

STATEMENT BY THE CIVIL SOCIETY COALITION ON HUMAN RIGHTS AND CONSTITUTIONAL LAW – UGANDA ON THE ANTI-HOMOSEXUALITY BILL 2009

Submitted to the Legal and Parliamentary Affairs Committee of Uganda's parliament on 9th May 2011

As man and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity. When individuals are attacked, abused or imprisoned because of their sexual orientation, we must speak out. ...Today, many nations have modern constitutions that guarantee essential rights and liberties. And yet, homosexuality is considered a crime in more than 70 countries. This is not right. Yes, we recognize that social attitudes run deep. Yes, social change often comes with time. But let there be no confusion; where there is tension between cultural attitudes and universal human rights, rights must carry the day. Personal disapproval, even society's disapproval is no excuse to arrest, detain, imprison, harass or torture anyone, ever. – Ban Ki-Moon

When we discuss a contentious subject like homosexuality, we need to do so recognising that we are talking about human beings...We also need to realise that we live in a large world, not a narrow Uganda... (in) my opinion as a pediatrician and medical doctor who has studied the subject of homosexuality, I can tell you that homosexuality is not an acquired condition. - Dr. Munini Mulera

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. -Universal Declaration of Human Rights

Introduction

This statement is written and delivered by the Civil Society Coalition on Human Rights and Constitutional Law Uganda (herein after the Coalition). The Coalition is composed of over 31 civil society organizations, namely;

1. Advocates for Public International Law in Uganda (APILU)
2. African Women's Development Fund (AWDF)
3. Akina Mama wa Afrika (AMwA)
4. Centre for Domestic Violence Prevention (CEDOVIP)
5. Centre for Land Economy and Rights of Women (CLEAR-Uganda)
6. Centre for Women in Governance (CEWIGO)
7. Development Network for Indigenous Voluntary Associations (DENIVA)
8. East & Horn of Africa Human Rights Defenders Project (EAHRDP)
9. Forum for Women in Democracy (FOWODE)
10. Frank and Candy Uganda

11. Freedom and Roam Uganda (FARUG)
12. Human Rights & Peace Centre (HURIPEC) – Faculty of Law, Makerere University
13. Human Rights Awareness & Promotion Forum (HRAPF)
14. Icebreakers Uganda
15. Integrity Uganda
16. International Refugee Rights Initiative (IRRI)
17. Lady Mermaid Bureau (LMB)
18. Mentoring and Empowerment Programme for Young Women (MEMPROW)
19. National Association of Women’s Organizations in Uganda (NAWOU)
20. National Coalition of Women Living with HIV/AIDS (NACWOLA)
21. National Guidance & Empowerment Network of People Living with HIV/AIDS (NGEN+)
22. Raising Voices
23. Refugee Law Project (RLP) – Faculty of Law, Makerere University
24. Sexual Minorities Uganda (SMUG)
25. Spectrum Uganda
26. Support Initiative for People with Atypical Sex Development (SIPD)
27. Transgender Intersex and Transexuals Uganda
28. Uganda Association of Women Lawyers (FIDA-U)
29. Uganda Feminist Forum
30. Uganda Health Science and Press Association (UHSPA)
31. Women’s Organization & Network for Human Rights Advocacy (WONETHA)

The Coalition came into being after the tabling of the Anti-Homosexuality Bill 2009 in the Parliament of Uganda in September 2009. It serves as a forum for sexual rights advocacy within a human rights and constitutional law framework. The Coalition uses the law, research, public awareness and dialogue as its main methods of work.

The purpose of this statement is to provide the Legal and Parliamentary affairs Committee of the Parliament of Uganda with a human rights and constitutional audit of the Anti Homosexuality Bill 2009.

Summary of the Coalition’s Position on the Bill

We note the fact that submissions have already been made to the Committee by different stakeholders. We align ourselves with those submissions that reflect the position that the Bill is Anti-Human Rights, Anti-Constitutionalism and Anti-Good Governance. The Coalition’s unwavering position is that the Anti-Homosexuality Bill 2009 is incurably defective, and should be withdrawn from Parliament without any amendments whatsoever.

