



PARLIAMENT OF UGANDA

**MINORITY REPORT TO THE REPORT OF THE SECTORAL COMMITTEE ON
LEGAL AND PARLIAMENTARY AFFAIRS ON THE ANTI HOMOSEXUALITY
BILL, 2023**

**OFFICE OF THE CLERK TO PARLIAMENT
PARLIAMENT BUILDING
KAMPALA-UGANDA**

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1.0. INTRODUCTION

On Thursday, 9th March, 2023, a Bill entitled “The Anti-Homosexuality Bill, 2023” was, in accordance with Rule 128 of the Rules of Procedure of Parliament, read for a first time and referred to the Committee on Legal and Parliamentary Affairs for scrutiny.

2.0. OBJECT OF THE BILL

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

- (a) prohibiting any form of sexual relations between persons of the same sex and the promotion or recognition of sexual relations between persons of the same sex;
- (b) strengthening the nation’s capacity to deal with emerging internal and external threats to the traditional, heterosexual family. This legislation further recognizes the fact that same sex attraction is not an innate and immutable characteristic;
- (c) protecting the cherished culture of the people of Uganda, legal, religious, and traditional family values of Ugandans against the acts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda;
- (d) protecting children and youth who are made vulnerable to sexual abuse through homosexuality and related acts.

The Bill purports to address the gaps in the provisions of other laws in Uganda, for example the Penal Code Act, Cap. 120, which allegedly has no comprehensive provision catering for anti-homosexuality and only focuses on unnatural offences under section 145 and lacks provisions for penalising the procurement, promoting, disseminating literature and other pornographic materials concerning the offences of homosexuality.

3.0. POINTS OF DISSENT TO THE MAIN REPORT

Rule 205 of the Rules of Procedure of Parliament grants a Member or Members dissenting from the opinion of a majority of a Committee to state, in writing, the reasons for his or her or their dissent and the statements of reasons

shall be appended to the report of the Committee. In accordance with this rule, we the minority, advance the following reasons for dissenting with the majority report-

3.1. The Bill is misconceived

Honorable Members and Madam Speaker, the explanatory memorandum of the Bill indicates that the intention of the Bill is designed to address the gaps in the provisions of other laws in Uganda, for example the Penal Code Act, Cap. 120. The explanatory memorandum further indicates that the Penal Code Act, Cap. 120 has no comprehensive provision catering for anti-homosexuality since, according to the Bill, the Penal Code Act focuses on unnatural offences under section 145 and lacks provisions for penalising the procurement, promoting, disseminating literature and other pantographic materials concerning the offences of homosexuality.

Honorable Members this is not a factual statement since we all know that homosexuality is an offence prescribed in section 145 of the Penal Code Act which is reproduced below-

“145. Unnatural offences

Any person who—

(a)has carnal knowledge of any person against the order of nature;

(b)has carnal knowledge of an animal; or

(c)permits a male person to have carnal knowledge of him or her against the order of nature,

commits an offence and is liable to imprisonment for life.”

The above section specifically prohibits and punishes the conduct of a person who has carnal knowledge of any person against the order of nature as well as the conduct of a person who permits a male person to have carnal knowledge of him or her against the order of nature. This provision has been in the Penal Code Act for more than 100 years and for the member to state that there are no provisions criminalizing homosexuality is disingenuous. Whereas the term “homosexuality” is not used specifically in section 145 of the Penal Code Act,

the provision specifically deals with conduct that amounts to homosexuality and it prohibits it and anal sex.

The explanatory memorandum also indicates that the Penal Code Act focuses on unnatural offences under section 145 and lacks provisions for penalising the procurement, promoting, disseminating literature and other pantographic materials concerning the offences of homosexuality. This is not true since the provisions of section 145 criminalise, in addition to homosexuality, sexual acts between animals and human beings. In addition, the Penal Code Act has comprehensive provisions that deal with penalising the procurement, promoting, disseminating literature and other pornographic materials concerning the offences of homosexuality under the general prohibition on conspiracies under Chapter XLI of the Penal Code Act, Cap.120 (conspiracy to commit felony, conspiracy to commit misdemeanor and other conspiracies).

For instance, court in case of *Nabagesera & 3 Ors v Attorney General & Anor (Miscellaneous Cause 33 of 2012)* recognised that the actions of petitioner in **organizing a workshop** advocating for normalization of minority rights in Uganda was a conspiracy since it engaged in the direct and indirect promotion of same-sex practices which are prohibited by the Penal Code Act. This means that acts that tend to promote homosexuality can be dealt with as conspiracies under the Penal Code Act.

