill was not clear. Although its aim was to outlaw the promotion of homosexuality, it extended its application to third parties (such as 'persons in authority') on whom it bestowed a duty and obligation to 'police' homosexual acts or tendencies. The most problematic aspect of the Bill, however, was its human rights implications for which it was widely criticised by human rights organisations and the international community. Nevertheless, after several revisions and amendments, it was eventually passed into law in December 2013, with the death penalty clause removed. That is how the Anti-Homosexuality Act 2014 came into being.

A number of observations are to be made from the parliamentary debates leading to the passing of the Anti-Homosexuality Act 2014. First, it appears that the legislators saw their role as custodians of morality rather than representatives of their people, whose role is to make laws and ensure that the government is functioning properly and effectively. For example, in moving the Bill for its second reading, Mr Benson Obua-Ogwal stated the following:⁴¹

This Bill is meant to provide for marriage in Uganda as contracted between only man and woman, and that is the way the Creator really intended it to be. This is one of the reasons why this Bill must be

39 S Devi 'Uganda takes "another step backward" with HIV Bill' 383 (9933) 1945-2018, [https://doi.org/10.1016/S0140-6736\(14\)60941-7](https://doi.org/10.1016/S0140-6736(14)60941-7) (accessed 23 August 2024).

40 JC Mubangizi & B Twinomugisha 'Protecting the right to freedom of sexual orientation: What can Uganda learn from South Africa' (2011) 22 *Stellenbosch Law Review* 344.

41 Uganda Parliament Parliamentary Debates (Hansard) 20 December 2013 (Mr Benson Obua-Ogwal).

considered – there is an attempt to redefine marriage. The family is also under attack, and it is our role, as Members of Parliament, to protect what we know as the family. The family is being redefined and we need to protect what we know, as Ugandans, to be a family.

Regarding the purpose of the Bill, the member went on to say:⁴²

The Bill further aims at providing a comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda and legal, religious and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda.

The other observation is that in passing the Bill, the legislators were not unaware of its human rights implications and the potential violation of international human rights norms. They were clearly and unequivocally reminded of these norms by the dissenting minority opinion in the report of the Committee on Legal and Parliamentary Affairs to whom the Bill had been referred after the first reading in accordance with Rules 117 and 118 of the Rules of Procedure of Parliament. The opinion advised as follows:⁴³

The introduction of this law contravenes many international conventions and treaties which are already ratified by Uganda, such as the African Charter on Human and Peoples' Rights (the Banjul Charter) ratified by Uganda on 10 May 1996; the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The opinion further advised:⁴⁴

A citizen loses the right to his or her citizenry the moment the state intervenes in the affairs of his or her bedroom. To that end, that Act offends the provision of Article 27 of the Constitution of the Republic of Uganda, which comprehensively provides for the right to privacy of persons ... What two consenting adults do in the privacy of their bedroom should not be the business of this Parliament. It is not right to have the state allowed in the bedrooms of people.

This advice was clearly not taken, as the Bill was passed by Parliament in December 2013, as mentioned earlier, and was signed into law by President Yoweri Museveni in early 2014. However, as mentioned earlier, the statute was later struck down by Uganda's Constitutional Court in August 2014 on a technicality, with the Court ruling that Parliament had passed the law without a quorum.⁴⁵

42 As above.

43 As above.

44 Uganda Parliament Parliamentary Debates (Hansard) 20 December 2013 (Mr Mwiru).

45 *Oloka-Onyango & 9 Others v Attorney-General* Constitutional Petition 8 of 2014 [2014] UGSC 14 (1 August 2014).

On 3 May 2021 Parliament passed the Sexual Offences Bill of which the objective was to criminalise any sexual activity conducted between individuals of the same gender, as well as anal intercourse among individuals of any gender. The legislation was intended to introduce significant changes to the Ugandan Penal Code with regard to sexual offences. However, in August 2021 President Museveni declined to approve the Bill, arguing that many of the provisions included in the proposed law were superfluous as they were already covered by existing legislation such as the Penal Code Act.

The most recent attempt at enacting legislation aimed at criminalising the sexual behaviour of LGBTI persons is the Anti-Homosexuality Act of 2023. Deemed as the harshest law against LGBTI persons ever, the 2023 Anti-Homosexuality Bill was initially passed by Parliament on 21 March 2023. As mentioned earlier, it was signed into law in May 2023 after having been passed by Parliament again with a few amendments. Worldwide condemnation of the Act was swift and vociferous.