The reasons for this are based on the law, the constitution, public health, African Culture and good governance. The reasons are explained below;

The Coalition's legal Position on the Anti-Homosexuality Bill:, Unconstitutional, Disproportionate, and Redundant

1. Unconstitutional

Fact: Six of the eighteen substantive provisions of the Anti Homosexuality Bill 2009 are unconstitutional. This implies that parliament can only pass them after amending the constitution.

Under Article 2 of the constitution of Uganda, the Constitution is the supreme law of Uganda, and shall have binding force on **ALL** authorities and persons throughout Uganda (emphasis ours). If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

This implies that six provisions of the Anti Homosexuality Bill can only be passed after amendment of the Constitution. In other words, this is a No Go area for parliament until the Constitution permits it.

The six unconstitutional provisions are;

Clause 2 of the Bill; The Offence of Homosexuality

The prohibition of Homosexuality in section 2 of the Anti Homosexuality Bill is unconstitutional to the extent that it contravenes two key constitutional provisions: these are right to freedom from non discrimination and the right to privacy;

1) ***Non- discrimination***

Article 21(1) of the Constitution of Uganda provides for equality before and under the law and equal protection for all persons in Uganda. It reads 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”.

Sub-article 2 provides;

“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, or social or economic standing, political opinion or disability.”

Under sub-article 3, it is provided that;

(3) “ For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

By criminalising homosexuality, which is a natural condition, the law would have treated persons who have a homosexual orientation differently.

In the case of **Kasha Jacqueline, Pepe Onziema & David Kato Vs Giles Muhame and The Rolling stone Publication LTD, High Court Miscellaneous Cause No. 163 of 2010**, Hon. Justice V. F. Musoke Kibuka made it clear that the rights in the constitution apply equally to everyone regardless of their sexual orientation. He held that the publication of the applicants’ photographs and calling for them to be hanged was a violation of their rights to dignity and privacy.

In the earlier case of **Victor Mukasa & Yvonne Oyo Vs Attorney General [Misc. Cause No. 247 of 2006 (HC), Unreported]** in which agents of the state broke into the residence of the plaintiffs in search for evidence of suspected lesbianism, court easily reached the conclusion that the actions were an invasion of the applicants privacy regardless of their sexual orientation.

Under international law, Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), prohibit discrimination on grounds of including other status. This has been held to include sexual orientation.

The UN Human Rights Committee in the case of **Toonen Vs Australia (UN Human Rights Committee; Communication No. 488/1992: Australia CCPR/C/5/D488/1992, 4, April 1992)**. Pronounced itself on the issue;

“.....The state party has sought the committee’s guidance as to whether sexual orientation may be considered an “other status” for purposes of article 26 of the ICCPR The same issue could arise under article 2Paragraph 1 of the covenant. The committee confines itself to noting however that in its view the reference to sex in article 2 paragraph 1 and article 26 is to be taken as including sexual orientation....”. (page 10 UN Human Rights Committee; Communication No. 488/1992)

Criminalizing homosexuality is differential treatment and since Article 21(1) uses the words “ALL PERSONS”, then criminalising homosexuality would be clearly unconstitutional.

2) **The Right to privacy (Article 27 (2)):**

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

In the case of **Kasha Jacqueline, Pepe Onziema & David Kato Vs Giles Muhame and The Rolling stone Publication LTD, High Court Miscellaneous Cause No. 163 of 2010**, Hon. Justice V. F. Musoke Kibuka ruled that;

“.....With regard to the right of privacy under Article 27 of the constitution, court has no doubt again using the objective test that the exposure of the identities of the persons and homes of the applicants for the purpose of fighting gayism and the activities of gays as can easily be seen from the general outlook of the expunged publication, threatens the rights of the applicants to privacy of the person and their homes. They are entitled to that right”..... (Emphasis in underline added)

Therefore it is clear that since criminalising homosexuality certainly leads to the invasion of the person’s privacy if at all a prosecution is to be successfully, it is clear that in almost all cases, the person’s right to privacy will be violated.

Under Article 17 of the international covenant on civil and political rights (ICCPR), “No one shall be subjected to unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation.”

