

PROTECTING 'MORALS' BY DEHUMANISING SUSPECTED LGBTI PERSONS?

A CRITIQUE OF THE ENFORCEMENT OF THE LAWS CRIMINALISING SAME-SEX CONDUCT IN UGANDA



*Human Rights Awareness and
Promotion Forum (HRAPF)*



*The Civil Society Coalition on Human
Rights and Constitutional Law (CCHRCL)*

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**The Civil Society Coalition on Human Rights and Constitutional Law
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and
Human Rights Awareness and Promotion Forum
(HRAPF)**

October, 2013

ABOUT THE CIVIL SOCIETY COALITION ON HUMAN RIGHTS AND CONSTITUTIONAL LAW

The Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) is a broad-based coalition of 51 organisations. Formed in October 2009 to oppose the anti-human rights, anti-democratic, anti-public health, and indeed anti-constitutional agenda being promoted by the draconian Anti-Homosexuality Bill 2009 (AHB) that had been tabled a month earlier, the Coalition was a ground-breaking and historical initiative that was the first of its kind to bring together LGBTI activists, their feminist allies, and many different civil society actors to engage in advocacy centered around sexual rights in Uganda. The Coalition's membership rapidly grew from the eight initial members, and currently includes mainstream human rights organisations, feminist organisations, HIV/AIDS organisations, sex worker organisations, LGBTI organisations, Refugee Rights organisations and media organisations. The Coalition operates under a secretariat that was first hosted at Akina Mama wa Afrika (AMwA) and now at the Refugee Law Project of the School of Law, Makerere University.

Through the Coalition's leadership, and with support from various key regional and international sexual rights activists, organisations and donors, news of the AHB spread fast. Influential political and religious leaders around the world publicly condemned the Bill for its anti-human rights provisions. Both local and international pressure have had some success in influencing public debate on the Bill which the Coalition continues to fight against through outreach, public forums, media advocacy, publications, and legal interventions. The Coalition is therefore contributing towards expanding and diversifying LGBTI activism, opening up spaces for public dialogue on sexuality, and strengthening the movement for social justice in Uganda.

For more information about the Coalition go to www.ugandans4rights.org or write to ahbcoalition.coordinator@gmail.com



ABOUT THE HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)

The Human Rights Awareness and Promotion Forum (HRAPF) is a human rights organisation whose mandate is to use the law to promote human rights awareness and enforcement. HRAPF works for the protection of the rights of the most marginalised groups in Uganda. It operates a legal aid clinic that provides specialised services to marginalised groups.

In addition to legal aid services, HRAPF researches, monitors and documents violations of human rights, carries out legal and policy analysis on issues affecting human rights, builds alliances, coalitions, and advocacy groups, carries out strategic litigation, and undertakes direct teaching of human rights to achieve its objectives.

HRAPF chairs the Legal Committee of the Civil Society Coalition on Human Rights and Constitutional Law.

HRAPF is also a member of the Legal Aid Service Providers Network (LASPNET) and the Human Rights Network (HURINET).

For more information about HRAPF visit www.hrapf.org or write to info@hrapf.org

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We also thank all the persons and institutions that provided responses during the course of the study: the Uganda Police Force, the Judiciary, the Directorate of Public Prosecutions, the Uganda Prisons Services, members of the CSCHRCL, members of LASPNET, other mainstream organisations, LGBTI organisations and the individual LGBTI persons who shared their experiences. Your involvement in the study has ensured its successful completion.

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We specially acknowledge all the generous supporters who made a tremendous contribution of financial support to this project. Their kind support facilitated extensive research on this subject, which would not otherwise have been possible.



DEDICATION

We dedicate this report to the countless LGBTI persons and suspected LGBTI persons who have fallen victim to Uganda’s same-sex criminal laws. We dedicate it also to the general population of Uganda who are under-informed about sexuality and gender, and are thus readily manipulated by unscrupulous politicians and religious leaders.

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Table of Contents

ABOUT THE CIVIL SOCIETY COALITION ON HUMAN RIGHTS AND CONSTITUTIONAL LAW.....	3
ABOUT THE HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)	4
ACKNOWLEDGMENTS.....	5
DEDICATION.....	6
ACRONYMS.....	10
EXECUTIVE SUMMARY	11
CHAPTER ONE	
1.0 INTRODUCTION.....	19
1.1 BACKGROUND TO THE STUDY.....	19
1.2 OBJECTIVES OF THE STUDY.....	23
1.3 RESEARCH METHODOLOGY.....	23
1.4 LIMITATIONS OF THE STUDY.....	25
1.5 SOLUTIONS TO THE CHALLENGES.....	26
CHAPTER TWO	
2.0 THE NATURE OF THE LAWS USED TO CRIMINALISE SAME-SEX CONDUCT IN UGANDA.....	28
2.1 INTRODUCTION.....	28
2.2 BRIEF HISTORY OF THE LAWS.....	28
2.3 THE OFFENCE OF CARNAL KNOWLEDGE AGAINST THE ORDER OF NATURE	29
2.4 THE OFFENCE OF A PERSON ‘PERMITTING A MALE PERSON TO HAVE CARNAL KNOWLEDGE OF HIM OR HER AGAINST THE ORDER OF NATURE’	32
2.5 THE OFFENCE OF ATTEMPTING TO HAVE CARNAL KNOWLEDGE OF SOMEONE AGAINST THE ORDER OF NATURE.....	32
2.6 THE OFFENCES UNDER INDECENT PRACTICES.....	33
2.7 OTHER OFFENCES.....	34
2.8 CONCLUSION	34

CHAPTER THREE

3.0 THE ENFORCEMENT OF THE CRIMINAL LAWS ON SAME-SEX RELATIONS IN UGANDA; ARRESTS, CHARGES, AND PROSECUTIONS.....	35
3.1 INTRODUCTION.....	35
3.2 ARRESTS UNDER SECTION 145(a).....	35
3.3 CHARGES.....	45
3.4 PROSECUTION OF OFFENCES.....	48
3.5 ACCESS TO LEGAL REPRESENTATION FOR PERSONS ACCUSED OF SAME-SEX RELATED OFFENCES.....	54
3.6 CONCLUSION.....	56

CHAPTER FOUR

4.0 VIOLATIONS SUFFERED BY PERSONS AFFECTED BY THE ENFORCEMENT OF THE LAWS CRIMINALISING ADULT CONSENSUAL SAME SEX CONDUCT	57
4.1 INTRODUCTION.....	57
4.2 VIOLATIONS OF CONSTITUTIONAL RIGHTS.....	57
4.3 TORTIOUS VIOLATIONS.....	62
4.4 OTHER VIOLATIONS.....	64
4.5 CONCLUSION.....	66

CHAPTER FIVE

5.0 RECOMMENDATIONS AND CONCLUSIONS.....	67
5.1 RECOMMENDATIONS.....	67
5.2 CONCLUSION.....	72

REFERENCES.....	74
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APPENDIX: THE ANTI HOMOSEXUALITY BILL 2009.....	77
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ACRONYMS

AHB	Anti Homosexuality Bill
AMWA	Akina Mama Wa Afrika
CID	Criminal Investigations Department of the Uganda Police Force
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law
CSOs	Civil Society Organisations
DPP	Directorate/Director of Public Prosecution
EHAHRDP	East and Horn of Africa Human Rights Defenders Project
FARUG	Freedom and Roam Uganda
FLN	Family Life Network
HRAPF	Human Rights Awareness and Promotion Forum
JLOS	Justice, Law and Order Sector
LDC	Law Development Centre
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MCA	Magistrates Courts Act
MP	Member of Parliament
NGO	Non Governmental Organisation
PCA	Penal Code Act
P/S	Police Station
RLP	Refugee Law Project, School of Law, Makerere University
SIPD	Support Initiative for People with Atypical Sex Development
SMUG	Sexual Minorities Uganda
UN	United Nations
UPF	Uganda Police Force
UPS	Uganda Prisons Service

EXECUTIVE SUMMARY

The current Constitution of the Republic of Uganda was adopted in 1995. In clear and unambiguous terms, it states that it is the supreme law of the land. Yet, the laws criminalising same-sex conduct in Uganda arguably violate the Constitution, and so does the administration of these laws.

The laws criminalising same-sex conduct in Uganda have been in existence since Uganda became a British protectorate late in the 19th century. No single conviction or even acquittal (indicating a full trial) has been found in the law books in Kampala in the last five years (2007 –2011), and arguably none has ever been recorded in Uganda’s legal history. Nevertheless, the laws are used every day to intimidate, harass, and degrade LGBTI persons.

Findings

The 1902 Order in Council gave the Commissioner (later Governor) powers to make laws for Uganda. In 1909, the Governor made the Indian Penal Code 1860 applicable to Uganda. Eventually, Uganda’s first Penal Code was introduced in 1930 modeled on the Griffiths Penal Code of Australia. It was the 1930 Penal Code that introduced the offence of ‘carnal knowledge against the order of nature’ as it appears today.

Under the 1930 Penal Code, the offence of ‘carnal knowledge against the order of nature’ was punished by 14 years imprisonment and corporal punishment. The Code was amended in 1950 to remove the reference to corporal punishment. After Uganda’s independence in 1962, the 1930 Penal Code with no change continued to apply. It was modified only in 1990 to increase the punishment to life imprisonment.

This study demonstrates the general absence of convictions (or even acquittals) in five recent years under these laws. Nonetheless, they are widely enforced. In many instances, the laws are abused and constitutional protections are ignored. Thus the Penal Code ends up being used to persecute suspected LGBTI persons.



Persons are frequently arrested over accusations of same-sex conduct in Uganda. Usually the arrests are not premised on a reasonable suspicion as to the commission of an offence; rather, they are due to the external appearance of the person, or a tip off by a third party, or an attempt at mob justice by the community, or by entrapment by the police. The trends emerging from arrests under these provisions are:

- Most arrests are carried out by the police rather than by private individuals.
- Individuals most frequently targeted are transgender persons due to their appearance.
- The police normally effect arrests first before investigating the cases. Upon any complaint, the first step is usually to arrest the accused persons.
- Some arrests are instigated as part of a blackmail scheme, or to settle personal scores using the police.
- The police themselves use the criminal charges as a basis for extortion: most people are released after 'settling' the matter with the police, usually through the payment of money.
- Cases of arrests documented by NGOs could not be traced at the police stations surveyed for this study, as usually no records of these cases are entered into the police books, suggesting the use of arrests to threaten suspects rather than to enforce the law.
- The process of arrest is usually done in public, with the person arrested subjected to humiliation. Cases of this kind are usually given extensive coverage in the media, which disseminates the information far and wide, and brands people guilty even before trial.
- Usually no distinction is made between consensual same-sex relations among adults and non-consensual relations, especially since the law also makes no distinction between the two.
- When arrests are reported in the media, consensual adult same-sex relations are conflated with paedophilia. Intemperate language further demonises LGBTI.

Fewer persons than those arrested get formally charged with the committing of an offence. Where they get charged, it is usually with the one of the offences under the unnatural offences umbrella (carnal knowledge against the order of nature, attempt to commit unnatural offences and gross indecency). Other charges are: being 'idle and disorderly' and being 'rogues and vagabonds.'

Before the amendment of the Penal Code in 2007 to include the defilement of boys under eighteen years, such cases used to be prosecuted under the unnatural offences provisions. This led to a large number of charges being made under this section. The number drastically dropped after the amendment came into force.

Most of the charges drawn by the police are usually sanctioned by State Attorneys. This occurs despite the fact that the evidence on record is usually scanty. Incidentally the Prosecutorial Policy used by the Directorate of Public Prosecutions requires that there should be evidence to support the charge before such a charge is sanctioned.

After sanctioning the file, usually the accused person is arraigned before court for plea taking. When an accused pleads 'not guilty,' the accused is either sent on remand or released on bail. Those sent on remand are usually mistreated and segregated in prison; they are sometimes subjected to ill treatment. In one instance, this has led to death.

The study found that over the period 2007-2011, there is neither a single conviction nor an acquittal for consensual same-sex conduct on file in any magistrate's court in Kampala. In an egregious example of a waste of both police and judicial resources, all cases that were filed in court during the period 2007-2011 in Kampala district ended in dismissal for want of prosecution. Though not conclusive since cases before magistrates' courts largely go unreported, attempts to look for other acquittals or convictions in the Law Reports revealed no single conviction or acquittal since the laws were introduced (with the exception of those for non-consensual same sexual relations with minors before 2007).

Few of the accused persons secure access to lawyers, yet they are constitutionally entitled to lawyers provided by the state where they are charged with 'carnal knowledge against the order of nature' since it carries a maximum penalty of life imprisonment. Only two civil society organisations provide legal aid services to LGBTI persons and only two private law firms have handled LGBTI cases before. Other law firms which accept such cases impose stringent and irregular conditions, such as keeping a determined distance away from the client and requiring the payment of all the legal fees instantly.



The enforcement of the law as it is today amounts to persecution and dehumanising of LGBTI persons. This is because:

- The process of enforcing criminal laws against consensual, adult, same-sex conduct violates a number of the constitutional rights of LGBTI persons, including the right to equality, right to life, freedom from inhuman or degrading treatment, the right to privacy, the right to liberty, and the right to a fair trial.
- The process of enforcing the criminal laws can give rise to tortious claims, including the following: assault, battery, false imprisonment, malicious prosecution, and defamation.
- Other effects include: loss of self-esteem, the threat of mob justice, loss of housing, loss of employment, and abandonment by family and friends.

Recommendations

To the Attorney General

The study recommends that, as the Legal Advisor of government on the constitutionality and legality of various laws and actions, the Attorney General should:

- Advise government on the dangers of passing the Anti-Homosexuality Bill 2009;
- Advise the Executive, Parliament and the Judiciary as to the illegality and non-constitutionality of the actions being undertaken in the name of implementing laws that criminalise consensual same-sex conduct among adults;
- Advise Parliament on its duty to protect the Constitution and its responsibility to desist from passing laws that violate the Constitution;
- Advise government on the likely outcomes of cases taken before courts of law seeking compensation for unlawful arrest, restriction or detention. Awards made by courts will have a direct impact on the Consolidated Fund.

To the Uganda Police Force

As the body responsible for arresting suspects and as the first point of contact with the community, the police should:

- Only arrest people on allegations that can be proven in courts of law. The effect of doing otherwise violates basic constitutional rights of the persons affected;

- Make a professional decision not to arrest persons suspected of having consensual adult same-sex relations. To continue to arrest such persons serves no justifiable purpose;
- Prioritise criminal offences that are capable of being enforced and that have an actual victim rather than spending police resources on investigating victimless offences;
- Recognise that, as professionally trained officers, entrusted by the people of Uganda with important powers, the Service should not become facilitators of private extortion and blackmail;
- Keep proper records of all cases handled and ensure accessibility of the records to the public. Invest in a computerised system for proper documentation and accessibility of records, which would reduce time wasted by filing papers;
- Allow LGBTI activists to conduct awareness campaigns on sexual orientation and gender identity issues for the police.

If arrests must be made, then:

- Arrest for the right reasons and not mere suspicions that are unsupported by reasonable evidence or that are fuelled by hate-filled tip-offs or the desire for extra money through extortion and blackmail;
- Conduct the arrests in a humane and professional manner. Take care to observe all the rights of the arrested person, with particular attention to the rights of transgender and intersex persons;
- Respect each suspect's right to the presumption of innocence by protecting persons arrested from unnecessary media and public displays, which have lasting effects for persons accused under the unnatural offences laws;
- Have separate facilities in the police cells for holding transgender and intersex persons who may be arrested under these provisions; and
- Protect the right to privacy of each suspect by desisting from anal exams or by seeking to confirm a person's sex/gender through physical inspection, undressing and unwarranted touching.

To the DPP

As the constitutional officer charged with directing the police to investigate any information of a



criminal nature and to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial, the DPP should:

- Not sanction charges involving consensual adult same-sex relations, especially where the complainant is not one of the persons involved in the act;
- Ensure that the rights of LGBTI persons are respected and that charges are not arbitrarily sanctioned; and
- Develop a prosecutorial policy on cases involving consensual adult same-sex relations, which will guide State Attorneys on how to handle such cases.