As with the 2014 Anti-Homosexuality Act, the parliamentary debates leading to the passing of the 2023 Bill make for interesting reading. In moving the motion for the second reading of the Bill, it was stated that the objective of the Bill was

to establish a comprehensive and enhanced legislation to protect traditional family values, our diverse culture, and our faiths, by prohibiting any form of sexual relations between persons of the same sex and the promotion or recognition of sexual relations between persons of the same sex.⁴⁶

The other objective was 'to strengthen the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family' and 'to protect our cherished culture, the legal, religious and traditional family values of Ugandans and acts that are likely to promote sexual promiscuity in this country'.⁴⁷ This is the very same language that was used in debating and passing the 2014 Anti-Homosexuality Act.

The debates also display a lack of understanding of Uganda's place in the international community and the relationship between Ugandan law and international law. This is clear from the contribution of one member who submitted as follows:⁴⁸

46 Uganda Parliament Parliamentary Debates (Hansard) 21 March 2023 7559 (Mr Basalirwa).

47 As above.

48 Uganda Parliament Parliamentary Debates (Hansard) 21 March 2023 7562 (Ms Rwakoojo).

Whereas Uganda is a signatory to a number of international instruments that might be interpreted to recognise sexual minorities, these do not legally create binding obligations on Uganda since the Constitution, which is the supreme law of Uganda, and other enactments such as the Penal Code Act, specifically bar sexual acts between sexual minorities.

This raises the issue of the relationship between the Ugandan Constitution and international law. The Ugandan Constitution contains provisions that emphasise the importance of international law, including the respect for international treaties, conventions and protocols. Article 2(2) of the Constitution explicitly states that ‘the Constitution shall be the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda’. However, unlike countries with a monist system – where international law can have direct effect within the domestic legal system without requiring specific legislative action – Uganda is considered a dualist state. Accordingly, international treaties and conventions to which Uganda is a party do not automatically become part of the domestic legal system. Instead, these international obligations must be explicitly incorporated into national law through legislation passed by the national Parliament.

Indeed, in cases where there is a conflict between the Constitution and international law, the Constitution prevails. However, the Ugandan courts have shown a willingness to interpret the Constitution in light of international human rights norms and principles.⁴⁹ The courts have also recognised the importance of international law in interpreting and applying Ugandan law, particularly in cases involving human rights and environmental protection.⁵⁰ It can therefore be argued that the Ugandan Constitution and international law have a complementary relationship, with international law serving as a source of guidance and inspiration for the development of Ugandan law and the protection of human rights and fundamental freedoms.

It is important to note that, as with the parliamentary debates leading to the passing of the Anti-Homosexuality Act 2014, the minority report presented during the debates on the 2023 Bill

49 See eg *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 3 of 2006 [2009] UGSC 6 (21 January 2009) in which the Ugandan Constitutional Court held that the mandatory death penalty for murder was in violation of international human rights law. The Court relied upon international treaties and conventions, such as the International Covenant on Civil and Political Rights, to support its decision.

50 See eg *Uganda v Thomas Kwoyelo* Constitutional Appeal 1 of 2012 [2015] UGSC 5 (8 April 2015) in which the Court relied upon international law, including the Rome Statute of the International Criminal Court, to interpret and apply Ugandan law on war crimes.

advised members of its potential human rights violation. The report made it clear that

not only does the Bill contravene the provisions of the Constitution of the Republic of Uganda, it also contravenes established international and regional human rights standards, as it unfairly limits the fundamental rights of the LGBTQ+ persons. This criminalisation denies them equal protection under the law, owing to the harsh and differential treatment they receive based on their sexual orientation and criminalisation of the same.⁵¹

The report warned that, if passed into law, the Bill would 'infringe the rights of Ugandans, specifically the rights and freedoms of expression, association, liberty, privacy, equality and freedom from discrimination, inhuman and degrading treatment, the right to a fair hearing'.⁵² The report concluded that if Parliament enacted the Bill into law, it would be unconstitutional. The report also concluded that 'the Bill is ill-conceived. It contains provisions that are unconstitutional, it reverses the gains registered in the fight against gender-based violence. It criminalises individuals instead of conduct and that contravenes all known legal norms'.⁵³ As in December 2013, the advice of the minority was clearly not taken, and Parliament went ahead and passed the Bill that is now the Anti-Homosexuality Act 2023.