The UN Human Rights Committee, which monitors state compliance with the ICCPR, addressed prohibition of homosexuality and the attendant invasion of privacy in the case of **Toonen Vs Australia (UN Human Rights Committee; Communication No. 488/1992: Australia CCPR/C/5/D488/1992, 4, April 1992)**. The committee observed that;

“.....It is undisputed that adult consensual sexual activity in private is covered by the concept of privacy...” (Page 9 UN Human Rights Committee; Communication No. 488/1992)

The committee directed the Australian Government to repeal the offending law that interfered with the applicant’s right to his sexual orientation.

Similarly enactment of the Anti Homosexuality Bill will contravene the right to privacy of homosexuals in Uganda and will be both unconstitutional and in contravention of established international law.

Clause 13; Promotion of Homosexuality

Clause 13 which criminalises promotion of homosexuality would also be unconstitutional. The clause criminalises the activities of individuals or organizations who work on issues of human rights, sexual orientation and gender identity - and has ramifications for other civil society actors, including individuals and organisations working on HIV/AIDS prevention programmes and access to treatment for people living with HIV and AIDS. It poses potential severe unjustifiable restrictions on the right to freedom of expression in the context of legitimate human rights defence work.

The Clause also targets donors and funders who mainly fund a wide range of activities aimed at promoting human rights. It also targets professionals like lawyers, doctors and counselors who may come across homosexuals during the course of their work, and any attempt at giving them advice based on their behaviour and sexual orientation could be classified as ‘aiding and abetting homosexuality’. It also seeks to punish landlords who in a genuine bid to make money and rent premises to the highest bidder may find themselves being accused of promoting homosexuality.

Admittedly, if enforced, Section 13 would be a great tool for limiting the ‘promotion of homosexuality’ as the Bill refers to it, but this would be at the cost of violating the sacrosanct Ugandan constitution which recognises a host of rights that would be violated by such a provision. Therefore passing the Bill with Clause 13 would necessitate a constitutional amendment prior to the passing of the law.

This clause violates key rights and freedoms protected in the Constitution of the Republic of Uganda 1995. It contravenes Articles 20(1) and 20(2) of the Constitution the combined effect of which is that the state shall not arbitrarily delineate and stand in the way of promotion of fundamental human rights which are enshrined in the constitution. Article 20(1) of the constitution provides that *‘Fundamental rights and freedoms of the individual are inherent and not granted by the state.’* Article 20(2) provides that *“The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons”*.

It also violates Articles 29(1)(a), 29(1)(c), 29(1)(d) and 29(1)(e) of the Constitution, which protect the rights to freedom of speech, religion and conscience, assembly and association respectively.

Under Article 29(1)(a), freedom of speech and expression are protected, and this includes freedom of the press and other media. Freedom of the press has been expressed to be one of the key tenets of a democratic country. In the case of **Charles Onyango Obbo and Anor v. Attorney General [Constitutional Appeal No.2 of 2002 (SC)]**, stated that the rights to freedom of the press should be jealously guarded and can only be limited by the limitation clause if any. He quoted from R. vs. Zundel (supra) at p.205, where the following excerpt from an earlier judgment in Edmonton Journal vs. Alberta (A.G.) (1989) 2 SCR 1326, was cited with approval –

“It is difficult to imagine a guaranteed right more important to democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasised. ... It seems that the rights enshrined in s.2(b) should therefore only be restricted in the clearest of circumstances.”

Freedom of thought, conscience and belief is protected under Article 29(1)(b) and is stated to include academic freedom in institutions of learning; it is well known that institutions of higher learning play a very important role in developing a wealth of knowledge and academic freedom is at the heart of these institutions. By putting a limit to what academicians can ‘think and discuss’ the law would be violating the constitution.

Article 29(1) (c) of the constitution protects the freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with the Constitution; Religious leaders play an important role in counseling of individuals with problems. However under this Bill, they would be precluded from reaching out to some of their converts who are gay because doing so may be interpreted as ‘promoting homosexuality’. This limitation thus would preclude such practitioners from practicing their religion.