To Parliament

Parliament plays an important role in making laws for the country. This role imposes a great responsibility on Parliament to make laws that are constitutional, relevant and necessary for the public good. As such Parliament should:

- Prevent the rampant abuse of human rights through the law by repealing those provisions criminalising same-sex conduct in Uganda;
- Reject the Anti-Homosexuality Bill which, if passed, will exacerbate the situation multifold and further entrench the violations against LGBTI persons in Uganda. The proposed law is unconstitutional, would promote hatred and, above all, would be virtually unenforceable;
- Endeavor to enact laws that are compliant with international, regional and domestic human rights standards established and observed through regional and international human rights instruments;
- Pass laws that balance the interests of the majority with the necessary protection of minorities;
- Pass criminal laws that are capable of being implemented and serving the essential purposes of the criminal law; and
- Conduct post-legislative scrutiny to assess the levels of implementation of the laws enacted.

To the Judiciary

As the arm of government with the powers to determine the legality of both the actions of Parliament and the Executive, and the powers to adjudicate disputes between persons, the Judiciary should:

- Be more responsive to the constitutional violations involved in bringing a suspect to court based on charges too flimsy to sustain and without any evidence. This would discourage the police and the DPP from preferring and sanctioning such charges. Courts should not be used to persecute a marginalised group;
- Recognise that cases brought before the court concerning adult same-sex conduct are brought under statutes that violate the Constitution of Uganda; and
- Keep proper records of all cases handled. This is important for posterity and for accountability.

To the Media

The media plays a very important roles and responsibilities in a free and democratic society and should:

- Maintain the balance between the public's right to know and each person's constitutional rights. These include the right to a fair hearing, the presumption of innocence, the right to privacy, and the right to be free from inhuman and degrading treatment.
- When the media reports on the actions of persons accused of crimes:
- Report truthfully and factually;
- Do not pass judgment on the suspect by portraying them as guilty before the court has found them so, and
- Distinguish between cases of consensual adult same-sex relations and defilement, pedophilia or rape. The two are different; the latter ought to continue to be criminalised;
- Avoid the use of terms that further ostracise LGBTI persons and entrench discrimination against them;
- Avoid hate speech. Do not call for harm to be done to the suspects; and
- Pay due regard to the life, privacy, and livelihood of the suspects before reporting.

With the high levels of homophobia in Uganda, it is necessary to think twice before the



publishing names and pictures of persons suspected of having consensual same-sex relations.

To LGBTI Organisations

- Endeavour to properly document cases of arrest that occur against members of the LGBTI community for consensual adult same-sexual conduct;
- Engage mainstream organisations on LGBTI issues and rights;
- Engage the print, broadcast and other media and sensitise them to the dangers of negative reporting; and
- Reach out to engage in constructive dialogue with the government (including the Attorney General, Police, Parliament and the Judiciary) with the aim of creating and fostering better understanding of LGBTI issues.

To mainstream organisations and legal aid service providers

As the main bridge between government and citizens of a country, and key defenders of the rights of all people including minorities, CSOs should:

- Properly document cases of violations of human rights including those of LGBTI persons and organisations. NGOs should be able to keep better records of violations, in order to be able to map out violations and seek appropriate remedies;
- Extend services to LGBTI persons and organisations;
- Beef up human rights awareness campaigns to include LGBTI issues in the broader human rights contexts;
- Engage more extensively with the mainstream media on LGBTI issues; and
- Design programs that are inclusive of LGBTI persons.

CHAPTER ONE

1.0 INTRODUCTION

1.1 BACKGROUND TO THE STUDY

This study was commissioned and conducted by the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) and Human Rights Awareness and Promotion Forum (HRAPF) as part of efforts to oppose the further criminalisation of same-sex conduct in Uganda, as proposed in the Anti Homosexuality Bill 2009 (AHB).¹

The AHB proposes to, among other things,² create the offence of “homosexuality” and “aggravated homosexuality” and to criminalise attempts to commit homosexuality. The particular provisions are reproduced below:

Clause 2. The offence of homosexuality

- (1) A person commits the offence of homosexuality if-
- (a) he penetrates the anus or mouth of another person of the same sex with his penis or any other sexual contraption;
 - (b) he or she uses any object or sexual contraption to penetrate or stimulate sexual organ of a person of the same sex;
 - (e) he or she touches another person with the intention of committing the act of homosexuality.
- (2) A person who commits an offence under this section shall be liable on conviction to imprisonment for life.

Clause 3. Aggravated homosexuality.

- (1) A person commits the offense of aggravated homosexuality where the:
- (a) Person against whom the offence is committed is below the age of 18 years;
 - (b) Offender is a person living with HIV;
 - (c) Offender is a parent or guardian of the person against whom the offence is committed;
 - (d) Offender is a person in authority over the person against whom the offence is committed:

¹ The Anti Homosexuality Bill 2009 was tabled before the Parliament of Uganda as a private member's bill by Ndorwa West Member of Parliament, David Bahati, on 14 October 2009.

² According to the long title of the Bill, it is intended to be 'An Act to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of such relations and to provide for other related matters.'



- (e) *Victim of the offence is a person with disability*
 - (f) *Offender is a serial offender, or*
 - (g) *Offender applies, administers or causes to be used by any man or woman any drug, matter or thing with intent to stupefy overpower him or her so as to there by enable any person to have unlawful carnal connection with any person of the same sex,*
- (2) *A person who commits the offence of aggravated homosexuality shall be liable on conviction to suffer death.*
- (3) *Where a person is charged with the offence under this section, that person shall undergo examination to ascertain his or her HIV status.*

Clause 4. Attempt to commit homosexuality.

- (1) *A person who attempts to commit the offence of homosexuality commits a felony and is liable on conviction to imprisonment seven years.*
- (2) *A person who attempts to commit the offence of aggravated homosexuality commits an offence and is liable on conviction to imprisonment for life.*

While the proponents of the AHB argue that there is need for a stronger law to curb homosexuality in Uganda because of the weak existing criminal laws coupled with the ineffective implementation of the same,³ the Coalition maintains that sexual acts between consenting adults should not be criminalised. Criminalisation of these acts contravenes established international and regional human rights standards, as well as the Constitution of the Republic of Uganda. The Bill would infringe upon the right to privacy, equality and non-discrimination, as it would target a particular section of the population for criminal sanctions solely because of their sexual orientation.⁴

³ The memorandum for the Anti Homosexuality Bill 2009 shows that the bill is intended to complement the existing law since “The Penal Code Act (Cap120) has no comprehensive provision catering for anti homosexuality. It focuses on unnatural offences under section 145 and lacks provisions for penalizing the procurement, promoting, disseminating literature and other pornographic materials concerning the offences of homosexuality hence the need for legislation to provide for charging, investigating, prosecuting, convicting and sentencing of offenders.”

⁴ The Coalition states its position on the Bill on its website as follows: “We, the various member organisations of the Uganda Civil Society Coalition on Human Rights and Constitutional Law see many unconstitutional and Human Rights violating implications of the Bill. As a matter of fact, this Bill represents one of the most serious attacks to date on the 1995 Constitution and on the key human rights protections enshrined in the Constitution including: Article 20: Fundamental rights and freedoms are inherent and not granted by the State Article 21: Right to Equality and Freedom from discrimination, Article 22: The Right to Life (the death penalty provisions), Article 27: The Right to Privacy, Article 29: Right to freedom of conscience, expression, movement, religion, assembly and association (this includes freedom of speech, Academic freedom and media freedom), Article 30: Right to Education, Article 32: Affirmative Action in favour of marginalised groups and, Article 36 on the Rights of Minorities” <http://www.ugandans4rights.org/issues.php> (Accessed 15th January 2013)

Furthermore, it is nearly impractical to prosecute cases of two consenting adult persons since there would be no complainant to give evidence against the other.

The Coalition believes that further criminalisation of homosexuality would simply drive more LGBTI persons underground, increase discrimination based on sexual orientation and gender identity, and further condone violations of the constitutional rights of LGBTI persons by third parties. This would go against Uganda's international obligations and the Constitution that imposes upon the state the duties to 'Respect, Protect, and Fulfill' human rights.

The study began from the hypothesis that the criminal law related to same-sex conduct is utilised in ways that diverge from simple enforcement of the provisions and is instead used to harass, intimidate and dehumanise LGBTI persons. The legal process does not proceed beyond charges and arraignment and therefore the accused persons are made to undergo a humiliating experience that is in reality malicious prosecution since the chances of sustaining the charges are almost non-existent. Furthermore, the experience changes the lives of the accused persons forever and for the worse owing to the psychological trauma, the rejection, and the silent accusations that follow.

The study restricted itself to the period 2007 to 2011. The choice of the period of study was informed by the recent history of the LGBTI movement in Uganda. This period perhaps more than any other in Uganda's history has seen LGBTI issues come to the fore. In 2005, the Constitution was amended to include a prohibition on same-sex marriages.⁵ Both proponents and opponents of LGBTI rights in Uganda have been particularly active in the intervening years, with a nascent LGBTI movement being immediately responded to by anti-LGBTI groups with the support of international Pentecostal religious groups. Pastors Martin Ssempe⁶ and Solomon Male⁷ became particularly vocal in their advocacy against 'sodomy.' Marches were held in the capital Kampala

Section 10(b) of the Constitutional Amendment Act 2005 introduced Article 31(2)(a) into the Constitution.

⁶ Pastor Martin Ssempe is a Ugandan pastor and activist, founder of the Makerere Community Church. He is one of the leading anti gay crusaders in Uganda. He was convicted on charges of conspiracy to tarnish Pastor Robert Kayanja's name by accusing him of 'sodomising' youths in his church.

⁷ Pastor Solomon Male is a Ugandan pastor and Executive Director of Arising For Christ. He is one of the strong opponents of homosexuality in Uganda. He was also convicted alongside Sempa on charges of conspiracy to tarnish Pastor Robert Kayanja's name by accusing him of 'sodomising' youths in his church. Though he still chairs the National Coalition Against Homosexuality and Sexual Abuses in Uganda (NCAHSAU), he is now opposed to the Anti Homosexuality Bill, which he describes as 'a waste of time'. He wrote to Parliament that; "As a person who has been at the forefront of fighting sodomy in this country, counseling both victims and those lured in to quit and deal with their real life challenges, and dealing with systems; I believe the Bill won't solve the problem," Anita Ashaba, *The Anti-Homosexuality Bill Won't Solve The Problem, Says Pastor Male*, Chimp Reports <http://www.chimpreports.com/index.php/people/7064-the-anti-homosexuality-bill-won%E2%80%99t-solve-the-problem,-says-pastor-male.html> Accessed 15th January 2013)



and other areas to protest against gay rights in Uganda.⁸

In early 2009, the Family Life Network led by Pastor Stephen Langa, together with three American evangelists led by Scott Lively of Exodus International,⁹ organised and held a 3 day seminar in Kampala¹⁰ at which homosexuals were castigated and Scott Lively repeated his assertions that homosexuals had an agenda to take over the world and annihilate the family. The U.S. group met with Ugandan legislators. Soon after, the then Minister of Ethics and Integrity, Hon. James Nsaba Buturo announced that a new and stronger law against homosexuality was in the offing.¹¹ A few months later a private member's bill, the Anti Homosexuality Bill (2009), was tabled in Parliament by Hon. David Bahati, Member of Parliament for Ndorwa county West, Kabale district.¹²

The Bill attracted a lot of debate and attention among the Ugandan populace and the international community respectively. At the height of this, the Rolling Stone tabloid published pictures and addresses of suspected gay people and called for their hanging. Consequently, many of those named faced various threats and some were forced to leave the country. In response to this, the Coalition sponsored a court application for three of those named in the tabloid. David Kato, Jacqueline Kasha, and Pepe Julian Onziema successfully applied for a court injunction against the Rolling Stone tabloid in 2010.¹³ About two weeks after the ruling in January 2011, one of the applicants David Kato was found murdered at his home in Kyetume, Mukono district.¹⁴ Media coverage of the burial ceremony of David Kato outed many of the members of the LGBTI community and put them at further risk.

⁸Including one dubbed 'The one million persons march' which was reportedly attended by over 4000 persons in Jinja. See Geoff Magga, *Ugandans protest against Obama and anti-gay bill*, <http://www.afrik-news.com/article16948.html> (Accessed 4th April 2012)

⁹He is currently facing a lawsuit in the United States accusing him of inciting persecution against gays and lesbians in Uganda. http://www.masslive.com/news/index.ssf/2012/03/springfield_minister_scott_lively_sued_by_uganda_gay_activists.html Accessed on 4th April 2012

¹⁰The others were Lee Brundidge and Don Schmierer

¹¹Joyce Namutebi; *Anti-gay Bill to be tabled soon*, *The New Vision*, July 1st 2009 <http://www.newvision.co.ug/D/8/13/686525>

¹²He was later elected as the Vice Chairperson of the National Resistance Movement caucus in parliament. *Ultimate media; Bahati new NRM Caucus Boss* <http://www.ugpulse.com/uganda-news/government/mp-bahati-new-nrm-caucus-boss/19986.aspx> (accessed 15th February 2012)

¹³The case of *Kasha Jacqueline, Pepe Onziema & David Kato v. Giles Muhame and The Rolling Stone Publications Ltd*, Miscellaneous Application No. 163 of 2010

¹⁴BBC; *Uganda gay rights activist David Kato killed*, <http://www.bbc.co.uk/news/world-africa-12295718> (accessed 4th April 2012)

1.2 OBJECTIVES OF THE STUDY

Major Objective

To study the trends, challenges, and effects of the enforcement of the laws criminalising same-sex conduct in Uganda.

Specific Objectives

The specific objectives of the study were:

1. To analyse the nature of criminal laws against same-sex conduct in Uganda
2. To map trends of enforcement of the criminal laws on same-sex conduct in Uganda
3. To examine the impact of the enforcement of the criminal laws on the lives of the persons accused

1.3 RESEARCH METHODOLOGY

Study design

The study was conducted using qualitative and exploratory research techniques.

Scope of the study

The study covered the period 2007-2011. This choice was based on the Uganda Constitutional Reform 2005 and the increased visibility of homosexuality as a widely discussed subject in Ugandan society, the Parliament, media, and civil society. During this period, the Anti Homosexuality Bill was tabled in Parliament, and harassment, arrests and detention of LGBTI persons increased. It is also the time when Ugandan LGBTI activists gained international recognition for their work.

Data collection methods

The study largely employed qualitative data collection methods:

i) Interviews

Direct interviews were conducted with members of the LGBTI community, selected law firms, members of the CSCHRCL, members of the Legal Aid Service Providers Network (LASPNET), the Uganda Police Force, the Judiciary and the Uganda Prison Service. The interviewers created an atmosphere of free interaction with the interviewees, explained the purpose of the research and defined to the interviewees the technical concepts and terms. This ensured that both parties



were open with each other and the respondents clearly understood what they were being asked. During the interviews, questions were asked in an interactive and relaxed way rather than following a fixed sequence. Answers given were then noted down. Clarifications were equally sought and recorded.

Interviews were conducted with key personalities in the following institutions:

JLOS institutions

- Uganda Police Force
- The Judiciary
- The Uganda Prisons Service
- Directorate of Public Prosecutions

Law Firms

- Rwakafuzi & Co. Advocates
- Onyango & Co. Advocates

Mainstream organisations

Interviews were conducted with eight mainstream organisations working in the area of advocacy in Uganda.

Legal Aid Service Providers

Interviews were conducted with eleven legal aid service providers, who are members of the Legal Aid Service Providers Network (LASPNET)

LGBTI organisations

Interviews were also conducted with eight LGBTI organisations working in Uganda and the umbrella LGBTI organisation, Sexual Minorities Uganda (SMUG).

Individuals

Six individuals who have personally been arrested or in any other way have been affected by the laws were interviewed and shared their experiences.