4 Understanding the 2023 Anti-Homosexuality Act

According to the long title, the purpose of the Act is 'to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of sexual relations between persons of the same sex; and for related matters'.⁵⁴ However, an introductory memorandum prefacing the Bill that served before Parliament stated the following:

The object of the Bill is to establish a comprehensive and enhanced legislation to protect the traditional family by –

- (a) prohibiting any form of sexual relations between persons of the same sex and the promotion or recognition of sexual relations between persons of the same sex;
- (b) strengthening the nation's capacity to deal with emerging internal and external threats to the traditional, heterosexual

51 Uganda Parliament Parliamentary Debates (Hansard) 21 March 2023 7566 (Mr Odoi-Oyelwowo).

52 As above.

53 Uganda Parliament Parliamentary Debates (n 51) 7567.

54 Long title of the Bill.

- family. This legislation further recognises the fact that same sex attraction is not an innate and immutable characteristic;
- (c) protecting the cherished culture of the people of Uganda, legal, religious, and traditional family values of Ugandans against the acts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda;
 - (d) protecting children and youth who are made vulnerable to sexual abuse through homosexuality and related acts.

This seems to indicate that the purpose of the legislation goes beyond the mere prohibition of same-sex relations but extends to the so-called 'protection' of African values, the culture of Ugandans and the traditional heterosexual family. According to one commentator, '[t]his is reflective of a spate of new laws across Africa. Their proponents argue that they protect the heterosexual African family and "African values" in a rejection of "Western norms"'.⁵⁵ Okech argues that these laws endanger people's lives as they 'cause a crackdown on basic sexual and reproductive health services and education, including lifesaving HIV/AIDS services. While targeting gender and sexually diverse people, they're actually pushing a conservative interpretation of gender relations and roles'.⁵⁶ She sees these laws as a reaction by patriarchal societies to increased freedoms for formerly-marginalised groups, such as women and girls. Increased participation of women in political spaces, enhanced access to education, and measures to prevent gender-based violence are indicators of these freedoms.⁵⁷

Besides being opprobrious in its objective, the Act contains certain aspects that make it egregious. One such aspect is the definition of the offence of homosexuality and its sentence. Under section 2(1) of the Act, 'a person commits the offence of homosexuality if the person performs a sexual act or allows a person of the same sex to perform a sexual act on him or her'. Section 2(2) prescribes a sentence of life imprisonment for the offence. Even more egregious is the description of the offence of 'aggravated homosexuality' and its sentence.⁵⁸ This so-called aggravated homosexuality refers to same-sex conduct where the victim is either a child or a disabled individual, or where the perpetrator is living with HIV, serves as a parent or guardian to the victim, possesses authority or control over the victim, or is a serial offender. The offence carries the death penalty.

55 A Okech 'Uganda's anti-homosexuality law is a patriarchal backlash against progress' *The Conversation* 31 May 2023, <https://theconversation.com/ugandas-anti-homosexuality-law-is-a-patriarchal-backlash-against-progress-206681> (accessed 5 September 2023).

56 As above.

57 As above.

58 Sec 3 of the Act.

Sections 2(3) and 3(3) of the Act deal with attempts. Under section 2(3) a person who attempts to commit the offence of homosexuality is liable, on conviction, to imprisonment of ten years. Under section 3(3) attempting to commit the offence of aggravated homosexuality is punishable with a term of imprisonment of 14 years.

Section 5 of the Act deals with 'protection, assistance and payment of compensation to victims of homosexuality', and section 6 talks of 'consent of a victim of homosexuality'. These provisions are a clear indication of how the Act confuses consensual and non-consensual same-sex relations. Indeed, throughout the Act, and during the parliamentary debates that led to its passing, there seems to be a total lack of understanding of the difference between consensual and non-consensual same-sex relations. According to the UN High Commissioner for Human Rights, 'the former should never be criminalised, whereas the latter requires evidence-based measures to end sexual violence in all its forms – including against children, no matter the gender or sexual orientation of the perpetrator'.⁵⁹

Another aspect of the Act that has attracted much concern is a ban on the promotion of homosexual activities. Section 11 imposes a jail term of up to 20 years for promoting homosexuality through advertising, publishing, printing, distributing, or broadcasting any material that promotes or encourages homosexuality. This means that individuals or institutions that support or fund LGBTI persons' activities or organisations face prosecution and imprisonment. Similarly, media groups, journalists and publishers face prosecution and imprisonment for publishing, broadcasting or distributing any material that advocates LGBTI rights or promotes homosexuality.