Article 29(d) provides for freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; these are some of the key elements of advocacy for human rights activists. However continuing with such advocacy for equality of persons who are gay with the rest of society will be criminalized. This implies that the freedom to assemble , demonstrate and petition will be limited to particular issues and this limitation will be unconstitutional.

Finally Article 29(1)(e) protects freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations. By criminalizing ‘promoting of homosexuality’ the Bill would effectively put a stop to coalitions that do come together to oppose Bills like this one, and also to advocate for equality. This would be a limitation to the right, and as we shall see below, it would not be justified.

Clause 14; Failure to disclose the offence

Clause 14 confers authority on Ugandan law enforcers to arrest and charge any persons in authority who fails to report the commission of an offence under the Act within 24 hours of first having had knowledge of such offence.

Clause 14 therefore violates two basic Constitutional rights, namely the right to privacy and the right to practice a profession.

The right to privacy has already been discussed above and thus we shall concentrate on the right to practice one’s profession.

As for the right to practice one’s profession, Clause 14 enjoins persons in authority to divulge information acquired by virtue of their position and relationship with persons under their authority to police thus offending two basic established principles of vertical relations at law namely; the principle of utmost trust in a fiduciary relationship and the doctrine of confidentiality in the same

relationship. This is likely to injure vertical relations at law especially injure the right to practice one's profession.

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

Professional practice in all professions is guided by professional ethics and codes of conduct clearly specified and that have gone sway for times immemorial the world over. One of the basic tenets of professional practice is the doctrine of Confidentiality by which a professional is bound not to divulge information acquired from a client by virtue of their professional relationship. Clause 14 of Anti-Homosexuality Bill roundly enjoins all professionals to report to police information on commission of homosexuality, acquired in the course of their professional dealings and relationships with their clients, in breach of their professional duty of confidentiality to their clients. This removes the basis of trust, which is the foundation of the professional – client relationship and thereby violates the right to practice a profession. The provision clearly undermines the right to engage in lawful occupations, trade or business that may directly or indirectly have a link with client's sexuality. Medical doctors and personnel, lawyers, Counselors, religious leaders, traders of sex products, social workers, human rights activists and many other professional are affected by Clause 14 of the Bill. This is unfortunate in a liberalized market economy, supported very much by the private sector that is grounded on the right to practice one's profession and carry on any lawful occupation, trade or business.

Whereas there are exceptions to the strict adherence to the doctrine of confidentiality, such as; defense of the professional in court proceedings instituted by the client, furtherance of the interest of the client and disclosure by compulsion of the law, compulsion such as under clause 14 of the Bill which violates human rights and the letter and spirit of the Constitution is null and void to the extent of such inconsistency by virtue of article 2 of the Constitution.

Clause 16; Extra Territorial Jurisdiction

Clause 16 basically confers authority on Ugandan law enforcers to arrest and charge a Ugandan citizen or any permanent resident who engages in homosexual activities outside the borders of Uganda.

The law enforcement model of extra-territoriality is normally used in relation to international crimes such as money laundering, terrorism, etc. In fact the Ugandan Penal Code already provides for crimes that call for extra-territoriality. All these touch on the security of the state e.g., treason, terrorism and war mongering (see S.4 of the PCA).

When it comes to offences committed partly within and partly outside Uganda, Section 5 of the Penal Code provides:

*When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code is done partly within **and** partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction. [Emphasis added]*

This means that in order to enforce this provision, the state may have to deploy spies to follow people when they travel abroad in order to establish who they have slept with and how they did it? By so doing, this will be infringing on their constitutional right to privacy. In the case of **Victor Mukasa & Yvonne Oyo v. Attorney General [Misc. Cause No. 247 of 2006 (HC), Unreported]** the High Court recognized the right to privacy of lesbian activists whose home had been unlawfully raided by law enforcement agents.

Thus clause 16 is a gross abuse of the principle of extra-territoriality and a violation of the right to privacy under Article 16. The clause carries hidden venom that is bound to spread beyond persons that engage in homosexuality by making all Ugandan potential crime.