2. Document review

The research team conducted an intensive study of the relevant written documents obtained during the research. The documents studied include:

- i) Records of court including court proceedings and trial records.
- ii) Police documents including charge sheets, witness statements, and the Uganda Police Annual Crime Reports for the years 2008, 2009 and 2010.
- iii) Records of client files in the LGBTI and legal aid organisations visited.
- iv) Review of the four daily newspapers and their weekend editions (New Vision, Daily Monitor, Red Pepper and Bukedde) for the period 2007 to August 2011. A page-by-page analysis was completed, highlighting LGBTI as well as any other human rights issues and recording any reports of cases, charges or arrests involving the offence of carnal knowledge against the order of nature and related offences.

1.4 LIMITATIONS OF THE STUDY

A number of challenges were met during the conducting of the study. The major challenges were:

i) Homophobia:

The level of homophobia at all levels in Uganda is substantial. In most of the places visited during the study, the researchers were the objects of public scorn and were sneered at. In some cases, researchers were accused of promoting sodomy in Ugandan society under the guise of promoting human rights. Many of the people approached were not even willing to interact with the researchers for the purposes of generating information for the study.

ii) Ignorance:

Many people do not comprehend the difference between sodomy/anal sex and homosexuality, nor do they comprehend the difference between consensual same-sex between adults on the one hand, and pedophilia and rape on the other. This posed a challenge in conducting interviews since most people conflated the two issues and were hugely and justifiably disgusted by the latter.



iii) Limited access to information/records:

Access to information/records, particularly from police stations and other government institutions, proved to be a significant obstacle during the study. The researchers were tossed back and forth by the institutions, organisations, and individuals that were expected to avail information for the study. In an effort to limit and in some cases deny researchers' access to information, numerous excuses were given. Researchers were compelled to employ time consuming techniques to access the information required. In some cases, evasive answers were given.

iv) Inaccurate records:

The study revealed the existence of a poor record-keeping culture and lack of proper documentation. For example, it was very difficult to trace case files from both the police stations and courts. Most of the courts in Kampala have started computerising their systems but finding the actual hard copy case file proved to be difficult in most circumstances. As for LGBTI organisations, the major challenge was that most information was not documented due to the fear of jeopardising the security of the persons involved.

1.5 SOLUTIONS TO THE CHALLENGES

In a bid to reduce the effect of the above limitations, the researchers came up with a number of solutions:

i) Frank explanation of the objectives of the study

The researchers endeavored to clearly explain the aims and objectives of the study to the interviewees. This involved assuring the interviewees that this had nothing to do with 'promotion of homosexuality.' It also involved full disclosure of what the Coalition and HRAPF do.

ii) Politely correcting the misconceptions

The researchers took the time to politely explain to the respondents the difference between sodomy/anal sex and homosexuality as an orientation. The concept of consensual same-sex relations between adults was emphasised.

iii) Reference to the Access to Information Act

Efforts were made to remind officials that the information required was actually public information and could be legally accessed under the Access to Information Act. Also senior officials in the Uganda Police Force were approached to help access the information.

iv) **Verification and Corroboration of Records**

For incomplete records, efforts were made to follow up the information provided. For example, all cases identified at police stations and NGOs were followed up with the courts of law, if at all they were ever forwarded. For records that could not be verified, these were left out or reported in the exact terms used by that organisation or entity.

v) **Extension of time for the research**

The study was originally intended to be conducted in six months but this proved to be a serious underestimate, obliging the researchers to revise the time frame for the study.

1.6 **ETHICAL CONSIDERATIONS**

Given the sensitive nature in Uganda of the topics addressed, ethical considerations were paramount. Interviewees were informed about the objectives of the study and what was intended to be done with the data. The choice to reveal or not reveal their names was left to the respondents and for those who preferred anonymity, pseudo names or no names at all were used. Where the interviewees requested to speak off the record, the information was not used. Some NGOs and government agencies do not handle LGBTI issues at all. Any information that could not be immediately verified and which could have adverse effects for the institution or individual involved was also left out.



CHAPTER TWO

2.0 THE NATURE OF THE LAWS USED TO CRIMINALISE SAME-SEX CONDUCT IN UGANDA

2.1 INTRODUCTION

This Chapter analyses the nature of the criminal provisions used to criminalise same-sex conduct in Uganda. It provides a brief history of the laws and examines the nature of the offences commonly used.

2.2 BRIEF HISTORY OF THE LAWS

The laws criminalising same-sex relations in Uganda have been on the law books since Uganda became a British Protectorate. The Africa Order In Council 1889 was applied to Uganda when Uganda became a British protectorate in 1894. The Order-in-Council provided that jurisdiction should so far as circumstances permitted be exercised upon the principles of and in conformity with the substance of the law for the time being in force in England. This introduced British law and Victorian morality in Uganda.

In 1902, the British Crown passed the Uganda Order in Council that provided that statutes made by the Crown, the common law, and principles of equity in force in England as at 1890 were to be the legal regime governing the lives of the people in the protectorate. The Order in Council, however, also permitted the continued application of African Customary Law so long as it was not repugnant to morality and natural justice. The British law as it stood in 1902, including the unnatural offences laws, was thus imported into Uganda. With regard to same-sex sexuality, Britain had undergone its own moral panic¹⁵ in the late 19th century, which led to the 1885 amendment of the criminal law to recriminalise male homosexuality through the introduction of the provision on acts of 'gross indecency.'¹⁶ This criminalisation was imported into Uganda less than ten years later.

¹⁵The moral panic followed the publication of W.T Stead's *The Maiden Tribute of Modern Babylon*, which was a series of highly controversial newspaper articles on child prostitution that appeared in the *Pall Mall Gazette* in July 1885. With sensational crossheads, such as "The Violation of Virgins" and "Strapping Girls Down," the *Maiden Tribute* threw Victorian moralists into a state of panic and aroused public support for the 1885 Criminal Law amendment.

¹⁶Section 11 of the Criminal Law Amendment Act 1885 commonly known as the Labouchere Amendment.

In 1909, the Applied Indian Acts Ordinance No. 3 of 1909 was enacted. This made Acts applicable in India until 1st January 1908 applicable to the Uganda protectorate.¹⁷ The Indian Penal Code 1860 thus became applicable to Uganda and remained so until 1930 when Uganda's first Penal Code was enacted.¹⁸

The 1930 Penal Code Ordinance was described as 'a model criminal code.'¹⁹ It prescribed the sentence of fourteen years and corporal punishment as the punishment for carnal knowledge against the order of nature and seven years and corporal punishment for attempts and acts of gross indecency. Corporal punishment was removed in the 1950 amendment. The punishment for carnal knowledge against the order of nature was increased from 14 years to life imprisonment in 1990, ostensibly as a way of combating the HIV/AIDS epidemic.²⁰ These changes were incorporated into the current Penal Code Cap 120 following the compilation of the Laws Revised Edition 2000 of the Laws of the Republic of Uganda.

In the early 2000s, debate about the legality of same-sex relations in Uganda led to the conclusion that the current law is not sufficiently specific on which offences it criminalises and thus there is a need for a law that clearly shows which acts are criminalised. If the Anti Homosexuality Bill 2009 becomes law, then the 'post Section 145' period will have begun in Uganda, albeit in a way very different from what happened in other countries (further criminalisation instead of decriminalisation, as occurred in India, for example).

2.3 THE OFFENCE OF CARNAL KNOWLEDGE AGAINST THE ORDER OF NATURE

Section 145(a) of the Penal Code Act is regarded as the main provision criminalising same-sex relations in Uganda. It provides that '*Any person who has carnal knowledge of any person against the order of nature commits an offence and is liable to imprisonment for life.*'

¹⁷See Jerry Du Pont; *The common law abroad; Constitutional and Legal legacy of the British empire*, Wm. S. Hein Publishing, London, 2001 pp 979

¹⁸The Penal Code Ordinance, No.7 of 1930, later Cap 128 of the Laws of Uganda Protectorate, revised Edition 1935. Uganda's first Penal Code was modeled on the Griffith Code named after Sir Samuel Hawker Griffith (1845-1920), first Chief Justice of the High Court of Australia and earlier Premier and Chief Justice of Queensland, who had drafted his criminal code, adopted in Queensland in 1901. This Penal Code drew on the Italian Penal Code and the Penal Code of New York. See Michael Kirby, Michael Kirby, *The Sodomy Offence: England's Least Lovely Criminal Law Export?* pp 29 <http://www.acclawyers.org/wp-content/uploads/2011/05/2-Kirby-The-Sodomy-Offence-2011-JCCL-22.pdf> 9 Accessed on 4th April 2012

¹⁹Graeme R. Newman(Ed); *Crime and punishment in the world; Africa and the Middle east*, Vol. 1, ABC-CLIO, California, pp 230

²⁰The Penal Code Amendment Act 1990



The elements of the offence are:

- Carnal knowledge
- Of a person
- Against the order of nature

Ugandan law does not define the meaning of this offence and it has not yet been interpreted by Uganda Courts. However, a recent Nigerian Supreme Court decision defined the words 'carnal knowledge' and 'against the order of nature' in the following terms:

*'While carnal knowledge is an old legal euphemism for sexual intercourse with a woman, it acquires a different meaning in section 81. The... meaning comes to light when taken along with the proximate words "against the order of nature". The order of nature is carnal knowledge with the female sex. Carnal knowledge with the male sex is against the order of nature and here, nature should mean God and not just the generic universe that exists independently of mankind or people.'*²¹

The Court was interpreting the provision in light of male homosexuality. It reminds one of the language used in 1669 by Sir Edward Coke to describe anal sex: *"buggery is a detestable and abominable sin, among Christians not to be named, committed by carnal knowledge against the ordinance of the Creator and the order of nature by mankind with mankind..."*²²

Ugandan law does not define the meaning of this offence. However it should be noted that the offence has been interpreted to include more than anal sex between men. The list of what conduct would constitute 'carnal knowledge against the order of nature' is open and may include all conduct that the judges would deem to be 'against the order of nature'. Initially, it seems, the offence was not limited to sexual acts between men. It could include 'any sexual conduct deemed irregular and extend to sexual intercourse with Turks and "Saracens," as with Jews and Jewesses.'²³ In India (whose Penal Code partly inspired ours), the courts have listed what constitutes 'carnal knowledge against the order of nature to include anal sex, oral sex, and thigh sex.'²⁴ Making a

²¹Magaji v. The Nigerian Army, (2008) 2-3 SC 32

²²Sir Edward Coke, *Third Part of the Institutes of the Laws of England*, 4th Edition (London: A. Crook et al, 1669), Cap X page 58

²³Michael Kirby, *supra*

²⁴Arvind Narrain; *Challenging the Anti Sodomy law in India; The story of a struggle*, <http://ebookbrowse.com/ur-challenging-the-anti-sodomy-law-in-india-arvind-narrain-pdf-d96414662> (Accessed 9th March 2013)

case for inclusion of oral sex, the court in *Khanu vs Emperor* stated that *'the natural object of sexual intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os [oral intercourse] is impossible.'*²⁵ It then went on to define sexual intercourse as *'the temporary visitation of one organism by a member of the other organism, for certain clearly defined and limited objects. The primary objective of the visiting organism is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that [the] sin of Gomorrah is no less carnal intercourse than the sin of Sodom.'* In *Lohana Vasanthlal Devchand v. The State*,²⁶ the Court further emphasised that *'the act of oral sex involves enveloping of [the] penis by the mouth, thus creating an alternative socially unacceptable activity, which is against the order of nature'*. According to Arvind Narrain, *'This idea of sex without the possibility of conception was used by the judiciary over the last 149 years to characterize homosexuality as a 'perversion', 'despicable specimen of humanity', 'abhorrent crime', 'result of a perverse mind' and 'abhorred by civilized society.'*²⁷

The offence is thus wider than the common law offence of 'buggery' or 'sodomy,' which strictly speaking refers to anal intercourse by a man with another man.

Despite the potential wide reach of Section 145(a), it is important to note that Section 145 of Uganda's Penal Code does not criminalise homosexuality as a sexual orientation. Neither does it criminalise homosexuals as a group of people. It only prohibits certain acts. However the fact that in the popular imagination these sexual acts are mostly associated with homosexuals has made them the only group vulnerable to prosecution under the law.²⁸

The question of whether this provision penalises same-sex relations amongst women remains open to discussion. The definition of carnal knowledge as involving penetration by a 'penis' largely would exclude women who have sex with women. Under the old English buggery laws, same-sex conduct among women was not criminalised and one of the arguments used was that women were not capable of penetration. Elnathan John however makes an argument basing

²⁵*Khanu vs Emperor, AIR 1925 Sind 286.*

²⁶*AIR 1968 Guj 252*

²⁷*Arvind Narrain supra*

²⁸*Ibid*



on Section 214 of the Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria, which is similar to Uganda's Section 145(a) that the provision is wide enough to include lesbianism, for despite the use of the term carnal knowledge which would imply penetration by a penis, the judgment in Magaji²⁹ shows that anything that is not penile-vaginal intercourse would be criminalised.³⁰ Since, this has not been interpreted either in Nigeria or Uganda, the question is still open to debate.

Also it is important to note is that consent, the age of the participants, and whether the acts take place in private are immaterial to the offence. Consent was not accepted as a defence because *'Carnal activities against the order of nature violated human integrity and polluted society so that ...more than the individual's will or body was at stake.'*³¹

2.4 THE OFFENCE OF A PERSON 'PERMITTING A MALE PERSON TO HAVE CARNAL KNOWLEDGE OF HIM OR HER AGAINST THE ORDER OF NATURE'

Section 145(c) establishes the offence of a man or woman permitting a male person to have carnal knowledge of him or her against the order of nature. The offence was intended to punish passive participants. A duty was imposed upon everyone to resist persons who wanted to have carnal knowledge of them against the order of nature. This way both parties would be punishable: the one who penetrates and the one who permits to be penetrated.

This provision arguably even covers a woman who permits a male person penetrate her anally.

2.5 THE OFFENCE OF ATTEMPTING TO HAVE CARNAL KNOWLEDGE OF SOMEONE AGAINST THE ORDER OF NATURE

Section 146 of the Penal Code provides that:

'Any person who attempts to commit any of the offences specified in Section 145 commits a felony and is liable to seven years imprisonment.'

This is an inchoate offence, which is an act that, although not constituting a complete offence, is nonetheless prohibited by the criminal law because it constitutes steps towards the complete

²⁹Ibid

³⁰Elnathan John, *Legal Opinion: Is lesbianism a criminal offence under Nigerian law?* http://www.academia.edu/757724/LEGAL_OPINION_IS_LESBIANISM_A_CRIME_UNDER_NIGERIAN_SECULAR_CRIMINAL_LAW Accessed 9th March 2013

³¹Michael Kirby *supra* pp 29

offence. Inchoate offences include incitement, attempt, and conspiracy. Therefore an attempt to have ‘carnal knowledge against the order of nature’ is enough to constitute an offence. In this respect, attempts would include making steps towards having sexual intercourse with someone of the same sex. Thus any sexual act or approach not resulting in penetration could be called an “attempt.”³²

2.6 THE OFFENCES UNDER INDECENT PRACTICES

Section 148 of the Penal code provides that:

‘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 any 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.’

Ugandan law does not define what constitutes acts of ‘gross indecency’. Oxford Law Dictionary³³ defines gross indecency as ‘a sexual act that is more than ordinary indecency but falls short of actual intercourse. It may include masturbation and indecent physical contact or even indecent behaviour without any physical contact.’

There are several offences created under this section:

- i) *Committing an act of gross indecency with another person*
- ii) *Procuring another person to commit an act of gross indecency with that person*
- iii) *Attempting to procure the commission of an act of gross indecency by another person with themselves*

These offences necessarily involve more than one person. Mutual masturbation would be criminalised, as would be inter crural contact and oral-genital contact.³⁴

These acts are punishable whether committed in public or in private. It is an easier offence to prove because it does not require proof of penetration.