Section 11 of the Act has been particularly criticised for targeting 'third parties' who are not necessarily in any same-sex conduct, such as journalists and funders. The same applies to section 9 which targeted property owners whose premises are occupied or used by LGBTI persons. Similarly, section 10 targets people who conduct marriage ceremonies between persons of the same sex.

It should be pointed out that the enactment of the 2023 Anti-Homosexuality Act was challenged in court on procedural and substantive grounds in the case of *Hon Fox Odoi-Oywelowo & 21 Others v Attorney-General & 3 Others*.⁶⁰ Apart from the procedural

59 OHCHR 'Uganda: Türk urges President not to sign shocking anti-homosexuality Bill', <https://www.ohchr.org/en/press-releases/2023/03/uganda-turk-urges-president-not-sign-shocking-anti-homosexuality-bill> (accessed 12 April 2023).

60 Consolidated Constitutional Petitions 14, 15, 16 & 85 of 2023.

aspects, the petition raised the issue of the impact of the contested statute on prior judicial decisions concerning related issues, and questioned the financial repercussions it may have on the nation's budgetary framework. More critically, the petition challenged specific provisions of the Anti-Homosexuality Act on the grounds that they violated constitutional rights and freedoms enshrined in the Ugandan Constitution, as well as international human rights instruments to which Uganda is a party.

Although the statute was not struck down, the Court nonetheless found certain sections of the Act to be unconstitutional. For example, section 3(2)(c) of the Act, which criminalised the transmission of a terminal illness through same-sex sexual activity, was found to violate the right to health enshrined in article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶¹ Relatedly, sections 9 and 11(2)(d) of the Act were found to be inconsistent with the right to health, as well as the right to an adequate standard of living enshrined in article 25(1) of the Universal Declaration of Human Rights (Universal Declaration) and article 11(1) of ICESCR.⁶² Furthermore, section 14 in its entirety was adjudged to infringe the right to health, privacy and freedom of religion.⁶³ The right to privacy in this context is recognised under article 12 of the Universal Declaration and article 17(1) of the International Covenant on Civil and Political Rights (ICCPR), while the right to freedom of religion is encapsulated in article 29(1)(c) of the Ugandan Constitution.⁶⁴

5 Human rights implications

In order to understand the human rights implications of the 2023 Anti-Homosexuality Act, it is important to first highlight Uganda's obligations under international law. As mentioned earlier, Uganda is a party to several international human rights treaties. These include, but are not limited to, ICCPR;⁶⁵ ICESCR;⁶⁶ the Convention on the Rights of the Child (CRC);⁶⁷ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);⁶⁸ and the

61 Para 532.

62 Para 535.

63 As above.

64 As above.

65 Adopted by the UN General Assembly on 16 December 1966.

66 Adopted by the UN General Assembly on 16 December 1966.

67 UN Commission on Human Rights, adopted on 7 March 1990, E/CN.4/RES/1990/74.

68 Adopted by the UN General Assembly on 18 December 1979.

Convention on the Rights of Persons with Disabilities (CRPD).⁶⁹ It is also party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁷⁰ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁷¹ At the regional/continental level, Uganda is a party to the African Charter on Human and Peoples' Rights (African Charter);⁷² the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol);⁷³ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁷⁴ Uganda therefore is obligated to respect, protect and fulfil the human rights of its citizens as contained in these international instruments.

The Ugandan Constitution clearly states that respect for international law and treaty obligations is one of the principles upon which the foreign policy of Uganda is based. Moreover, one of the functions of the Ugandan Human Rights Commission is 'to monitor the government's compliance with international treaty and convention obligations on human rights'.⁷⁵ The status and recognition of international law in Uganda is further reinforced by article 286 of the Constitution dealing with the status of international agreements, treaties and conventions.

It should also be noted that most of the human rights norms in the international human rights instruments to which Uganda is a party are contained in the Ugandan Constitution. As mentioned earlier, these rights are for the benefit of all citizens, including LGBTI persons. In other words, the rights of all Ugandan citizens, including LGBTI persons, are contained in the Constitution and should be respected and protected. Unfortunately, the 2023 Anti-Homosexuality Act violates most, if not all, those rights. Although the Act essentially violates almost every conceivable relevant right in international human rights instruments and in the Ugandan Constitution, only a few can be discussed here.