We, the minority surmise that this Bill was introduced under a reasonable but mistaken belief that the Penal Code Act is not sufficient to deal with the matters relating to homosexuality. It was introduced during a time when anti-homosexual sentiments have been wiped up across the country and is not based on any evidence to show that incidents of homosexuality have increased and require additional legislative interventions. Indeed, according to the Annual Crime Police Reports, incidents of homosexuality have been reducing in Uganda, peaking in 2017 where 120 cases were reported, in 2018, 100 cases were reported, in 2019, 103 cases were reported, 79 cases were reported in 2020, 80 cases were reported in 2021 and 83 in 2022. This means that the legislative interventions that are existing in the laws of Uganda are having effect. In light of the above, we the minority find that the Bill was misconceived and serves no purpose.

3.2. Criminalising the appearance of a person

The second point of dissent is that the Bill in its current form creates penal sanctions against a person merely based on appearance, thereby attempting to reverse the decision of court in *Kasha Jacqueline Vs Rolling Stone Limited & another, Misc. Cause 163 of 2010*.

The minority are aware that clause 2 (1) (d) of the Bill proposes to declare as acts of homosexuality a person who holds out as a lesbian, gay, transgender, a queer or any other sexual or gender identity that is contrary to the binary categories of male and female. This provision has the effect of criminalising the persons who identify as lesbian, gay, transgender, a queer or any other sexual or gender identity that is contrary to the binary categories of male and female without such persons having committed an offence under the laws of Uganda.

The Committee was also informed by Uganda Medical Association that there are some rare biological cases affecting the genes that code for unusual expressions of physical phenotypic expression associated with the genital organs. These include Klinefelter's Syndrome (XXY), a random genetic occurrence when a boy has an extra X chromosome that emerges in adulthood with feminine appearance and behaviour. Another congenital condition called Ambiguous genitalia exists; in this case an infant's genitalia are not clear whether they are male or female. This condition, recognized in early infancy, may be corrected by surgery after assessing whether the genes of the infant are male or female. Uganda Medical Association proposes that the law should cater for such people including persons with genetic abnormalities and inter sex persons who pose both male and female.

The DPP also cautioned the Committee about clause 2 (1) (d) which seeks to punish a person based on appearance and reasoned that if a person holds out as a thief, he cannot be charged of theft unless there is clear evidence that prove that he or she has either stolen or attempted to steal anything.

The minority are concerned that the police has been arresting people based on their appearance as was found in the case *Victor Mukasa & Another vs. Attorney General (High Court Miscellaneous Cause No 24 of 2006)* where the plaintiff in the

case was arrested by police based on appearance and without having committed an offence and taken to police to determine her “sexuality”.

The minority are aware that following police conduct in Victor Mukasa supra, court guided in the case of *Kasha Jacqueline Vs Rolling Stone Limited & another, Misc. Cause 163 of 2010* that “the scope of S. 145 of the Penal Code Act is narrower than gaysim generally. That one has to commit an act under S. 145 to be regarded as a criminal”. This decision means that being or appearing as a LGBTIQ+ person is not in itself an offence until a person commits any of the prohibited acts under the law. This means that a person cannot be criminalized but the conduct of the person, if contrary to the law, should be criminalized and punished. The minority are of the considered opinion that this Bill is intended to reverse the decision *Kasha Jacqueline Vs Rolling Stone Limited & another, Misc. Cause 163 of 2010* by criminalizing persons based on appearance and not prohibited conduct.

3.3. Duplication of provisions in the Penal Code

The third point of dissent the minority have with the majority report concerns the duplication of provisions that exist in other laws and are reproduced in the Bill.

The minority note that majority of stakeholders who appeared before the Committee point out that the Bill introduces nothing of practical value and merely reproduces provisions that already exist in other laws. Whereas the majority of the clauses of the Bill are unconstitutional, the rest are redundant and they become useless once the unconstitutional provisions are removed. The redundant clauses include 5(2) – (4), 7, 9, 10, 11, 13, 15, 16 and 17. The Bill is a duplication of the provision already in place under the Penal Code and is unnecessary.

The DPP also objected to the Bill on grounds that the proposals contained in the Bill should be introduced in the Penal Code Act rather than being introduced in the proposed Bill. The DPP reasoned that the Penal Code has overtime been disintegrated chapter by chapter, leading to scattering of the provisions.