³²Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, New York, December, 2008

³³Pp 223

³⁴See para 14 of *Dudgeon v. The United Kingdom*, European Court of Human Rights (2000) no. 35765/97



2.7 OTHER OFFENCES

Other offences usually invoked against LGBTI persons are:

Being idle and disorderly: The whole of Section 167 concerns the offence of being 'idle and disorderly.' Under Section 167(e), any person can be convicted of the offence by publicly committing an 'indecent act' *'without lawful excuse.'* Under Section 167 (f), any person *"who in any public place solicits or loiters for immoral purposes"* also commits this offence. Section 167 says that such person *"shall be deemed an idle and disorderly person, and is liable on conviction to imprisonment for three months or to a fine not exceeding three thousand shillings or to both such fine and imprisonment, but in the case of an offence contrary to paragraph (a), (e) or (f) that person is liable to imprisonment for seven years."*

This section of the Penal Code is vague. It covers a very wide range of activities and behaviours, which might explain why the police prefer it to section 145.

Rogues and vagabonds: Under Section 168(1)(a), every person convicted of an offence under Section 167, after having been previously convicted as an idle and disorderly person, shall be deemed to be a rogue and vagabond. Having earned that title, the person affected has committed a misdemeanor. The person is liable for the first offence to imprisonment for six months. For every subsequent offence, the penalty jumps to imprisonment for one year.

2.8 CONCLUSION

The above are the key offences that are often used to charge persons suspected of engaging in same-sex conduct. Since it is difficult to prove carnal knowledge against the order of nature, charges of attempts to commit carnal knowledge, gross indecency, idle and disorderly, and rogue and vagabond are more frequent.

CHAPTER THREE

3.0 THE ENFORCEMENT OF THE CRIMINAL LAWS ON SAME-SEX RELATIONS IN UGANDA: ARRESTS, CHARGES, AND PROSECUTIONS

3.1 INTRODUCTION

This chapter examines the enforcement of the criminal laws by focusing on trends in arrests, charges and prosecution of these offences. Whereas many are arrested under these provisions, fewer are charged, fewer still are arraigned in court, and almost no one has ever undergone a full trial leading to an acquittal or a conviction. This evidence strongly suggests that the laws are being used to settle personal scores, to embarrass persons, to extort, and to demonstrate might and power.

In order to capture trends within a specified timeframe, the study focused on the five-year period between 2007 and 2011. This period was selected because activism for LGBTI rights was increasing, while at the same time, opposition to LGBTI rights was also rising. There were calls for authorities to use the criminal law more during this period. Also during this period LGBTI organising reached its zenith and therefore documentation of cases became more possible.

3.2 ARRESTS UNDER SECTION 145(a)

Arrest is usually the first step in the enforcement of criminal laws. Ideally, it should be investigation and summons first, but that is rarely done in Uganda. Normally, the first time that most people get to know that they are in conflict with the law is when they are arrested. In this study, we adopt as a working definition of an arrest, *'an act where the state deprives a person of their liberty for the purpose of compelling that person to appear in court to answer a criminal charge.'*

The study sought to establish the trends that exist as regards arrests of persons for offences involving same-sex conduct. To this end newspapers were scanned, NGOs working on LGBTI issues were visited and interviewed, individuals who had experienced arrest were interviewed, and police officers were also interviewed.

To get an idea of the numbers of persons arrested under these provisions, the study focused on the five-year period from 2007 to 2011. The findings were as follows:



1. Number of arrests

To obtain information on the estimated number of persons arrested during this period, newspaper records, police records, and NGO records were studied. To avoid any conflation between non-consensual same-sex conduct (normally sex with boys under 18), which is not condoned and which is strongly opposed by the CSCHRCL and HRAPF, the study limited itself to cases of consensual adult same-sex relations.

From the print media, four dailies (New Vision, Daily Monitor, The Red Pepper, and Bukedde - a Luganda daily) and their weekend editions were examined. A summary of arrests covered by the print media during the study period is shown below:

Table 1: Summary of arrests under the laws criminalizing same sex conduct as reported by the different newspapers for the period 2007-2011

Newspaper	2007	2008	2009	2010	2011
THE NEW VISION	1	0	2	0	0
THE DAILY MONITOR	0	0	2	1	0
THE RED PEPPER	0	3	1	4	0
BUKEDDE	1	0	0	1	0
TOTAL	2	3	5	6	0

From the table above, the four daily newspapers covered a total of 16 arrests for consensual same-sex relations in the period 2007-2011. More arrests were reported in 2009 and 2010 than in 2007 and 2008. There were zero arrests reported in 2011.

From the media stories, a few trends may be noted:

- i) Imprecise reporting conflates pedophilia and consensual sex between adults. The media rarely makes a distinction between the two.
- ii) Coarse, graphic language used when reporting about arrests is negative and breeds homophobia. Crude terms such as ‘bum drillers’ and ‘bum shafters’ are often used by the media, especially the “Red Pepper,” when reports concern LGBTI persons.

- iii) Newspapers rarely consider the damage they do to suspects. They tend to publish details and pictures of suspects.
- iv) The newspapers rarely consider the privacy of suspects and tend to publish full colour pictures of suspects before the suspects are convicted of such cases.

Records obtained from NGOs more or less agree with the press records. Non-governmental organisations play a leading role in the documentation of human rights violations. The NGOs engaged in this study were classified into LGBTI organisations and mainstream organisations.³⁵

LGBTI organisations carry out activities aimed at promoting equality and non-discrimination for LGBTI persons. Sexual Minorities Uganda (SMUG), the umbrella network for LGBTI organisations in Uganda, has engaged in following up and documenting cases concerning LGBTI persons since 2007. According to SMUG Executive Director Frank Mugisha, most of these cases are received from member organisations or from the press. When information on arrests is received by SMUG officers, the cases are followed up until the release of the persons implicated is secured. However, documentation of such cases is rarely accomplished because of security concerns for the suspect and stigma.³⁶ The study revealed 23 documented cases of arrests of persons accused of same-sex conduct in Uganda during the period.

The arrests took place in such far flung areas as Kapchorwa, Bushenyi, Mbale, Luwero, Entebbe, Masaka and Kampala, among others. According to Mugisha, these are not the only cases, because many go undocumented. *“Due to security reasons, some cases would go undocumented. Others preferred anonymity and that is how the cases would end. The activists’ interest was to bail out the arrested person and [ensure their] security...”*³⁷

The study revealed that most mainstream organisations do not have specific programs/projects for LGBTI persons and thus rarely take interest in arrests of persons who are suspected of being involved in same-sex acts. Of the 17 mainstream organisations visited, only two had projects that specifically address the rights of LGBTI persons. Human Rights Awareness and Promotion

³⁵Loosely used to refer to all organisations that are not LGBTI organisations including women’s organisations, refugee rights organisations and other special interest groups organisations.

³⁶Interview with SMUG Executive Director Frank Mugisha 18th May 2012

³⁷Interview with Frank Mugisha supra



Forum (HRAPF) operates the only specialised legal aid clinic for LGBTI persons in Uganda. The clinic opened in 2010. It actively reaches out to indigent LGBTI persons in need of legal services. HRAPF handled 7 cases involving arrests of persons for consensual same-sex relations during the period 2010 and 2011.³⁸ The Refugee Law Project of the School of Law, Makerere University, deals with legal issues concerning refugees some of whom have reportedly been arrested for same-sex conduct. In the period 2007-2011, RLP recorded a total of 6 cases of arrests in Kampala among urban refugees and in Nakivale refugee settlement.³⁹

Two law firms, Rwakafuzi & Co. Advocates and Onyango & Company Advocates, handle the bulk of LGBTI cases that are referred to private lawyers. These cases are usually referred to these private firms by organisations like SMUG and the Coalition. From 2007 – 2011, the two law firms handled 10 cases involving arrests.

The researchers examined Police Annual Crime reports for 2008, 2009, 2010 and 2011. These annual police reports give an account of complaints received across the country. It was noted that the police annual crime reports give general statistics on the arrests and charges of cases of 'unnatural offences.'⁴⁰ The Annual Crime Report for the year 2008 does not contain any record of cases under unnatural offences apart from bestiality, which was reported at 115 cases.⁴¹

During the same year, 10,365 sex-related cases were reported to the police. These were accounted for as follows: 8,635 defilement cases (defilement under Ugandan law is sexual intercourse with a person under the age of eighteen), 1,536 of cases of rape and 194 other sex-related cases. Among the other sex-related offences included 79 cases of incest and 115 cases of bestiality. This report indicates that no case of consensual same-sex activity between adults was reported to the police in 2008. For the same period, the media reported at least 3 cases of LGBTI arrests. It should be noted that the Annual Crime Report covers cases 'reported to and investigated' by the police. This raises questions about the circumstances surrounding the arrests noted by NGOs and those reported in the media and possibly the accuracy of the police reports.

³⁸Interview with a lawyer working with HRAPF, 15th March 2012

³⁹Interview with a lawyer with the Refugee Law Project, School of Law, Makerere University

⁴⁰Under Section 145, this term covers carnal knowledge of another person against the order of nature (consensual and non consensual) and carnal knowledge of an animal (bestiality).

⁴¹Uganda Police; Crime Report 2008 pp 33, accessible at <http://www.upf.go.ug/Reports/Annual%20Report%202008.pdf> (Accessed February 14th 2012)

The same trend is seen for 2009 with 8,646 sex related offences recorded as follows: 7,360 defilement cases, 619 rape cases, 550 cases of indecent assault, 54 cases of incest, and 72 cases of unnatural offences.⁴² In 2010, 8,645 sex-related offences were investigated. Of these, the highest number of cases were of defilement at 7,564, followed by rape with 709 cases. Other sex-related offences recorded included 274 cases of indecent assault, 12 cases of incest, and 86 cases of unnatural offences.⁴³ Police records for 2011 indicate that defilement registered the highest number of offences at 7,690 cases compared to 7,564 cases in 2010. This was followed by rape at 520 cases. Other sex-related offences investigated were 347 cases of indecent assault, 20 cases of incest, and 55 cases of unnatural offences.⁴⁴

The police reports examined indicate a trend of increased arrests for unnatural offences for 2009 and 2010 and a slight decline for 2011. This record coincides with the trend indicated in the media coverage for the same years. However, because of the conflation between consensual same-sex relations and bestiality in the law, it is difficult to tell which cases are those of bestiality and which ones concern consensual same-sex relations. The officer in charge of the Crime Data Management Department at the CID headquarters revealed that the police do not have disaggregated data on the offences reported. He attributed this to the use of a manual information management system, which makes it hard to compile detailed data from across the country for purposes of analysis at the national level.⁴⁵ He however noted that this data can be retrieved from respective police stations and posts across the country.

The police records do not provide a conclusive picture of how many arrests for consensual same-sex activity between adults were made. However they clearly bring out the fact that fewer than 100 persons are arrested every year for unnatural offences including bestiality. From these reports, together with the media and NGO reports for the period in question, there is a high likelihood that these cases referred to under unnatural offences are mostly cases of bestiality rather than consensual same-sex relation cases.

⁴² Uganda Police; *Crime Report 2010* pp 19, accessible at <http://www.upf.go.ug/Reports/Annual%20Report%202010.pdf> (Accessed on 14th February 2012)

⁴³ Uganda Police; *Crime Report 2010* pp19, accessible at <http://www.upf.go.ug/Reports/Annual%20Report%202010.pdf> (Accessed on 14th February 2012)

⁴⁴ Uganda police Force; *Annual crime and Traffic/Road safety report 2011*, pp 14 <http://www.upf.go.ug/Reports/Annual%20Report%202011.pdf> (Accessed on 14th February 2012)

⁴⁵ Interview with Assistant Commissioner of Police, in charge of the Crime Data Management Department on 16th July 2012



The above findings show that in terms of official numbers, not many arrests take place in Uganda based on the laws criminalising same-sex conduct. However despite this fact, the few arrested persons undergo lots of challenges as Chapter 4 shows. Ideally, there should be no arrests at all due to the fact that these arrests are not usually justified and rarely lead to convictions or acquittals.

In terms of arrests recorded for each year, the trends are perhaps reflective of the social and political climate in the country. In 2007 and 2008, gay rights organising was just taking root in Uganda and during this time, anti-gay sentiments also began to rise. The resulting clash between these two groups laid a fertile ground for the arrest of persons. For the period of 2009 and 2010, opposition to gay rights organising reached a crescendo: anti-gay marches occurred in Kampala and other areas, the Family Life Network workshop facilitated by US evangelicals led by Scott Lively took place, and the Anti Homosexuality Bill, 2010 was tabled in parliament. 2010 was the year that the Rolling Stone tabloid published names and residences of gay persons and called for the public to 'Hang them.'⁴⁶

For 2011, the absence of a single reported case could perhaps be attributed to the aftermath of the murder of leading gay rights activist David Kato⁴⁷ early in the year. The police issued a statement to the effect that there was no persecution of gay people in Uganda and expressed commitment to do all in their power to investigate the case as well as to protect the citizens of Uganda. Perhaps another factor lay in the fact that leading gay rights activists won international human rights awards for their work in 2011.⁴⁸ All this recognition and publicity might have helped to ensure that the police did not arrest anyone for same-sex conduct during the time, or, if they did, to ensure that the arrests were not reported on by the media.

2. Reasons and circumstances of arrests

Beyond the numbers of arrests the issue of 'why people are arrested and under which circumstances' was examined. Interviews were conducted with NGOs and individuals who had been victims of the law. The following trends emerged:

⁴⁶ This was challenged in court in the case of *Kasha Jacqueline & 20 others v. Rollingstone Limited & Anor*; where the High Court of Uganda found that the actions of the tabloid violated the rights to privacy and dignity of the applicants regardless of their sexual orientation.

⁴⁷ The police issued statements to the effect that gay people were not being persecuted in Uganda

⁴⁸ Kasha Jacqueline Nabagesera won the Martin Ennals Award for Human Rights in 2011 and Frank Mugisha won the Rafto Prize for Human Rights as well as the RF Kennedy award for Human Rights in 2011.

- i) *Arrests are instigated by police entrapment:* It was reported that the police lay traps for suspected LGBTI persons. In one case in Entebbe, a policeman sent sexually explicit phone messages to a suspected LGBTI person. When the person responded to the messages, he was arrested by the police and charged with gross indecency.⁴⁹
- ii) *Blackmail and extortion:* In their statement to the African Commission on Human and People's Rights in Banjul Gambia in 2006, the International Gay and Lesbian Human Rights Commission and Sexual Minorities Uganda reported that:

*'Extortion is the single most common abuse facing gay men and lesbians in Uganda. IGLHRC and SMUG have documented dozens of cases of gay men and lesbians who have been forced to pay money to extortionists. Extortion usually takes the form of a threat by someone to inform police, family, school or employers about someone's sexuality. The police themselves often act as the blackmailer, and when they are not, they are still often complicit in the crime.'*⁵⁰

Unfortunately extortion and blackmail is still a pressing concern today. LGBTI organisations raised concerns about the use of arrests by the police to blackmail and extort money from suspected LGBTI persons. In these cases, the police usually release the persons arrested without charge after the person has parted with some money. According to a leading gay rights activist in Uganda:

*"... some of the alleged victims manipulate the system. They know that you are a gay man; they sleep with you and tell the police about it. They know that you will pay money because you fear to be exposed. I know at least 2 people who have experienced bribery and extortion."*⁵¹

Another activist asserts that there is extortion by the Uganda police and that this is the reason why they arrest LGBTI persons.⁵²

⁴⁹Interview with lawyer working with Human Rights Awareness and Promotion Forum (HRAPF) 15th March 2012

⁵⁰The International Gay and Lesbian Human Rights Commission and Sexual Minorities of Uganda, Report on the rights of Lesbian, Gay, Bisexual And Transgender People in the Republic of Uganda under The African Charter Of Human And Peoples' Rights; In Response to the Periodic Report of the Republic of Uganda, presented at the 39th Ordinary Session of the Commission in May 2006, November 2006 pp.8 Available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/105-1.pdf> (Accessed 9th March 2013)

⁵¹Interview with ML 21st July 2012.