Of all the human rights violated by the Anti-Homosexuality Act, the right to equality and non-discrimination is the most critical. The Act discriminates against individuals on the basis of their sexual

69 Adopted by the UN General Assembly on 24 January 2007, A/RES/61/106.

70 Adopted by the UN General Assembly on 10 December 1984.

71 Adopted by the UN General Assembly on 21 December 1965.

72 Adopted by the Organisation of African Unity (OAU) on 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

73 Adopted by the African Union on 11 July 2003.

74 Adopted by the Organisation of African Unity (OAU) on 11 July 1990, CAB/LEG/24.9/49 (1990).

75 Art 52(1)(h) of the Constitution.

orientation, which is a violation of human rights norms contained in several international human rights to which Uganda is a party, such as the Universal Declaration⁷⁶ and ICCPR.⁷⁷ It also violates article 2 of the African Charter which provides that individuals are entitled to the rights under the Charter ‘without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or any status’. Article 3 of the African Charter provides for ‘every individual’s’ right to equality before the law and equal protection before the law. The African Commission on Human and Peoples’ Rights (African Commission), which monitors the adherence of member states to the African Charter, has stated its view while evaluating state reports submitted to it in accordance with article 62, as follows:⁷⁸

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights ...The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.

Article 21(1) of the Ugandan Constitution guarantees the right to equality and freedom from discrimination. It states that ‘[a]ll 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’. The anti-homosexuality law clearly violates this constitutional guarantee.

It should be noted that in *Hon Fox Odoi-Oywelowo & 21 Others v Attorney-General & 3 Others* the Court did not find the Anti-Homosexuality Act to violate the right to equality and non-discrimination, holding as follows:⁷⁹

In the result, it is our finding 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. Consequently, we do not find sections 1, 2(1) - (4), 3(1) and 3(2) (c) - (f), (h), (j), 3(3) and (4), and 6 of the Anti-Homosexuality Act to contravene the right to equality and freedom from discrimination guaranteed under articles 21(1), (2), (3), (4), 32(1), 3(2)(c), and 45 of the Ugandan Constitution. On the other hand, the limitation to the right to equality and non-discrimination embedded in sections 12 and 13 of the Act to abide article 17(1)(c) of the Constitution, and are

76 Art 7.

77 Arts 2 & 26.

78 See 21st Activity Report of the African Commission on Human and Peoples’ Rights Doc EX.CL/322 (X), <https://achpr.au.int/sites/default/files/files/2022-09/achpr40actrep212006eng.pdf> (accessed 13 August 2023).

79 Para 340.

demonstrably justifiable in a free and democratic society as envisaged under article 43(2) of the Constitution.

Another critical right for which the Anti-Homosexuality Act has serious implications is the right to privacy. This right is protected under the Universal Declaration⁸⁰ and ICCPR,⁸¹ among other international human rights instruments. It is also protected by the Ugandan Constitution, article 27, which states:

- (1) No person shall be subjected to –
 - (a) unlawful search of the person, home or other property of that person; or
 - (b) unlawful entry by others of the premises of that person.
- (2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

By criminalising adult consensual sexual activity (albeit same-sex), which by nature is private, the Anti-Homosexuality Act violates the right to privacy contained in international human rights instruments and the Ugandan Constitution. It is worth noting that in *Odoi-Oywelewo* the Court found no violation of the right to privacy, holding that 'we find no violation whatsoever of article 27 of the Constitution, neither do we find any inconsistency between sections 1, 2, 3, 9 and 11(2)(d) of the Anti-Homosexuality Act and the right to privacy enshrined in article 12 of the UDHR and article 17(1) of the ICCPR'.⁸²

There is no doubt that freedom of expression is central to issues of human rights, sexual orientation and gender identity. It is also 'one of the most fundamental rights that individuals can enjoy'.⁸³ That is why it is protected under the Universal Declaration⁸⁴ and ICCPR.⁸⁵ It is also protected by the African Charter⁸⁶ and the Ugandan Constitution itself.⁸⁷ It is clear that the Anti-Homosexuality Act violates this right. As mentioned earlier, the Act criminalises the promotion of homosexuality through advertising, publishing, printing, distributing or broadcasting any material that promotes or encourages homosexuality. Clearly, the Act goes beyond the parties to same-sex conduct and extends criminalisation to third parties that enable communication and expression. It restricts

80 Art 12.

81 Art 17.

82 Para 371.

83 JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2013) 96.

84 Art 19.

85 Art 19(2).

86 Art 9(2).

87 Art 29.

freedom of expression by criminalising the expression of support for homosexuality or LGBTI rights. This is a serious violation of the right to freedom of expression.