Clause 18; Nullification of inconsistent international treaties, protocols, declarations and conventions

Clause 18 of the bill provides for nullification of inconsistent treaties, protocols, declarations and conventions. This implies that any international treaty, protocols, declarations and conventions, to which Uganda is a signatory that contradicts the Anti-homosexual bill is null and void.

Article 287 of the Constitution obliges Uganda to fully subscribe to all its international treaties obligations ratified prior to the passing of the 1995 constitution. It provides;

Where—

- (a) Any treaty, agreement or convention with any country or international organization was made or affirmed by Uganda or the Government on or after the 9th day of October, 1962, and was still in force immediately before the coming into force of this constitution; or*
- (b) Uganda or the government was otherwise a party immediately before the coming into force of this constitution to any such treaty, agreement or convention,*

The treaty, agreement or convention shall not be affected by the coming into force of this constitution: and Uganda or the Government, as the case may be, shall continue to be a party to it.

This means that these treaties remain binding to the country.

Parliament cannot legislate or simply wish away these obligations just because they are inconsistent with a domestic legislation. Indeed, international law prohibits such a thing. Article 26 of the Vienna Convention on the Law of Treaties clearly sets out the *pacta sunt servanda* rule which requires that; ... ***“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”***

Though Uganda is not a signatory to the Vienna convention on the Law of Treaties, the provisions of that treaty have developed into international customary law principles thus binding even states that may not be parties to it.

Parliament has only a procedural role to incorporate treaties into Ugandan law – and that is the full extent of its powers. It cannot purport to proscribe the limit of the President’s treaty making powers. Nor indeed, can Parliament bind its own future action by purporting to exercise in advance its power to scrutinize treaties signed by the President and determine which of them to ratify.

All that Parliament can do is to either ratify or refuse to ratify a treaty after it is signed, and in the latter case such treaty does not become part of Ugandan law. This is the balance of executive power and democratic input achieved by Article 123, and one that clause 18 of the Bill is incompetent to amend.

Section 18 **does not** have any legal effect because the procedure of treaty termination as provided under the Vienna Convention on the Law of Treaties has not been followed. We cannot unilaterally negate or declare our withdrawal from these obligations. This clause is a manifestly unconstitutional provision given that if passed, it would represent an attempt by Parliament to usurp power that is granted to the executive arm of government under the Constitution. Parliament cannot pass s.18 of the said bill unless Articles 287,123(1) & (2), 2(2) and chapter 4 of the constitution are amended.

Generally, the Bill violates the rights of minorities under article 36 which provides that;

“ Minorities have a right to participate in decision-making processes and their views and interests shall be taken into account in the making of national plans and programmes.”

Criminalization of homosexuality would have the effect of excluding the views and interests of sexual minorities in making national plans and programmes. This undermines the spirit and letter of Article 36 of the constitution and is therefore unconstitutional and against human rights of homosexuals.

Limitation of rights

However despite the establishment of all the constitutional rights, Article 43 of the Constitution provides a general limitation to human rights:

General limitation on fundamental and other human rights and freedoms

- 5- *In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*
- 6- *Public interest under this article shall not permit—*
 - (a) *Political persecution;*
 - (b) *Detention without trial;*
 - (c) *Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and **demonstrably justifiable in a free and democratic society**, or what is provided in this Constitution. [Emphasis added]*

The issue is whether the limitation of the rights to non discrimination, privacy, right to practice a profession and rights to freedom of association, press, thought, conscience and expression. The test to determine whether rights can be limited was discussed at length in the case of **Charles Onyango Obbo and Anor v. Attorney General [Constitutional Appeal No.2 of 2002 (SC), Unreported]**. Justice Mulenga construed article 43(2) as a “limitation within a limitation.” He stated that;

[T]he limitation provided in clause 1 [of article 43] is qualified by clause 2, which in effect introduces a ‘limitation within a limitation.’ It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of public interest. For avoidance of that danger, they enacted clause (2)... [T]hey provided in that clause a yardstick, by which to gauge any limitation imposed on rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. That is why I have referred to it as a ‘limitation within a limitation.’ The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick.”
[p.26]

Thus in a free and democratic society, dehumanizing a section of the population by criminalizing natural conduct would clearly not be justifiable as a necessary limitation to the enjoyment of basic freedoms. In the above case, the court found that the laws criminalizing publication of sedition were an unnecessary limitation on the rights to media freedom.