⁵²Interview with KT 18th May 2012



The following testimony by a gay Ugandan explaining a typical story of extortion in Uganda is featured on Moving Walls, an Annual Documentary Photography exhibition organised by the Open Society Foundations:⁵³

“I used to be religious, but I’m not anymore. I lost my religion because of all the hatred preached by the Christians here. I’d rather go to my room and pray by myself to God. I know that God is there.

This guy asked me whether I was married. I said no, I love men, I don’t love women. He was interested, we exchanged numbers. We met the next day and he took me on his boda (motorcycle). Then he said he had run out of fuel, so I got off. There were policemen waiting. One slapped me. The one from my tribe said I was shaming them. He said he would call the media and put my picture in the newspaper. I got very scared. They took me to the police station. I had to write that I wanted to sodomize the guy. I refused. They were humiliating me, pushing me with their guns. They told me the guy wanted 1.5 million shillings. I had 15,000 in my wallet. They took it. I said I could raise only 300,000. It was money to pay my brother’s school fees. I hired a taxi and went to my place with two policemen. The driver and one policeman stood outside. I went inside with the other policeman and gave him the money. I was released at 3:00 am.”

IGLHRC and SMUG conclude that ‘*whether the victim pays the extortionist or not, blackmail leaves the victim demoralised and vulnerable. If the victim pays, the result may be financial bankruptcy, particularly if the perpetrator continues with demands for money. If the victim cannot or does not pay, the result can be loss of employment, housing, children, ostracism from family and the community, imprisonment or even death.*’⁵⁴

iii) *Settling scores*: The police are usually alerted by persons who want to injure the character and the reputation of others or to exact revenge. Such persons provide anonymous tips to the police. Without additional investigation, the police arrest the suspected persons. Because of the anonymity of the tipoffs, there is usually no complainant. Without a complainant, most

⁵³Open Society Foundations, *Moving Walls, Being Gay in Uganda*, <http://www.opensocietyfoundations.org/moving-walls/18/being-gay-uganda> Accessed 12th December 2012

⁵⁴Above Note 47

of the arrested persons are released without charges. The study revealed that most of the anonymous tip-offs provided to the police come from persons who often have a grudge or misunderstanding with suspected LGBTI persons. One respondent cited a case in Bwaise (a Kampala suburb) where a member of the LGBTI community was arrested and charged with unnatural offences. The police had been tipped off by an ex-partner of the person arrested. The partners had broken up due to money-related grudges.⁵⁵

- iv) *Arrests for the 'safety' of the suspects:* Due to rampant homophobia and the risk of mob justice in Uganda,⁵⁶ a mob may well descend on two people and injure or even kill them based on an alarm raised by a single individual. People usually ask the reasons for the beating after the person has been killed. In such cases, the police take the suspect away before examining the facts and then make a decision on whether to press charges or not. In a case at Makerere University in 2010, the students of Mitchell Hall, Makerere University, beat up two male students, who were accused by one of the students of having been cuddling and kissing. The two students were rescued by the police, which later charged them with 'carnal knowledge against the order of nature'!⁵⁷ Criminalisation of homosexuality thus becomes an easy pretext for mob justice and this is one of the major fears that LGBTI persons live with.⁵⁸
- v) *Transgender/intersex persons arrested due to their physical appearance:* Individuals can be arrested by the police merely for being thought to be cross-dressing or for acting like a person of the opposite sex. Transgender persons are therefore highly vulnerable to arrests under these provisions even when they are not homosexuals. One prominent case concerns Brenda Kizza, a transgender woman. Brenda was repeatedly arrested and charged in court due to her appearance. She even complained that she was tortured and lost her teeth.⁵⁹ In these cases, transgender people are much more at risk of human rights violations. BX, a

⁵⁵Interview with a transgender activist, 18th May 2012

⁵⁶According to the Police Crime Report 2011, a total of 383 cases of Mob Action were reported and investigated in 2011, compared to 357 cases in 2010, hence an increase by 7 percent. This is attributed to thefts, robbery, suspected witchcraft and dissatisfaction with delayed/omission of justice. Uganda police, Annual Crime and Traffic/Road Safety Report, 2011 pp. 9

⁵⁷Interview with a lawyer working with HRAPF who secured police bond for the two, 15th March 2012.

⁵⁸Interview with Frank Mugisha supra

⁵⁹See for example, Alfred Wasike, Kampala Homosexuals speak out, *The New Vision*, August 16th 2007. Brenda was described as 'Another transgender, Brenda Kizza, with a male face and female body shocked the media when she said the Police has tortured her so much that at some point they kicked her teeth out. She opened her mouth to show her fake teeth. '



transgender woman, states that she has been arrested over 30 times in her lifetime because of her physical appearance.⁶⁰ A lawyer working with Refugee Law Project (RLP) agreed that many cases of arrests and assaults involve transgender persons.⁶¹ An officer working with Support Initiatives for Persons with Congenital Disorders (SIPD) also states that due to ignorance, some members of the population also regard intersex persons as homosexuals and therefore put the intersex persons at additional risk of being arrested.⁶²

- vi) Disrespect for the right to privacy on arrest: Since transgender persons and in some cases intersex persons usually fall victim to the laws, there are lots of violations of the right to privacy. The police have no facilities for the detention of transgender/intersex persons and will always make a decision to lock them up with men or women. The decision is usually based on the arrested person's genitalia and the police usually ask to confirm the sex of the persons through touching or seeing the genitalia, an action that is largely offensive and violates the basic rights to privacy and dignity of the person. Having little or no exposure to transgender/intersex persons, the police will be at a loss on what to do and end up violating their rights. BX narrates the trauma and the humiliation of such experiences, which also pose a risk of sexual assault from the group with which the transgender/intersex person may be detained.⁶³

These trends suggest that arrests of persons under this charge are not about to stop. Arrest is a show of force and usually the arrested person will do anything to gain their freedom. For a homosexual or transgender person who is in the closet, pressing such charges by the police against them means that they are likely to be forcefully outed to their detriment, and thus risk ostracism, stigma and loss of employment or education. The police and the blackmailers know this very well and will use the criminal law to extract money out of the suspects.

⁶⁰Interview with BX, 18th May 2012

⁶¹Interview with a lawyer working with Refugee Law Project, School of Law, Makerere University on 16th July 2012

⁶²Phone interview with TQ, 1st August 2012

⁶³Interview with BX *supra*

3.3 CHARGES

This study adopts the working definition of a charge as *'a written statement containing the accusations against any person alleged to have committed an offence.'* Charges are preferred by police upon arrest and sanctioned by the Director of Public Prosecutions (DPP) before the accused person is arraigned before court.⁶⁴ According to the officer in charge of the Crime Data Management Department at the CID headquarters, the police charge all crime suspects in accordance with the Penal Code and other laws relating to the respective offences. He noted that crime suspects are charged as long as there are facts available to support the preferred charge. He emphasised that police do not accord special treatment to cases of *'carnal knowledge against the order of nature'* when conducting police business.⁶⁵ Unfortunately, the truth on the ground is that many of the arrests made and subsequent charges preferred cannot be sustained in courts of law due to lack of admissible evidence; hence, the result is widespread dismissal of the cases.⁶⁶ According to an ML[?], *'People have been arrested on this charge but it is never proved. They arrest you and charge you, yet they cannot prove the charges against you.'*⁶⁷

Indeed, many persons arrested under circumstances suggestive of homosexual activity have been charged under Section 145(a). Makindye Magistrates Court in Kampala district alone handled 5 cases of people charged with carnal knowledge against the order of nature from 2007 to 2011. Four of these cases were from Katwe police station while one was from Kajjansi police station. A copy of the charge sheet from one of these cases is reproduced here below.⁶⁸

⁶⁴For the 6 well documented cases registered at SMUG, all went up to trial stage.

⁶⁵Interview with the Officer in charge of the Crime Data Management Department of the Uganda Police on 16th July 2012

⁶⁶supra

⁶⁷Interview with ML supra

⁶⁸The names of the accused person are obliterated for privacy and confidentiality reasons



UGANDA POLICE

POLICE FORM 5

KATWE POLICE STATION
CRB: 715510
DATE: 12th-OCT-2010

14110170
1483/10
STATE ATTORNEY GENERAL
CHARGE

UGANDA VERSUS:

MA 30425 OLD

MUGANDA BY TRIBE SELF EMPLOYED
B/D WHITE NILE ZONE MAKINDYE
DIVISION IKA DISTRICT.



STATEMENT OF OFFENCE

HAVING CARNAL KNOWLEDGE OF A PERSON AGAINST
THE ORDER OF NATURE CONTRARY TO SECTION 145(W)
OF THE PENAL CODE ACT.

PARTICULARS OF OFFENCE

ON THE NIGHT OF 11th-OCT-2010
AT WHITE NILE ZONE KATWE IN THE IKA DISTRICT
HAD CARNAL KNOWLEDGE OF -
AGAINST THE ORDER OF NATURE.

VINCENT OMBUTI (D/ASP)
OFFICER PREFERRING
CHARGE.

MAGISTRATE

It was also noted that some of the charges under section 145(a) were not drawn in accordance with the law with non-existent offences like 'unnatural offences contrary to section 145(a) PCA' or simply 'sodomy' listed.⁶⁹ It is the particulars of the offence that help to clearly spell out the actual conduct that leads to the charge. This scenario does not usually impact the legality of the charge, unless it occasions an injustice on the side of the accused person.⁷⁰

Since it is often difficult to find the evidence with which to sustain a charge of carnal knowledge against the order of nature, the police sometimes resort to charging people with related offences, which are said to be easier to prove, such as indecent assault, attempts to commit unnatural offences, and being idle and disorderly.⁷¹

It is important to note that most persons arrested get charged. When a person is charged, it in essence means that the police are confident that they have evidence against this person that would lead to a successful trial and possibly a conviction. For persons who do not want to undergo the rigours of a trial and the embarrassment that comes with it (even if they are not proven guilty), paying a bribe is the easiest way out. SMUG asserts that on a number of occasions, persons arrested have been threatened with such charges for purposes of blackmailing them into buying their freedom.⁷²

What is also further interesting is that the state attorneys (who are lawyers) actually go ahead and sanction these charges even when the file does not reveal sufficient evidence to sustain the charge. The common feeling is that the state attorneys and judicial officials are collaborating with the police to extort money out of the victims. According to the East African Bribery Index 2012,⁷³ Uganda is the most corrupt country in the east African region with a 40.7% prevalence of bribery.⁷⁴ The police are the most corrupt institution in the country (61.4% of the respondents) followed by the judiciary (49.6%). In all countries, most of the bribes were demanded rather than offered and Uganda had the largest proportion of bribe demands or expectations (40.7%).⁷⁵

⁶⁹Two of the five cases recorded at Makindye court are worded in this way as regards the charge

⁷⁰Section 132(1) of the Magistrates Courts Act Cap 16

⁷¹Interview with Officer in charge of Crime Data management *Supra*

⁷²Interview with Frank Mugisha *supra*

⁷³Transparency International Kenya, *East African Bribery Index 2012, Nairobi 2012 pp2*

⁷⁴*Ibid pp 1*

⁷⁵*ibid*



Given these high rates of corruption it would be surprising if such a profitable area of the law failed to fall prey to corrupt officials.

Another trend affecting transgender persons is that they are usually arrested and then released without charges. BX states that she has been arrested over 30 times by the police but has not been charged even once.⁷⁶ This points to systematic targeting of transgender persons simply because of the way they appear.

3.4 PROSECUTION OF OFFENCES

When a charge is sanctioned by the Directorate of Public Prosecutions, the case is filed in a court of competent jurisdiction. For offences under Section 145(a), the competent court of first instance is the Chief Magistrates courts since the maximum penalty is life imprisonment.⁷⁷

The case is filed in the name of the state and thus it is the duty of the Directorate of Public Prosecutions to conduct the prosecution. If the case undergoes full trial, then the accused person takes plea. If it is a plea of 'Not Guilty,' the burden is on the prosecution to prove the charges against the accused person. The standard of proof is beyond reasonable doubt. When the state has presented its witnesses, and has concluded its case, a ruling on whether or not there is a case to answer is made. If there is a case to answer, the accused person has an option to present witnesses in his or her defence. Following conclusion of the defence, the magistrate decides whether or not the accused is found guilty. However in some cases, a matter may be withdrawn by the prosecutor,⁷⁸ or dismissed for want of prosecution.⁷⁹ The effect of a withdrawal is that if it is made before the accused has been called upon to make his or her defence, the accused shall be discharged.⁸⁰ If it is made after the accused has been asked to present a defence, then the accused will be acquitted.⁸¹ The effect of dismissal is that the charge shall be dismissed and the accused person let free. However, this differs from an acquittal, which bars subsequent proceedings based on the same facts.⁸²

⁷⁶Interview with BX *supra*

⁷⁷Under section 161(1)(a) of the Magistrates Courts Act Cap 16 a Chief Magistrate has powers to try any offence other than offences for which the maximum penalty is death

⁷⁸Under Section 121 of the Magistrates Courts Act Cap 16

⁷⁹Under section 119(1) of the Magistrates Courts Act, where the prosecution does not appear and yet they had notice of the time and place of the hearing, the court shall dismiss the charges unless for some reason the court thinks it proper to adjourn the case.

⁸⁰Section 121(a) of the MCA

⁸¹Section 121(b) of the MCA

⁸²Section 119(2) of the MCA

For all cases concerning consensual same-sex relations that the researchers were able to access, the charges have been dismissed for want of prosecution. The five cases at Makindye Chief Magistrates court were all dismissed under Section 119 of the Magistrates Courts Act (MCA) as the state is said to have lost interest in them. This may be attributed to the absence of witnesses, and the demonstrated reluctance on the part of the state prosecutors to proceed with such cases where there is no complainant. One state attorney intimated to the researchers that such cases stagnate because of the difficulties in obtaining evidence since the two persons who would have been the complainants were consenting adults.⁸³

From the study, it appears that there is no case so far brought under Section 145(a) of the PCA that has ever undergone a full trial.

Prosecutorial policy on consensual same-sex activity

The Director of Public Prosecutions (DPP) is established under Article 120 of the Constitution of Uganda. Article 120(3) provides for the functions of the Director of Public Prosecutions as:

- a) *To direct the police to investigate any information of a criminal nature and to report to him or her expeditiously;*
- b) *To institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial;*
- c) *To take over and continue any criminal proceedings instituted by any other person or authority;*
- d) *To discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.*

These powers give the DPP control over prosecutions in Uganda. The DPP works with and supervises legal officers at the Directorate of Public Prosecutions. The officers can exercise functions provided for under (a), (b), and (c) above.⁸⁴ Functions in (d) above must be exercised by

⁸³Interview with a state Attorney who wished to remain anonymous 18th July 2012

⁸⁴Article 120(4)(a)



the Director of Public Prosecution personally and not by an officer or a deputy.⁸⁵ These powers, however, must be exercised with regard to public interest, the interest of the administration of justice, and the need to prevent abuse of legal process.

The DPP therefore has wide ranging powers as regards prosecutions in Uganda. In the execution of the functions conferred upon him/her, the DPP must be independent of any person or organ and shall not be subjected to anyone's direction and control.⁸⁶

The Directorate has put in place a prosecution policy that guides prosecutors in the performance of their duties, including the criteria governing the decision to prosecute. The policy in part states that:

“The decision to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families and relatives...

Resources should not be wasted pursuing inappropriate cases but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued”.

The prosecution policy is applicable to all cases in general. The directorate does not have policies on individual offences.⁸⁷ The Public Relations Officer, Directorate of Public Prosecutions, intimated that, until the amendment of the law in 2007 provided for defilement of boys, the DPP received numerous cases under unnatural offences.

⁸⁵Article 120(4)(b)

⁸⁶Article 120(6)

⁸⁷Interview with the Public Relations Officer, Directorate of Public Prosecutions, 19th July 2012

However, when asked about why the state attorneys go ahead and sanction files, she maintained that the Directorate officially treats the offence as any other offence since 'it is still on our statute books'. She added that, *"The offence can be charged and sanctioned as investigations go on for evidence against the accused."*⁸⁸

Since there is no policy guiding prosecution on cases concerning same-sex conduct, the situation is likely to remain as it is for a long time. The state attorneys are likely to go ahead and sanction the charges without fear of any consequences arising because of this lack of a policy.