The right to health is another important fundamental right for which the Anti-Homosexuality Act has serious implications. Both the African Charter⁸⁸ and ICESCR⁸⁹ protect the right to health and require Uganda to take steps to safeguard the health of its citizens. By criminalising homosexuality and implementing provisions that criminalise its promotion, as well as the aiding and abetting of homosexuality, the Act has adverse effects for the quality, accessibility, acceptability and availability of health services for individuals who identify as lesbian, gay, bisexual, or transgender. In addition, the Act singles out LGBTI persons living with HIV for harsher penalties. This is likely to adversely affect efforts to prevent the transmission of HIV, as it may force groups that are already marginalised due to their consensual sexual conduct to retreat further into hiding. It also goes against the International Guidelines on HIV/AIDS and Human Rights, which require states to 'review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups'.⁹⁰

As mentioned earlier, the offence of 'aggravated homosexuality' under the Act carries the death penalty. This is in contrast to the global trend towards a moratorium on the use of the death penalty. According to article 6(2) of ICCPR, '[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes'. The definition of 'crimes', however, should be consistent with the provisions of the Covenant. According to the UN Human Rights Committee, article 6 is abolitionist in outlook and the expression 'most serious crimes', therefore, should be 'read restrictively to mean that the death penalty should be a quite exceptional measure'.⁹¹ In that regard, the former UN Special Rapporteur on Extra-Judicial Executions, Asma Jahanghir, stated that it was

unacceptable that in some states homosexual relationships are still punishable by death. It must be recalled that under article 6 of the

88 Art 16.

89 Art 12.

90 OHCHR & UNAIDS *International guidelines on HIV/AIDS and human rights* (2006 consolidated version), <https://www.ohchr.org/sites/default/files/Documents/Publications/HIVAIDSGuidelinesen.pdf> (accessed 14 August 2023).

91 UN Human Rights Committee (HRC) CCPR General Comment 6: Article 6 (right to life) 30 April 1982, <https://www.refworld.org/docid/45388400a.html> (accessed 14 April 2023).

International Covenant on Civil and Political Rights death sentences may only be imposed for the most serious crimes, a stipulation which clearly excludes matters of sexual orientation.⁹²

Article 22 of the Ugandan Constitution purports to protect the right to life but allows for the intentional deprivation of life 'in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda'. It is submitted that including matters of same-sex relations within the ambit of this provision has serious implications for the rights of LGBTI persons.

The length and depth of this article do not lend themselves to a detailed discussion of the implications of the Anti-Homosexual Act on each and every right. Suffice to say that in addition to the rights discussed above, other rights affected include freedom and security of the person; freedom of conscience, thought and belief; the right to dignity; and freedom of association. The Act also has implications for the rights of specific groups of people such as children, persons with disabilities and persons living with HIV.

Notwithstanding the decision in *Odoi-Oywelowo*, Uganda could learn from other countries where court challenges to anti-LGBTI legislation have been successful. In February 2023 the Supreme Court of Kenya upheld the right to freedom of association for LGBTI persons and reiterated the right to non-discrimination on the grounds of sexual orientation in *Non-Governmental Organisations Co-Ordination Board v Eric Gitari & 5 Others*.⁹³ In reaching its decision, the Court specifically stated the following: 'The right to form an association is an inherent part of the right to freedom of association guaranteed to every person regardless of race, sex, nationality, ethnicity, language, religion, or any other status.'⁹⁴

On the issue of discrimination, the Court made reference to article 26 of ICCPR and article 2 of the African Charter, both of which prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.⁹⁵ The Court further held that

92 Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Ms Asma Jahangir E/CN.4/2001/9, 11 January 2001, <https://digitallibrary.un.org/record/433636?ln=en> (accessed 14 August 2023).