About balancing rights and the limitation, rights Mulenga JSC continued that;

“Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. ... “There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight.”

In the present law, what is sought to be limited by the provision is homosexuality and the reason is because homosexuality ‘threatens the traditional African family’.

The need to protect the traditional African family would be a legitimate justification if only there was anything that fits that description, and if there was a real likelihood of such a thing being threatened. Threats only will not suffice to limit a right. There must be a real likelihood.

Conclusively, the six provisions are unconstitutional and can only be lawfully enacted if the constitution is amended.

2. Redundant

Fact; Twelve of the eighteen substantive provisions are redundant. This is because they either replicate existing law or they are incapable of being practically implemented.

The provisions of the Bill that are not unconstitutional are simply redundant. This is because, they either replicate already existing provisions, or they will create absurdities and are largely not easy to implement.

The provisions that replicate existing law are;

- a. Clause 2 criminalises homosexuality, and yet Section 145 of the Penal Code Act of Uganda Cap 120 criminalises unnatural offences under which homosexuality falls.
- b. Clause 3(1)(a) which proposes the death penalty for homosexuality with a person below 18 years of age. The 2007 amendment to Penal Code criminalises sex against boys and girls below the age of 18
- c. The 2007 amendment to the Penal Code also imposes the death penalty for aggravated defilement, thereby already addressing what the Bill calls Aggravated homosexuality.
- d. Clause 4 which criminalises attempt to commit homosexuality, simply replicates Section 146 of the Penal Code Act Cap 120

The rest of the provisions listed here are all provided for in the Penal Code and other existing laws, and their application to homosexuality would simply require harmonisation and de genderisation of the existing provisions.

- a) Clause 4; attempts to commit homosexuality
- b) Clause 5; Protection, assistance and payment of compensation to victims
- c) Clause 6; Confidentiality
- d) Clause 7; Aiding and abetting homosexuality

- e) Clause 8; conspiracy to engage in homosexuality
- f) Clause 9; procuring homosexuality by threats
- g) Clause 10; Detention with intent to commit homosexuality
- h) Clause 11; Brothels
- i) Clause 12; same sex marriage
- j) Clause 15; jurisdiction
- k) Clause 17; Extradition

The same provisions are redundant are also nearly impossible to implement or they simply result into absurdities.

3. Disproportionate

The provisions for extra-territorial jurisdiction, which elevate the crimes provided for under the Bill to the same level as terrorism, treason and misprision of treason, are *disproportionate* to the behaviours they seek to criminalize.

Clause 16 basically confers authority on Ugandan law enforcers to arrest and charge a Ugandan citizen or any permanent resident who engages in homosexual activities outside the borders of Uganda.

This bill purports to criminalize acts which may not be illegal in other countries which is not legally viable. Does parliament intend to extradite such persons? Is there an extradition agreement with these countries? This renders the section redundant if there is no extradition agreement or the person refuses to come back.

What the Bill proposes to do is to elevate homosexual acts to a position of such importance that they appear to be at an even higher plane than murder, rape or grievous bodily harm for which no extra-territorial provision is made. It is difficult to see any rational basis for such inordinate attention to homosexuality. Is the government going to storm the bedrooms of consenting adults, or deploy spies to follow them when they travel abroad in order to establish who they have slept with by law enforcement agents?

Clause 16 is a gross abuse of the principle of extra-territoriality and a violation of the right to privacy under Article 16. The clause carries hidden venom that is bound to spread beyond persons that engage in homosexuality by making all Ugandan potential criminals.

4. Nullification of international Treaties and Conventions

This implies that any international treaty, protocols, declarations and conventions, to which Uganda is a signatory that contradicts the Anti-homosexual Bill is null and void.

Article 287 of the Constitution obliges Uganda to fully subscribe to all its international treaties obligations ratified prior to the passing of the 1995 constitution. Parliament thus cannot legislate or simply wish these obligations away just because they are inconsistent with the Anti-homosexual laws.