Acquittals/ Convictions

In the past five years, there have been no recorded convictions or acquittals on adult consensual same-sex conduct offences after a full trial in Kampala district. The Spokesperson of the Judiciary could neither confirm how many cases of carnal knowledge against the order of nature had been handled by the courts, nor absolutely assert that there has ever or never been a conviction.⁸⁹ He affirmed that reports with disaggregated data on cases handled by the courts are not published; thus, there is no record of how many cases of a certain category were handled in a given period. Information published simply gives a general picture of the total number of cases handled, that is, how many are disposed of and how many are pending.

For the judiciary, Chief Magistrates courts in Kampala were sampled. Kampala was selected because most of the cases reported actually took place in Kampala. The research team visited all Chief Magistrates Courts in Kampala: Makindye, Buganda Road, Nakawa, Nabweru and Mengo.

At Makindye Chief Magistrates Court, there were five registered cases, but all of them had been dismissed under Section 119(1) of the Magistrates Courts Act. The state simply did not appear and the Magistrates dismissed them. At Buganda Road court, three cases were registered under Section 145 during the period 2007-2011. They were all dismissed. For Nakawa Chief Magistrates Court, there was no case on record for the period, and the same was true for Nabweru Chief

⁸⁸*Ibid*

⁸⁹*Interview with the spokesperson of the Judiciary, April 2012*



Magistrates Court. Mengo Chief Magistrates Court handles only civil cases.

It was noted that the courts in Uganda are grappling with a problem of poor documentation as well as record keeping. 'Disappearance of case files' is a common phenomenon and some known cases are not traceable through the justice system. In one case a private advocate has been following up one of his clients since 2009, but the file has not been found to date.⁹⁰

The study also revealed that, whereas cases are sanctioned by the DPP and sent to court, most, if not all cases under Section 145(a) never make it to the stage of presentation of evidence. Most of them are dismissed for want of prosecution; hence not a single conviction or acquittal can be found on file for this period. This raises numerous reservations about the utility of Section 145(a) whose enforcement is near impossible.

Challenges in prosecuting cases concerning same-sex relations

In interviews with the police and the DPP's office, it was evident that cases involving same-sex relations are not easy to deal with. Many factors make them the ultimate prosecutor's nightmare. It is therefore surprising that such cases are actually charged and prosecuted. The challenges in prosecuting such cases are:

i) The absence of a complainant

For the offences of carnal knowledge against the order of nature, attempts and gross indecency, where the potential offenders are consenting adults, there is usually no complainant. It is usually the police or third parties who go out of their way to report such cases. However, after the alleged offender is arrested, there is no one to prove the charge against them. Ugandan law imposes the burden of proof on the prosecution. In the absence of a complainant, corroborative evidence is also rendered useless and this is why most of the cases are never prosecuted conclusively. According to the spokesperson of the DPP, *"it is very difficult to prove cases between two consenting adults because of the absence of a complainant and prosecution witnesses. Unless one puts a camera in a room to prove carnal knowledge, or one of the partners complained to the police and is ready to testify, it would be difficult to prove."*⁹¹

⁹⁰Interview with Mr. Ladislaus Rwakafuzi of Rwakafuzi & Co Advocates

⁹¹Interview with the spokesperson of the DPP *ibid*

Another reason why there are usually no complainants is because of the existence of the offence of ‘permitting a male person to have carnal knowledge of him/her against the order of nature.’ The punishment is the same as the ‘having carnal knowledge against the order of nature.’ This section of the offence discourages opportunists from reporting such cases.

ii) The need for corroborating evidence

Even where there is a complainant, common law requires the existence of corroborative evidence for sexual offences. Where there is a complainant, then there is usually no corroborative evidence since the complainants are either fraudsters or are trying to settle scores and thus would not normally have any other evidence to back up their stories. Corroborative evidence is evidence that confirms in material particulars the story of the complainant. Medical evidence is usually sought as corroboration and the complainants as well as the suspects are usually subjected to anal examinations to prove penetration. This is a further disincentive for opportunists.

iii) Violations of human rights involved in collecting evidence

Except where one of the persons involved in the act testifies, it would be difficult to get evidence to sustain a prosecution. In the case of *Victor Mukasa v. Yvonne Ooyo*,⁹² Local Council officials forcibly entered Victor Mukasa’s home, confiscated documents and arrested the person they found at the home, took her to the police station, undressed her and fondled her breasts, and later released her without charge. This kind of conduct was unlawful and the High Court condemned it. If charges had been brought against Mukasa and Ooyo and such evidence of police misconduct had come out, the most likely outcome would have been that the human rights violations would have overridden the demands for criminal justice. With such inefficiency it would be very difficult to sustain charges as well as collect key evidence.

⁹²*Mukasa and Another v Attorney-General (2008) AHRLR 248 (UgHC 2008)*



3.5 ACCESS TO LEGAL REPRESENTATION FOR PERSONS ACCUSED OF SAME-SEX RELATED OFFENCES

Access to justice in modern societies requires legal aid to be readily available to the poor and to marginalised individuals. It is unrealistic to imagine that ordinary citizens know enough law to be able to dispense with professional legal information and advice, conduct legal proceedings in person, or even to recognise that a legal problem exists. In addition, human rights standards and the Constitution of Uganda provide for equality before the law, the right to be heard, a fair trial, and access to justice, among other basic human rights. Despite this, there is no national legal aid policy that offers free access to legal aid services to the ordinary poor Ugandan and few people have access to legal aid services.⁹³ LGBTI persons are among the most marginalised groups in Uganda. They are largely despised and regarded as immoral. Widespread homophobia does not make the situation any better. Homophobia is often responsible for LGBTI persons finding themselves in conflict with the law, at risk of blackmail and malicious prosecutions.

Because of this state of affairs, very few members of the LGBTI community can afford the services of a private legal practitioner. Although under Article 28(3) of the Constitution, any person charged with an offence that carries a sentence of death or life imprisonment (Section 145 imposes the maximum punishment of life imprisonment) is entitled to legal representation at the expense of the state, this is not the case in practice, and accused persons have to pay for their own lawyers or get legal aid from NGOs where possible.

Most legal aid service providers in Uganda do not offer legal aid services to LGBTI persons. The research revealed only two organisations in Uganda that offer legal aid services to these groups. Human Rights Awareness and Promotion Forum (HRAPF) operates a specialised legal aid clinic for LGBTI persons and the Refugee Law Project of the School of Law, Makerere University, extends free legal services to indigent refugees including LGBTI refugees. The legal aid clinic at HRAPF has been in existence for only two years; before that, activists would play the role of paralegals and go to the police stations to rescue the LGBTI persons arrested and where possible

⁹³Danish Institute for Human Rights, 'Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors' pp 31-34 http://www.humanrights.dk/files/images/Publikationer/Legal_Aid_East_Africa_Dec_2011_DIHR_Study_Final.pdf

later on direct them to private lawyers who would represent them in courts of law. The most renowned of these was the late David Kato who could not rest until he had managed to get the arrested person released.⁹⁴

Despite the growing LGBTI movement in Uganda, the majority of LGBTI persons, confronted with widespread homophobia, are unwilling to open up and speak out about their status or join the gay movement to advocate for their rights. This poses a big challenge to the organisations which offer pro bono legal services to these persons as reaching out to them is made difficult.⁹⁵ Some LGBTI persons - especially those arrested outside the capital city - never get to be known. It is thus possible that some cases of malicious prosecution go ahead without anybody getting wind of it. For example, out of the five cases retrieved from the archives of Makindye Court, only two were known to the NGOs that advocate for the rights of LGBTI persons.

Some private lawyers/firms are sometimes instructed and paid by LGBTI organisations to handle their cases. This means that only those organisations that have the capacity to pay for these services can access them. Even at a fee, there are very few private lawyers /firms that would willingly and without prejudice admit and handle LGBTI cases.⁹⁶ Tales of lawyers rejecting instructions from LGBTI clients, asking the clients to keep a determined distance behind them on the way to court, and demanding immediate payment before consideration of the case are just some of the tests that LGBTI persons go through in their quest to access justice.⁹⁷ Victor Mukasa and Yvonne Oyo's civil suit took close to two years to be filed primarily because they could not get a lawyer to handle the case.

*'Most of the lawyers we approached refused to represent us because they feared backlash from society...I was willing to go ahead and represent myself. I told them that I would do that; go to the judge and tell my side of the story...We had money for legal representation but no lawyer would take it.'*⁹⁸

⁹⁵Interview with lawyer at HRAPF supra

⁹⁶Rwakafuzi & Co. Advocates and Onyango & Co. Advocates are the two law firms known to take on LGBTI cases without fuss.

⁹⁷Interview with Victor Mukasa, LGBTI activist on 17th July 2012

⁹⁸Interview with Victor Mukasa ibid



As such, most arrested persons appeared in court without any legal representation. Subsequently, the lucky ones have their cases dismissed yet others only see the light of freedom after some months of incarceration. Brian Pande and Fred Wesukile spent two months on remand in Mbale. They were only able to secure a lawyer after two months and it was only then that they were released on bail. Brian subsequently died of injuries received while on remand.⁹⁹

The study revealed an interesting and key working relationship between legal aid service providers and private legal practitioners as well as the LGBTI community when handling LGBTI cases. The NGOs and private law firms share resources and information and involve the activists when handling cases concerning LGBTI persons.

3.6 CONCLUSION

The study demonstrates that the laws criminalising adult consensual same-sex relations are used too often for purposes of extortion, rather than to prosecute the persons arrested. If the aim were to prosecute, then there would be instances of convictions or acquittals. But there are no such instances. The general absence of such cases, where cases rarely go beyond arraignment and are often dismissed, leaves open the question: 'What is the purpose of the criminal law if it cannot be enforced?' and if the present law is simply the vehicle used to deny Ugandans their constitutional rights and a means to permit extortion and encourage bribery, does it then serve any public purpose? Or does it instead help further erode public morality as its existence on the law books promotes extortion and blackmail? Ugandans need to review the laws.

⁹⁹See *Extrajudicial, summary or arbitrary executions based on sexual orientation or gender identity; references in the reports of the special rapporteur* <http://www2.ohchr.org/english/issues/executions/index.htm>. Fred Wesukire who was in prison with Brian in an interview held on 17th July 2012 recounted their experience on remand.

CHAPTER FOUR

4.0 VIOLATIONS SUFFERED BY PERSONS AFFECTED BY THE ENFORCEMENT OF THE LAWS CRIMINALISING ADULT CONSENSUAL SAME SEX CONDUCT

4.1 INTRODUCTION

This Chapter examines the impact of the trends of enforcement of the laws criminalising adult consensual same sex conduct on the victims of these laws, namely, persons who have been arrested and prosecuted under these laws.

4.2 VIOLATIONS OF CONSTITUTIONAL RIGHTS

The Constitution of the Republic of Uganda is the supreme law of the land. Adopted in 1995, it includes important protections for the human rights of the citizens of the country. There is an inevitable tension between the Constitution and the enforcement of the laws criminalising consensual adult same sex conduct in Uganda.

The process of arresting, charging and prosecuting suspected criminals in Uganda frequently violates the basic rights of the person. The rights violated include the right to liberty, right to equality and non-discrimination, the right to life, right to privacy, and the right to a fair trial.

The Right to liberty

Under Article 23(1) of the Constitution, no person shall be deprived of personal liberty except for purposes of bringing such a person before a court of law in execution of the order of a court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence under the laws of Uganda, or for such valid reasons that may justify a deprivation of the right like preventing the spread of a contagious disease, or for persons who have not attained the age of eighteen for their education and welfare.

Whenever the police make an arrest, it should be for purposes of bringing a person before a court of law for prosecution. If this is not so, and there is no other lawful reason, then the police officer is violating the right to liberty of the person arrested. Arresting a person suspected of being a



homosexual because of the way that person looks and charging that person with '*carnal knowledge against the order of nature*' or '*attempted carnal knowledge against the order of nature*' or '*gross indecency*' with full knowledge that such a charge cannot be sustained because the evidence does not point to any of these, is a violation of that person's right to liberty.

The Right to Equality and Non-Discrimination

Article 21(1) of the Constitution provides that '*All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law*'. Article 21(2) continues **that without prejudice to clause (1) of this article**, '*a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability*'.

The Constitution goes on to define "discriminate" (in Article 21(3)) as giving different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. Arresting a person because of that person's sexual orientation or gender identity, without having reasonable belief that any charge against that person can be sustained, is therefore discriminatory. The person would simply have been targeted because of a particular perceived status. The criminal law is used as a mere pretext.

The right to life

Article 22(1) of the Constitution protects the right to life. It provides that '*No person shall be deprived of life intentionally except 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 and the conviction and sentence have been confirmed by the highest appellate court.*'

Death due to wounds obtained during remand for charges that cannot be sustained is a violation of the right to life. The case of Brian Mpande illustrates this. Brian Mpande and Fred Wesukire were arrested in Mbale on allegations of being homosexuals. They were charged and remanded in Mbale prison. They were mistreated in prison by the warders. They were "...kept separately

from other prisoners because they [the warders] feared that we could affect other prisoners...and we were occasionally beaten by the warders".¹⁰⁰ After two months on remand, Brian and Fred were released on bail. Soon thereafter on 13th September, Brian died of injuries received from warders while on remand in Mbale. The primary case was never proved against them and the charges were dismissed. The police did not have enough evidence to sustain the charge but nonetheless went ahead and imposed it. Brian's death could certainly be tied to beatings administered by the warders and thus amounts to a violation by the state of Brian's right to life.

The right to freedom from torture, inhuman and degrading treatment

Every human being is entitled to be treated with dignity. Article 24 of Uganda's Constitution provides that 'No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment'. Court, in interpreting this provision as regards LGBTI persons, has declared that these rights apply to all Ugandans including LGBTI persons. In the Victor Mukasa case, the High Court held that the fondling and public humiliation of the second applicant was a violation of her right to dignity. When persons accused of same-sex conduct are arrested, they are usually treated like lesser human beings, as happened in the Victor Mukasa case. Transgender persons are usually undressed to 'confirm' their sex. This degrading treatment is unconstitutional. The International Gay and Lesbian Human Rights Commission in an action call reported that two transgender persons Brenda Kizza and George Oundo were arrested on Wednesday September 10, 2008 and held at Nabweru Police Post for a full week without access to lawyers or to bail. They were then released without being brought before a magistrate. They reported being beaten, kicked, and hit with batons around the legs and ankles during their detention as interrogators demanded that they provide information about the names and addresses of other LGBT activists.¹⁰¹ As noted above in the Brian Mpande case,¹⁰² Fred Wesukira related that they were usually beaten by the warders and that Brian died due to the wounds received during the torture.¹⁰³

¹⁰⁰ See *Extrajudicial, summary or arbitrary executions based on sexual orientation or gender identity; references in the reports of the special Rapporteur* <http://www2.ohchr.org/english/issues/executions/index.htm>

¹⁰¹ *International Gay and Lesbian Human Rights Commission (IGLHRC) reported this in their Take Action section entitled Uganda: Demand An End To Official Harassment of LGBT Activists, 09/19/2008* <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/203.html> Accessed 12th December 2012

¹⁰² *supra*

¹⁰³ *Interview with Fred Wesukire supra*



The right to privacy

The constitutional right to privacy has particular relevance as regards sexual offences. Under Article 27(1) of the Constitution, *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.*

Article 27(2) provides that *'No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.'*

The activity described in the laws covering sexual offences would most often take place in the privacy of people's bedrooms. This creates a conflict between enforcement of the criminal law and the right to privacy. Any insistence on enforcing the criminal law would ultimately clash with the constitutional right to privacy. In the Victor Mukasa case, the court ruled that the first applicant's right to privacy was violated when the police were careless in handling documents that were confiscated from her home. Unauthorised entry into her home and access to those documents constituted a violation of her right to privacy. In the Rolling Stone case, the action of the tabloid newspaper in publishing the names and addresses of persons who were LGBTI or suspected LGBTI was held to be a violation of the right to privacy of the persons who were so identified.