93 Supreme Court Petition 16 of 2019 (2023).

94 Para 54.

95 Paras 74 & 75.

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 ... to allow discrimination based on sexual orientation would be counter to these constitutional principles.⁹⁶

Uganda could also take a leaf out of South Africa's case law book on the rights of sexual minorities, the *locus classicus* of which is *National Coalition of Gay and Lesbian Equality & Another v Minister of Justice & Others*.⁹⁷ The case clearly defined the term 'sexual orientation' and invalidated the common law offence of sodomy and other similar statutory offences. Regarding non-discrimination and the rights of sexual minorities, the Constitutional Court stated:⁹⁸

Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.

Another strategy that could be adopted is to challenge the Anti-Homosexuality Act through the mechanisms of the African Charter. Indeed, some have argued that the African Charter is an important instrument that could be utilised to tackle anti-gay laws in Africa. For example, Ekhato has argued that

the African Charter could be used for the promotion of gay rights especially in countries with anti-gay laws ... For example, it can be argued (to some extent) that article 2 of the African Charter grants equal protection to everyone.⁹⁹

Ekhato further argues that 'the African Union (AU) has posited that the various anti-gay laws enacted in different countries in Africa go against the tenor of the African Charter'.¹⁰⁰

6 Conclusion

Uganda is not the only country in Africa or in the world with strong anti-gay sentiments. It is not the only country in which same-sex relations are illegal. The new Ant-Homosexuality Act passed by the Ugandan Parliament in May 2023, however, undoubtedly is the

96 Para 79.

97 1999 (1) SA 6 (CC).

98 Para 132.

99 E Ekhato 'The impact of the African Charter on Human and Peoples' Rights on domestic law: A case study of Nigeria' (2015) 41 *Commonwealth Law Bulletin* 253-270.

100 As above.

harshest piece of legislation targeting LGBTI persons ever. In order to understand the human rights implications of the Act, this article has looked at its drafting history and highlighted certain aspects and contents of the Act. The human rights implications have also been discussed. It was evident that the law discriminates against individuals on the basis of their sexual orientation, violating their rights to equality and non-discrimination. Everyone is entitled to the same rights and freedoms without discrimination of any kind, including on the basis of sexual orientation or gender identity.

It has also been seen that the Anti-Homosexuality Act violates the right to privacy, as it criminalises consensual sexual conduct between adults in private spaces. The right to privacy is a fundamental human right that protects individuals from unwarranted interference in their personal lives. The Act also has implications for freedom of expression, as it criminalises the promotion of homosexuality, which can include expressing support for LGBTI rights. The right to freedom of expression includes the right to express opinions without interference and to seek, receive and impart information and ideas.

The discussion has also highlighted implications of the Act for the right to health, as it may discourage LGBTI individuals from seeking medical care and other healthcare services. The right to health includes the right to access healthcare services without discrimination. Implications of the Act on the right to life in the context of the death penalty have also been discussed. Mention has been made of the implications of the Act on several other rights, such as freedom and security of the person; freedom of conscience, thought and belief; the right to dignity; and freedom of association. The implications of the Act for the rights of specific groups of people, such as children, persons with disabilities and people living with HIV, have also been mentioned.

In conclusion, besides highlighting the significant human rights implications of Uganda's anti-homosexual legislation, particularly the recently-passed Anti-Homosexuality Act, the article also draws attention to the unrelenting opprobrious legislative efforts to criminalise same-sex relations that Uganda continues to make.

It is important for Uganda and other countries that criminalise same-sex relations to realise that the human rights of all individuals, regardless of their sexual orientation or gender identity, are important and should be respected and protected. This requires a concerted effort from various stakeholders, including the government itself, civil society organisations and international partners. In the particular context of Uganda, civil society organisations can play a crucial role

in advocating the rights of LGBTI persons and raising awareness about their issues. The protection of the rights of LGBTI persons can also be done through legal challenges. As argued earlier, lawyers and human rights activists can challenge the opprobrious anti-homosexuality legislation in court, arguing that laws criminalising same-sex relations violate international human rights norms and Uganda's own constitutional provisions. The African Charter and its mechanisms can also be utilised. Finally, international pressure can be brought to bear on the Ugandan government to respect the rights of LGBTI persons. International partners can do this by reducing aid to the country, issuing statements condemning the government's actions, and raising the issue in international forums such as the United Nations (UN).