Indeed, international law prohibits us from doing such a thing. Article 26 of the Vienna Convention on the Law of Treaties clearly sets out the *pacta sunt servanda* rule which requires that ;

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

It is worth pointing out that Uganda is a signatory to the Vienna convention on the law of treaties to respect treaties that it has signed.

Article 123 (1) gives the powers to make treaties to the president and Article 123(2) only gives parliament a procedural role to make laws that govern ratification of treaties.

Parliament therefore has only a procedural role to incorporate treaties into Ugandan law – and that is the full extent of its powers. It cannot purport to proscribe the limit of the President’s treaty making powers. Nor indeed, can parliament bind its own future action by purporting to exercise in advance its power to scrutinize treaties signed by the President and determine which of them to ratify.

All that Parliament can do is to either ratify or refuse to ratify a treaty after it is signed, and in the latter case such treaty does not become part of Ugandan law. This is the balance of executive power and democratic input achieved by Article 123, and one that clause 18 of the Bill is incompetent to amend.

Again under Articles 65-67 of the Vienna Convention on the Law on Treaties, a state wishing to terminate a treaty or provisions of must notify the other parties of its claim indicating the measure proposed and the reasons thereof. Such notification must be in writing, carried out through an instrument signed by the president or minister of foreign affairs, and communicated to other parties. This implies that enactment of a law cannot terminate a state’s obligations under a treaty.

Thus Clause 18 is manifestly unconstitutional and its passing would represent an attempt by Parliament to usurp power that is granted to the executive arm of government under the Constitution. Parliament can only do so if Articles 287,123(1) & (2), 2(2) and chapter 4 of the constitution are amended.

Conclusion

Generally, The Anti Homosexuality Bill cannot simply pass because the legal, constitutional and human rights test, and thus should be withdrawn in its entirety.

The Coalition's Medical and Public Health analysis of the Bill; Based on false science, Damaging Public Health, violates Doctor-patient Confidentiality and stigmatizes Persons Living with HIV/AIDS

The Anti-Homosexuality Bill was tabled in Uganda's parliament in 2009. It has generated a lot of comment, though very little from Uganda's Medical Professionals. A Medical perspective on the Bill is important because at a global level the profession is the repository of much research on Sex, Sexuality and Sexual Orientation. The Profession is also directly concerned with Treatment, Care and Prevention of HIV, aspects of Public Health that are impacted directly by this Bill.

An informed look at the Bill reveals the following;

- a. The Bill is based on false science, myths and discredited theories with regards to the science of Sexuality, Sexual Orientation and Homosexuality, as well as the possibility of changing Sexual Orientation.
- b. The bill is very far reaching, and of concern to both homosexuals and those who are not. For example, a Medical Doctor doing a physical genital exam can realistically be accused of 'homosexual touch'. And, since a doctor is a 'person in authority' as defined by the bill, the actual charge would be 'aggravated homosexuality'
- c. Children, adolescents who experiment with sex may find themselves labelled homosexuals. And, for those born with HIV, they are liable to be sentenced to death for 'aggravated homosexuality'.
- d. Doctor-patient confidentiality is swept away by the Bill
 - a. On suspicion, the Doctor is supposed to report the patient within 24 hours. (Practitioner is liable to a fine and or imprisonment if they do not.)
 - b. Giving scientific, relevant medical information (for example counselling a person who is questioning his/her sexuality) is breaking the provisions of the Bill - which may lead to charges of 'aiding and abetting homosexuality'
 - c. The practitioner is also liable to charges of 'promoting homosexuality' for example when he/she gives relevant information on HIV prevention in gay sex.
- e. The Bill stigmatizes a patient population, gay Ugandans. This kind of stigmatization
 - a. Restricts a medical practitioner from getting information about sexuality. (Who dares tell their doctor they are gay, and be reported to 'relevant authorities'? And, within 24 hours....)
 - b. Restricts access of the patient to correct information about sexuality.

In effect, the bill makes sure that any Ugandan who is gay has *NO RIGHT TO HEALTH CARE IN UGANDA*.