At the International level, in **Toonen v. Australia**,¹⁰⁴ the U.N Human Rights Committee found that the existence of sodomy laws, even if unenforced for a decade, violated the author's right to privacy. The Committee found that if the laws were not being enforced, then it could not be said that these laws were protecting the morals of the people of Tasmania. This reasoning fits well with the Ugandan context, where same-sex relations are criminalised, yet no current convictions of this offence have been recorded. This would encourage one to vehemently advocate for the repeal of the sodomy laws on the Uganda statute books; these laws not only violate the rights of LGBTI persons but also provide fertile ground for homophobia and oppressive cultural and religious beliefs to take root.

The right to a fair trial

Uganda's Constitution contains important provisions protecting a person's right to a fair hearing before an independent and impartial court. Yet, our study has shown that, after arrest and at the trial, a number of rights are violated in contravention of Article 28 of the Constitution.

Under Article 28(3), *Every person who is charged with a criminal offence shall –*

- (a) *Be presumed to be innocent until proved guilty or until that person has pleaded guilty;*
- (b) *Be informed immediately, in a language that the person understands, of the nature of the offence;*
- (c) *Be given adequate time and facilities for the preparation of his or her defence;*
- (d) *Be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;*
- (e) *In the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;*
- (f) *Be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;*
- (g) *Be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.*

As illustrated by the Victor Mukasa case, very few of these rights are respected when arresting suspected LGBTI persons. Article 28(11) of the Constitution protects a person from being compelled to give evidence against himself in a trial for a criminal offence. Nonetheless, just being transgender, for example, is apparently sufficient to satisfy the police that one is a homosexual engaged in 'carnal knowledge against the order of nature.' The persons arrested are not informed of their rights and the whole circumstances are so humiliating that the suspect cannot reasonably be said to be having a fair trial. When a suspect cannot pay a bribe and charges are placed, and where suspects have no lawyer, persons such as Brian Mpande and Fred Wesukira are not availed of the right to a hearing on bail. Demands for bribes, coupled with ongoing harassment, ensure that suspects cannot have a fair trial. Suspects are also kept in police cells for more than the 48 hours required by the Constitution. Brenda Kizza and George Oundo spent a week in police



detention without access to lawyers or to a magistrate. They were then released without being brought before a magistrate but were required to keep on reporting to the police.¹⁰⁵

Under Article 28(3)(e), persons charged with carnal knowledge against the order of nature are entitled to a lawyer at the expense of the state, for the offence carries a maximum penalty of life imprisonment. Unfortunately, this is not usually respected. In the case of Wesukira and Mpande, the two were sent on remand without a lawyer handling their case until they retained a lawyer commissioned by SMUG who ensured their release on bail.¹⁰⁶

Under Article 28(6), *'No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.'* Unfortunately many LGBTI persons have been charged with nonexistent offences and offences that are not supported by the facts. Brenda Kizza and George Oundo were arrested on claims of "spreading homosexuality," though no such crime exists under Ugandan law.¹⁰⁷

Enforcing the criminal laws against same-sex conduct violates a myriad of rights of LGBTI persons. By the time the arrested person leaves the police station, that person has been discriminated against in violation of Article 21(2) of the Constitution, deprived of liberty in violation of Article 23 of the Constitution, subjected to degrading treatment in violation of Article 24 of the Constitution, unlawfully searched in violation of Article 27 of the Constitution, and denied his or her freedom to assembly and freedom to associate as guaranteed by Article 29 of the Constitution. Yet the charges are never proved against the LGBTI person - not even in one known instance! The law is being abused to satisfy private grudges and to permit unjust enrichment by Uganda public officers at the expense of the constitutional rights of the people of Uganda.

4.3 TORTIOUS VIOLATIONS

Apart from violating constitutional rights, the enforcement of these laws gives rise to a number of actions that amount to torts under common law. Such torts include assault and battery, false imprisonment, malicious prosecution and defamation as explained below:

¹⁰⁴Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

¹⁰⁵IGLHRC *supra*

¹⁰⁶Interview with Brian Wesukire, 18th July 2012

¹⁰⁷IGLHRC *supra*

Assault & battery

An assault is an intentional or reckless act that causes someone to fear immediate physical harm. Actual physical contact is not necessary to constitute an assault (for example, pointing a gun at someone). During arrests, many of the persons arrested apprehend fear of harm if they do not cooperate, even if they are not given reasons for their arrest or their rights.

On the other hand, battery is the intentional or reckless application of physical force to someone without their consent. Battery is a form of trespass to the person. Whereas policemen are allowed to use reasonable force when arresting suspects, they often use force even where it is not required. People are dragged, pushed, and pulled during arrest. These are torts for which the law can provide a remedy.

False imprisonment

False imprisonment occurs when there is unlawful restriction of a person's freedom of movement. The tort does not require being kept in a prison. Any complete deprivation of freedom of movement is sufficient, so false imprisonment includes unlawful arrest and unlawfully preventing a person leaving a room or a shop. A policeman who arrests a person to extort a bribe would be actually falsely imprisoning that person. Where a person is arrested just because of how that person looks, and without any reasonable suspicion of having committed an offence, this is a form of false imprisonment.

Malicious prosecution

Malicious institution of legal proceedings against a person is actionable in tort if the proceedings were initiated both maliciously and without reasonable and probable cause, and if the proceedings were unsuccessful. No one who has been convicted of a criminal charge can sue for malicious prosecution. Where people are arrested for offences related to homosexuality in circumstances where it is not reasonable to believe that the persons were committing such an offence, the subsequent charges and prosecution would be malicious. As already shown, convictions for homosexuality are extremely rare or even non-existent. One effective way to stop the police from arresting people without evidence of having committed a crime is to sue the police for malicious prosecution.



4.4 OTHER VIOLATIONS

Beyond the constitutional and tortious violations, there are other infringements that may not necessarily be enforceable in courts of law, but which nevertheless greatly impact the accused person. These include:

1. Embarrassment and loss of self esteem

The media has not made the plight of the LGBTI any easier. Their issues are perceived as news items that promote quick sales. Exposure of suspected gay persons by mainstream print media is associated with a quick boost in sales. Since LGBTI activities are criminalized, they trigger controversial debate. One such publication that routinely engages in this sales tactic is the Red Pepper tabloid. It uses crude language such as 'Bum driller arrested.' It splashes pictures of the suspected person and it publishes unproved details of what reportedly happened. The impact on the person so exposed is multifold, not least when the published claims cannot be substantiated.

2. Exposing suspects to mob justice

Uganda is a country prone to mob action. In late 2012, the Uganda Human Rights Commission noted with great concern that it was,

'...disturbed by the increasing acts of violence and lawlessness by the 'boda boda' operators who have in some instances inflicted bodily harm on the Police in the course of its work. There have also been reports of boda boda operators blocking free flow of road traffic like in the case that happened recently on Jinja Road at Mukono. The Commission regrets to note that mob justice has reached unprecedented levels in Uganda as evident in the ugly photographs and grim pictures of battered or dead victims of the vice that have now become a common sight in the print and television news in Uganda. According to the Police Crime Report of the period from January to June 2010, a total of 199 people were killed in mob justice in Uganda. The report also revealed that whereas theft was the leading cause of mob justice accounting for 108 cases, robbery, witchcraft, murder and burglary were also found to be triggers of mob action among communities.

Many suspected criminals are dealt with through mob action by people who have lost faith in the police and the rest of the criminal justice system. By criminalising same-sex conduct, LGBTI persons are made potential targets. The laws pose a danger to the safety and security of LGBTI persons. The danger is especially great for transgender persons who sometimes are accused of pretending to be male or female in order to engage in theft and crime.

3. Continued harassment by members of the public

Owing to the public manner in which arrests are carried out and owing also to the continued exploitation of suspects by the sensationalist media, suspects are often targets of aversion and stigma. This is so, despite the fact that the allegations of crime are never proved. It is difficult for such persons to return quietly to their homes or villages. Having been publicly accused, they risk ridicule, humiliation, and harassment by members of the public. Such humiliation can even lead to suicide. They live in constant fear of attacks from members of the public. The Makerere University student who was arrested at Mitchell Hall had to relocate from the area in which he was staying as he was constantly hassled by those who knew of the incident.

4. Loss of jobs and housing due to unsubstantiated allegations

One of the common effects of arrests for offences related to homosexuality is that despite the fact that charges are not proved, the persons arrested lose their jobs and housing. Employers and landlords normally turn the arrested persons out of their jobs or houses citing their arrests. In other cases, no reason is given and the employers/landlords lay the person off work or end the tenancy in terms that clearly indicate the reason without stating it explicitly.

5. Abandonment by family and friends

One's family and friends are usually the closest people with whom one may confide. They offer consolation and friendly shoulders to cry on. However, where one has been arrested for offences connected with homosexuality, family and friends often disown the person and distance themselves from the person arrested. Some parents even disown and disinherit their children. The mere fact that someone has been arrested is enough to lead people to conclude that the person is guilty. These unfortunate results emanate from the purported enforcement of the laws criminalising same-sex conduct.

6. Effect on family and friends

The notoriety following someone arrested for carnal knowledge against the order of nature goes beyond the individual to her or his family. Ugandan families are mostly extended families; a perceived disgrace to one member of a family usually results in the whole family being ostracized, branded, and shunned.



4.5 CONCLUSION

Enforcement of the criminal laws on homosexuality causes ridicule, harassment and humiliation of the suspects. The lack of convictions demonstrates that enforcement of the laws on homosexuality do not serve the stated justifications for the law – namely, protecting morals. Many constitutional rights of the person are violated during the process of enforcement. The process is also embarrassing for the suspect. Victims face psychological problems including low self-esteem and risk of suicide. Some face family rejection and insecurity while other lose jobs, housing and/or their education. With so little to show for the effort, retaining and enforcing the laws against homosexuality are a poor continuing investment and effort in Uganda in the 21st century.

CHAPTER FIVE

5.0 RECOMMENDATIONS AND CONCLUSIONS

5.1 RECOMMENDATIONS

To the Attorney General

The study recommends that, as the legal advisor of the government on the constitutionality and legality of various laws, the Attorney General should:

- Advise the executive and the legislature on the dangers of passing the Anti-Homosexuality Bill 2009;
- Advise the Executive, Parliament and the Judiciary as to the illegality and non-constitutionality of the actions being undertaken in the name of implementing laws that criminalise consensual same-sex conduct among adults;
- Advise Parliament on its duty to protect the Constitution and its responsibility to desist from passing laws that violate the Constitution;
- Advise government on the likely outcomes of cases taken before courts of law seeking compensation for unlawful arrest, restriction or detention. Awards made by courts will have a direct impact on the Consolidated Fund.

To the Uganda Police Force

As the body responsible for arresting suspects and as the first point of contact with the community, the police should:

- Arrest people on allegations that can be proven in courts of law. The effect of doing otherwise violates basic constitutional rights of the persons affected;
- Make a professional decision not to arrest persons suspected of having consensual adult same-sex relations. To continue to arrest such persons serves no justifiable purpose;
- Prioritise areas of the criminal law that are capable of being enforced and that have an actual victim rather than spending police resources on investigating victimless offences;



- Recognise that, as professionally trained officers entrusted by the people of Uganda with important powers, the Service should not become facilitators of private extortion and blackmail;
- Keep proper records of all cases handled and ensure accessibility of the records to the public. Invest in a computerised system for proper documentation and accessibility of records. Cut down on time wasted by filing papers; and
- Allow LGBTI activists to conduct awareness campaigns on sexual orientation and gender identity issues for the police.

If arrests must be made, then:

- Arrest for the right reasons and not mere suspicions that are not supported by reasonable evidence or that are fuelled by hate-filled tip-offs or the need for extra earnings through extortion and blackmail;
- Conduct the arrests in a humane and professional manner. Take care to observe all the rights of the person at arrest, with particular attention to the rights of transgender and intersex persons;
- Persons arrested are presumed innocent under the Uganda Constitution. Protect those persons arrested from mob justice;
- Protect them also from media and public displays. People presumed innocent should not have their security jeopardized while in custody;
- Have separate facilities in the police cells for holding transgender and intersex persons who may be arrested under these provisions; and
- Protect the right to privacy of each suspect by desisting from anal exam or by seeking to confirm a person's sex/gender through physical inspection (e.g., undressing and unwarranted touching).

To the DPP

As the constitutional officer charged with having regard to the public interest, to the administration of justice, and to the need to prevent abuse of the legal process, the DPP should:

- Not sanction charges involving consensual adult same-sex relations, especially where the complainant is not one of the persons involved in the act;
- Ensure that the rights of LGBTI persons are respected and that charges are not arbitrarily sanctioned; and
- Develop a prosecutorial policy on cases involving consensual adult same-sex relations, which will guide State Attorneys on how to handle such cases.

To Parliament

Parliament plays an important role in making laws for the country. This role imposes a great responsibility on Parliament to make laws that are constitutional, relevant and necessary for the public good. As such Parliament should:

- Prevent the rampant abuse of human rights using the law by repealing those provisions criminalising same-sex conduct in Uganda. As the body responsible for enacting and repealing laws, Parliament has the power to decriminalise consensual adult same-sex relations and to rid the country of a law that serves only to promote humiliation, dehumanization and discrimination of a section of the population for no reason other than inherent characteristics arising from their sexual orientation or gender identity;
- Reject the Anti-Homosexuality Bill which, if passed, will exacerbate the situation multifold and further entrench the violations against LGBTI persons in Uganda. The proposed law is unconstitutional, would promote hatred and, above all, would be virtually unenforceable;
- Endeavor to enact laws which are compliant with international, regional and domestic human rights standards established and observed through regional and international human rights instruments;
- Pass laws that balance the interests of the majority with the necessary protection of minorities.
- Pass criminal laws that are capable of being implemented and serving the essential purposes of the criminal law; and
- Conduct post-legislative scrutiny to assess the levels of implementation of the laws enacted.



To the Judiciary

As the arm of government with the powers to determine the legality of both the actions of Parliament and the Executive, and the powers to adjudicate disputes between persons, the Judiciary should:

- Be more responsive to the constitutional violations involved in bringing a suspect to court based on charges too flimsy to sustain and without any evidence. This would discourage the police and the DPP from preferring and sanctioning such charges respectively. Courts should not be used to persecute a marginalised group;
- Recognise that cases brought before it concerning adult same-sex conduct are brought under statutes that violate the Constitution of Uganda; and
- Keep proper records of all cases handled. This is important for posterity and for accountability. The effort to computerise case summaries in Kampala courts is a welcome step. This should be done for all case files for easy access. Original case files should be kept and a system for easy accessibility developed.

To the Media

The media has a very important set of roles and responsibilities to fulfill in a free and democratic society and should:

- Maintain the balance between the public's right to know and each person of interest's constitutional rights. These include the right to a fair hearing, the presumption of innocence, the right to privacy, and the right to be free to be free of degrading treatment from any party.

When the media reports on the actions of persons accused of crimes:

- Report truthfully and factually;
- Do not pass judgment on the suspect by portraying him or her as guilty before a court has found them to be so;
- Distinguish between cases of consensual adult same-sex relations and defilement or pedophilia/rape. The two are different; the latter ought to continue to be criminalised;

- Avoid the use of terms that further ostracise LGBTI persons and entrench discrimination against them;
- Avoid hate speech. Do not call for harm to be done to the suspects; and
- Pay due regard to the life, privacy, and livelihood of the suspects before reporting. With the high levels of homophobia in Uganda, it is necessary to think twice before publishing names and pictures of persons suspected of having consensual same-sex relations.

To LGBTI Organisations

- Endeavour to properly document cases of arrest that occur against members of the LGBTI community for consensual adult same-sexual conduct;
- Engage mainstream organisations on LGBTI issues and rights;
- Engage the print, broadcast and other media and sensitise them to the dangers of negative reporting; and

Reach out and engage in constructive dialogue with the government (including the Attorney General, Police, Parliament and the Judiciary) with the aim of creating and fostering better understanding of LGBTI issues.