- f. The Bill stigmatizes and criminalises those having HIV.
 - a. An accused person gets a different charge, with heavier punishments including the Death Penalty and Life imprisonment for ‘attempt’ simply because s/he is HIV positive.
 - b. Mitigating factors like; whether or not there has been HIV transmission, whether or not there was consensual sex, means to decrease the chances of HIV transmission, disclosure, infectiousness, and many others are not considered. Whether or not one has HIV is seen as the only pertinent factor.
 - c. On suspicion of homosexuality, the Bill mandates forced HIV testing. A suspect is immediately tested. What if that Ugandan is innocent, but HIV positive? How are you dealing with issues of disclosure when the police is mandated to test a person within 24 hours of the alleged crime?

- g. From a Public Health perspective, the Bill is a disaster.
 - a. Any teaching of sexuality and sexual orientation is immediately dubbed Promotion of Homosexuality. For example, UNICEF’s ‘Teenage Toolkit’.
 - b. Forced HIV testing, with subsequent punishment for being HIV positive is not an incentive to do HIV testing and HIV prevention.
 - c. Gay men are a very important Most-at-Risk-Population in HIV prevention. The Bill criminalises any HIV prevention programme and outreach to them. Teaching and promoting safer gay sex is criminalised in the bill. Handing out safer sex materials like condoms and water based lubricant is ‘promotion of homosexuality’
 - d. The legislated stigmatization of people living with HIV as detailed above is a setback in HIV prevention efforts within any community, but in this instance the gay Ugandan community.

These are but some of the major implications of the Anti-Homosexuality Bill (2009) when it becomes law. A more detailed and referenced analysis of the medical and Public Health aspects of the AHB is in the report attached.

Democracy and Good Governance considerations

From a **GOVERNANCE PERSPECTIVE** the Bill is repugnant in that it criminalises a range of civil society activities, and thereby circumscribes their capacity to intervene effectively. It undermines civil society’s freedom of expression through banning the ‘promotion’ of sexual health and sexual rights messages. It also asserts a single model of family rather than recognising the diversity of traditional and modern structures already existent in Uganda. As such it stifles the majority of Uganda’s heterosexual citizens, alongside their homosexual brothers and sisters.

From a **POLITICAL PERSPECTIVE** the Kill the Gays Bill, and the wider homophobic discourse which it is derived from, and which it seeks to exacerbate, is being used to divert the attention of ordinary Ugandans from more immediately pressing issues.

Position on the Proposed amendments

The Coalition has been reliably informed that the Cabinet sub-committee tasked with reviewing the Anti-Homosexuality Bill has met with the Bill's original proponent, Honorable Bahati, in an attempt to find a 'win win situation' which protects both National and International interests. We also know that Honorable Bahati, in response to the sub-committee's report of February 2011, has proposed a number of amendments to his original Bill.

As a Coalition we do not believe that there is any conflict between national and international perspectives on the original Bill, nor do we believe that the proposed amendments in any way offer an acceptable way forward; while the wording may have changed, the intention of Bahati's proposed amendments remains the same: to **Kill the Gays**. We therefore reject the original Bill, together with the proposed amendments, in their entirety.

Comments on Process

We also protest the manner in which attempts have been made to exclude the voices of civil society actors from the debates about the Anti-Homosexuality Bill. Laws, unlike sex between consenting adults, should be done in public, not behind closed doors.

Position and recommendations on the Way Forward

1. We call unanimously for the complete withdrawal of the Anti-Homosexuality Bill, whether in its original or amended form
2. We urge the incoming Parliament to pursue urgent legal reform to introduce clear legal recognition of the distinction between consensual and non-consensual sex between adults, whatever their gender. Specifically:
 - The existing definition of rape must be modified to recognise male victims for purposes of comprehensively criminalising non-consensual sex
 - The Penal Code must be amended in order to decriminalise consensual same-sex relations.
3. We call for a broader, more informed and ongoing dialogue on sexual health and sexual rights, between a broad range of stakeholders, including but not limited to: Government, religious leaders, traditional leaders, human rights activists, feminists, journalists, public health workers, sexual majorities and minorities, to minimise the manipulation of sexuality for political purposes, and to maximise human rights, public health and good governance for all.