To mainstream organisations and legal aid service providers

As the main connecting point between government and citizens of a country and key defenders of the rights of all people including minorities, CSOs should:

- Properly document cases of violations of human rights including those of LGBTI persons and organisations. NGOs should be able to keep better records of violations, in order to keep track of and identify trends in violations and seek appropriate remedies;
- Extend services to LGBTI persons and organisations;
- Broaden human rights awareness campaigns to include LGBTI issues in the broader human rights contexts;
- Engage more extensively with the mainstream media on LGBTI issues; and
- Design programs that are inclusive of LGBTI persons.



5.2 CONCLUSION

The fact that laws criminalising adult consensual same-sex conduct remain on the law books ensures that the law is used to harass, intimidate, and humiliate LGBTI persons. The law does not serve the main objectives of the criminal law and thus ought to be taken off the law books so that LGBTI persons are made equal to others before the law.

It is very important for the legislature to enact laws that govern the populace, but it is also equally important to ensure that the laws enacted are not used to the detriment of some persons or groups of persons in the country. Advocates of the retention of Section 145 (a) of the Penal Code Act and/or enactment of “tougher laws” to curb homosexuality in Uganda demonstrate an understandable passion to protect and uphold morality in Uganda. But a passion for morality is not enough. This study demonstrates that there has so far been no reliable documented success in the enforcement of this PCA provision. On the contrary, these provisions of the Penal Code have been used to bring criminal charges with no valid evidence against persons in Uganda, especially those in the LGBTI community. As a practical matter, the law has been an instrument used to blackmail and isolate LGBTI persons in the community.

Criminalising sexual conduct between consenting adults is not a productive use of resources from a law enforcement perspective. Evidence to sustain charges against these accused persons has proved very difficult to obtain. In this era, when we as a country have committed to adhere to various international human rights standards, the energies put into the effort to criminalise same-sex conduct would be better used to help Ugandans learn about human rights as a broad concept that accommodates inclusiveness of all regardless of their sexual orientation. Government and other persons of authority should invest in human rights issues that affect the wellbeing of all marginalised persons, including LGBTI persons. Those issues include access to justice, access to quality health care, and issues of equity among others. This is the direction in which a 21st century nation should go.

The presence of archaic, repressive laws that cannot be enforced brings an unnecessary financial burden on the taxpayer. Public moneys are spent on this enforcement at the expense of other worthwhile national development projects.

The proposed Anti Homosexuality Bill, despite having elaborate provisions, will be difficult to enforce since the evidence required is the same evidence as that required now. The rest of the provisions -- like the sweeping "promotion of homosexuality" clause and the nullification of international instruments -- would simply render human rights and public health work impossible in Uganda, and would make Uganda a pariah state in the international community



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APPENDIX: THE ANTI HOMOSEXUALITY BILL 2009

THE ANTI HOMOSEXUALITY BILL 2009

MEMORANDUM

1.1. The principle

The object of this Bill is to establish a comprehensive consolidated legislation to protect the traditional family by prohibiting (i) any form of sexual relations between persons of the same sex; and (ii) the promotion or recognition of such sexual relations in public institutions and other places through or with the support of any Government entity in Uganda or any non governmental organization inside or outside the country.

This Bill aims at strengthening the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family.

This legislation further recognizes the fact that same sex attraction is not an innate and immutable characteristic.

The Bill further aims at providing a comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda. 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.

There is also need to protect the children and youths of Uganda who are made vulnerable to sexual abuse and deviation as a result of cultural changes, uncensored information technologies, parentless child developmental settings and increasing attempts by homosexuals to raise children in homosexual relationships through adoption, foster care, or otherwise.



2.1. Defects In existing law

This proposed legislation is designed to fill the gaps in the provisions of other laws in Uganda e.g. the Penal Code Act Cap. 120.

The Penal Code Act (Cap120) has no comprehensive provision catering for anti homosexuality. It focuses on unnatural offences under section 145 and lacks provisions for penalizing the procurement, promoting, disseminating literature and other pornographic materials concerning the offences of homosexuality hence the need for legislation to provide for charging, investigating, prosecuting, convicting and sentencing of offenders.

This legislation comes to complement and supplement the provisions of the Constitution of Uganda and the Penal Code Act Cap 120 by not only criminalizing same sex marriages but also same-sex sexual acts and other related acts.

3.0. The objectives of the Bill

The objectives of the Bill are to:

- (a) Provide for marriage in Uganda as that contracted only between a man and a woman
- (b) Prohibit and penalize homosexual behavior and related practices in Uganda as they constitute a threat to the traditional family;
- (e) Prohibit ratification of any international treaties, conventions, protocols, agreements and declarations which are contrary or inconsistent with the provisions of this Act,
- (d) Prohibit the licensing of organisations which promote homosexuality.

3.1. Part I of the Bill incorporating clause 1 provides for preliminary mailers relating to interpretation of the words and phrases used in the Bill.

3.2. Part II of the Bill incorporating clause 2 to 6 prohibits homosexuality and related practices by introducing the offences of engaging in homosexuality, and the penalties of imprisonment upon conviction. This pan also provides for protection, assistance and support for victims of homosexuality.

3.3. Part III of the Bill incorporating clause 7 to clause 14 creates offences and penalties for acts that promote homosexuality, failure to report the offence and impose a duty on the community to report suspected cases of homosexuality.

3.4. Part IV of the Bill incorporating clause 15 to clause 17 provides for the jurisdiction of Uganda Courts in case of Homosexuality, including extra territorial jurisdiction.

3.5. Part V of the Bill incorporating clauses 18 and 19 provides for miscellaneous provisions on International Treaties, Protocols, declarations and conventions and the Minister to make regulations to give effect to the Act.

Schedule of the Bill gives the value of the currency point.

HON DAVID BAHATI,
Member of Parliament, Ndorwa County West Kabale.



THE ANTI HOMOSEXUALITY BILL, 2009

ARRANGEMENT OF CLAUSES

PART I – PRELIMINARY

Clause

- I. Interpretation.

PART II-PROHIBITION OF HOMOSEXUALITY

2. The offence of homosexuality
3. Aggravated homosexuality.
4. Attempt to commit homosexuality.
5. Protection, assistance and payment of compensation to victims of homosexuality
6. Confidentiality.

PART III – RELATED OFFENCES AND PENALTIES

7. Aiding and abating homosexuality.
8. Conspiracy to engage in homosexuality.
9. Procuring homosexuality. by threats, etc.
10. Detention with intent to commit homosexuality
11. Brothels.
12. Same sex marriage.
13. Promotion of homosexuality.
14. Failure to disclose the offence.

PART IV – JURISDICTION

15. Jurisdiction.
16. Extra-territorial Jurisdiction.
17. Extradition.

PART V – MISCELLANEOUS PROVISIONS

18. International treaties.
19. Regulations.

Schedule

Currency point

**A BILL FOR AN ACT
ENTITLED
THE ANTI HOMOSEXUALITY ACT, 2009**

An Act to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of such relations and to provide for other related matters

BE IT ENACTED by Parliament as follows:

PART I – PRELIMINARY.

1. Interpretation.

In this Act, unless the context otherwise requires –

“**authority**” means having power and control over other people because of your knowledge and official position; and shall include a person who exercises religious, political, economic or social authority;

“**bisexual**” means a person who is sexually attracted to both males and females;

“**child**” means a person below the age of 18 years;

“**currency point**” has the value assigned to it in the Schedule to this Act;

“**disability**” means a substantial limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation;

“**felony**” means an offence which is declared by law to be a felony or if not declared to be a misdemeanor is punishable without proof of previous conviction, with death or with imprisonment for 3 years or more.;

“**gay**” means a male person who engages in sexual intimacy with another person of the same sex;

“**gender**” means male or female;

“**HIV**” means the Human Immunodeficiency Virus;

“**homosexual**” means a person who engages or attempts to engage in same gender sexual activity;

“**homosexuality**” means same gender or same sex sexual acts;

“**lesbian**” means a female who engages in sexual intimacy with another female;

“**Minister**” means the Minister responsible for ethics and integrity;



“**misdemeanor**” means an offence which is not a felony;

“**serial offender**” means a person who has previous convictions of the offence of homosexuality or related offences;

“**sexual act**” includes –

- (a) physical sexual activity that does not necessarily culminate in intercourse and may include the touching of another’s breast, vagina, penis or anus;
- (b) stimulation or penetration of a vagina or mouth or anus or any part of the body of any person, however slight by a sexual organ;
- (c) the unlawful use of any object or organ by a person on another person’s sexual organ or anus or mouth;

“**sexual organ**” means a vagina, penis or any artificial sexual contraption;

“**touching**” includes touching –

- (a) with any part of the body;
- (b) with anything else;
- (c) through anything;

and in particular includes touching amounting to penetration of any sexual organ. anus or mouth.

“**victim**” includes a person who is involved in homosexual activities against his or her will.

PART II – HOMOSEXUALITY AND RELATED PRACTICES.

2. The offence of homosexuality

(1) A person commits the offence of homosexuality if-

- (a) he penetrates the anus or mouth of another person of the same sex with his penis or any other sexual contraption;
- (b) he or she uses any object or sexual contraption to penetrate or stimulate sexual organ of a person of the same sex;
- (c) he or she touches another person with the intention of committing the act of homosexuality.

(2) A person who commits an offence under this section shall be liable on conviction to imprisonment for life.

3. Aggravated homosexuality

(1) A person commits the offense of aggravated homosexuality where the

- (a) person against whom the offence is committed is below the age of 18 years;
 - (b) offender is a person living with HIV;
 - (c) offender is a parent or guardian of the person against whom the offence is committed;
 - (d) offender is a person in authority over the person against whom the offence is committed;
 - (e) victim of the offence is a person with disability;
 - (f) offender is a serial offender, or
 - (g) offender applies, administers or causes to be used by any man or woman any drug, matter or thing with intent to stupefy overpower him or her so as to there by enable any person to have unlawful carnal connection with any person of the same sex,
- (2) A person who commits the offence of aggravated homosexuality shall be liable on conviction to suffer death.
- (3) Where a person is charged with the offence under this section, that person shall undergo a medical examination to ascertain his or her HIV status.
4. Attempt to commit homosexuality
- (1) A person who attempts to commit the offence of homosexuality commits a felony and is liable on conviction to imprisonment seven years.
 - (2) A person who attempts to commit the offence of aggravated homosexuality commits an offence and is liable on conviction to imprisonment for life.
5. Protection, assistance and payment of compensation to victims of homosexuality
- (1) A victim of homosexuality shall not be penalized for any crime committed as a direct result of his or her involvement in homosexuality.
 - (2) A victim of homosexuality shall be assisted to enable his or her views and concerns to be presented and considered at the appropriate stages of the criminal proceedings.
 - (3) Where a person is convicted of homosexuality or aggravated homosexuality under sections 2 and 3 of this Act, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual or psychological harm caused to the victim by the offence.



(4) The amount of compensation shall be determined by the court and the court shall take into account the extent of harm suffered by the victim of the offence. the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence.

6. Confidentiality

(1) At any stage of the Investigation or trial of an offence under this Act, law enforcement officers, prosecutors, judicial officers and medical practitioners, as well as parties to the case, shall recognize the right to privacy of the victim.

(2) For the purpose of subsection (1), in cases involving children and other cases where the court considers it appropriate proceedings of the court shall be conducted in camera, outside the presence of the media.

(3) Any editor or publisher, reporter or columnist in case of printed materials. announcer or producer in case of television and radio, producer or director of a film to case of the movie industry. or any person utilizing trimedia facilities or information technology who publishes or causes the publicity of the names and personal circumstances or any other information tending to establish the victim's identity without authority of court commits an offence and is liable on conviction to a fine not exceeding two hundred and fifty currency points.

7. Aiding and abating homosexuality

A person who aids, abets, counsels or procures another to engage in acts of homosexuality commits an offence and is liable on conviction to imprisonment for seven years.

8. Conspiracy to engage in homosexuality

A person who conspires with another to induce another person of the same sex by any means of false pretence or other fraudulent means to permit any person of the same sex to have unlawful carnal knowledge of him or her commits an offence and is liable on conviction to imprisonment for seven years.

9. Procuring homosexuality by threats, etc

(1) A person who-

(a) by threats or intimidation procures or attempts to procure any woman or man to have any unlawful carnal knowledge with any person of the same sex, either in Uganda or elsewhere;

- (b) by false pretences or false representations procures any woman or man to have any unlawful carnal connection with any person of the same sex, either in Uganda or elsewhere; or
- (2) A person shall not be convicted of an offence under this section upon the evidence of one witness only, unless that witness is corroborated in some material particular by evidence implicating the accused.

10. **Detention with intent to commit homosexuality**

A person who detains another person with the intention to commit acts of homosexuality with him or herself or with any other person commits an offence and is liable on conviction for seven years.

11. **Brothels**

- (1) A person who keeps a house, room, set of rooms or place of any kind for the purposes of homosexuality commits an offence and is liable on conviction to imprisonment for seven years.
- 2) A person being the owner or occupier of premises or having or acting or assisting in the management or control of the premises, induces or knowingly suffers any man or woman to resort to or be upon such premises for the purpose of being unlawfully and carnally known by any man or woman of the same sex whether such carnal knowledge is intended to be with any particular man or woman generally, commits a felony and is liable on conviction to imprisonment for five years.

12. **Same sex marriage**

A person who purports to contract a marriage with another person of the same sex commits the offence of homosexuality and shall be liable on conviction to imprisonment for life.

13. **Promotion of homosexuality**

(1) A person who -

- (a) participates in production, procuring, marketing, broadcasting, disseminating, publishing pornographic materials for purposes of promoting homosexuality;
- (b) funds or sponsors homosexuality or other related activities;
- (c) offers premises and other related fixed or movable assets for purposes of homosexuality



- or promoting homosexuality;
- (d) uses electronic devices which include internet, films, mobile phones for purposes of homosexuality or promoting homosexuality and;
 - (e) who acts as an accomplice or attempts to promote or in any way abets homosexuality and related practices;
- commits an offence and is liable on conviction to a fine of not more than one hundred thousand currency points or imprisonment of a minimum of five years and a maximum of seven years or both fine and imprisonment.
- (2) Where the offender is a corporate body or a business or an association or a non-governmental organization, on conviction its certificate of registration shall be cancelled and the director or proprietor or promoter shall be liable on conviction to imprisonment for seven years.

14. Failure to disclose the offence

A person in authority, who being aware of the commission of any offence under this Act, omits to report the offence to the relevant authorities within twenty-four hours of having first had that knowledge, commits an offence and is liable on conviction to a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding three years.

PART IV – JURISDICTION

15. Jurisdiction

Save for aggravated homosexuality that shall be tried by the High Court, the magistrates court shall have jurisdiction to try the other offences under this Act.

16. Extra- Territorial Jurisdiction

This Act shall apply to offenses committed outside Uganda where –

- (a) a person who, while being a citizen of or permanently residing in Uganda, commits an act outside Uganda, which act would constitute an offence under this Act had it been committed in Uganda; or
- (b) the offence was committed partly outside and or partly in Uganda.

17. Extradition

A person charged with an offence under this Act shall be liable to extradition under the existing extradition laws.

PART V – MISCELLANEOUS

18. Nullification of inconsistent international treaties, protocols, declarations and conventions

- (1) Any International legal instrument whose provisions are contradictory to the spirit and provisions enshrined in this Act, are null and void to the extent of their inconsistency.
- (2) Definitions of “sexual orientation”, “sexual rights”, “sexual minorities”, “gender identity” shall not be used in any way to legitimize homosexuality, gender identity disorders and related practices in Uganda.

19. Regulations.

The Minister may, by statutory instrument make regulations generally for better carrying out the provisions of this Act.

SCHEDULE

One currency point is equivalent to twenty thousand shillings.





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