The Attorney General advised and pointed out a number of provisions that are already prescribed in our laws, making the Bill redundant and of no legislative value. The minority find the following provisions redundant-

- (a) Clause 1 defines matters that are already provided in other laws, including the Penal Code Act.
- (b) Clause 1 on the offence of Homosexuality is provided in section 145 of the Penal Code Act;
- (c) Clause 2 of the offence of aggravated homosexuality can be prevented in section 129 of the Penal Code Act on the offence of defilement;
- (d) Clause 4 is already prescribed in section 146 of the Penal Code Act;
- (e) Clause 7 is well entrenched in article 28 (2) of the Constitution which gives judicial discretion to a court or tribunal to exclude the press or the public from all or any proceedings before it, for reasons of morality, public order or national security, as may be in a free and democratic society.
- (f) Clause 8 is already provided for in section 19(1)(c) of the Penal Code Act, Cap.120.
- (g) Clause 9 of the Bill already exists in Chapter XLI of the Penal Code Act, Cap.120 as an offence;
- (h) clause 11 is already provided under in section 134 of the Penal Code Act, Cap.120 which broadly criminalizes detention with criminal intent.
- (i) Clause 13 is redundant since article 31 (2) specifically bans same sex marriages and the marriage Act defines a marriage and does not include same sex marriage.
- (j) Clause 16 is redundant since there exists a law to regulate extraditions from and to Uganda, being the Extradition Act, Cap.117.

The minority are aware that the provisions of this Bill once passed into law will complicate the prosecution of offences under the Penal Code Act since there will be multiple offences, with varying penalties. The minority know that section 39 of the Interpretation Act, Cap 3 provides guidance on an act which constitutes an offence under two or more laws. Section 39 provides as follows-
“Where an act constitutes an offence under two or more enactments, then the offender

shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.”

The Committee was cautioned by the Attorney General that there is nothing prevents Parliament from enacting new laws or indeed improving on existing provisions of the law to meet emerging challenges in or of society as long it cautions itself against duplication provision in other laws.

3.4. Constitutionality of the Bill

The Bill makes provision for the matters which infringing the Constitution of the Republic of Uganda, 1995 including article 27 on the right to privacy, article 24 and 44 (a) relating to non derogable right to freedom from inhuman and degrading treatment as protected under article 24 and article 44(a) and article 21 of the Constitution on the right against discrimination. The Bill goes beyond the limitations envisaged in article 43 of the Constitution and some provisions contravene the principle of legality prescribed in article 28 (12) of the Constitution.

Not only does the Bill contravene provisions of the Constitution of the Republic of Uganda, it also contravenes established international and regional human rights standards, as it unfairly limits the fundamental rights of LGBTIQ persons. This criminalization also denies them equal protection under the law, owing to the harsh differential treatment they receive based on their sexual orientation and the criminalization of the same. The provisions that infringe the Constitution include-

- (a) Clauses 3(1) (b) and (e), which make the offence of homosexuality aggravated when the offender is a person living with HIV and when the victim is a person with a disability would violate article 21 of the Constitution as they would be discriminatory. The discrimination is on the basis of HIV status and being a person with disability. These provisions perpetuate the stereotype that People Living with HIV (PLWHIV) cannot engage in safe adult-to-adult sex and that People with Disabilities (PWDs) are eminently victims in human relationships.

- (b) Clause 5(1), which provides that ‘a victim of homosexuality shall not be penalized for any crime committed as a direct result of his or her involvement in homosexuality’ combined with the definition of ‘victim’ in clause 1 as including ‘a person who is involved in homosexual activities against his or her will’ introduces the ‘homosexual panic’ defence, which essentially gives so called ‘victims’ leeway to harm suspected LGBTIQ persons and get away scot free, thereby contravening the presumption of innocence guaranteed under article 28 (3) (a) of the Constitution.

- (c) Clauses 1, 2(1)(d), (3(1)(b), (e), and (f), 4(1) and 8 in as a far as they define ‘touching’ as constituting the offence of ‘homosexuality’, ‘aggravated homosexuality’, ‘attempts to commit homosexuality’, and ‘aiding and abetting’ homosexuality respectively would violate the principle of legality under Article 28(12) of the Constitution. This provision requires that all criminal offences be properly defined, and is part of the non-derogable right to a fair hearing protected under Article 28 and Article 44(c) of the Constitution. Court has declared provisions of laws that are incapable of exact definition unconstitutional.

It is therefore the position of the minority that the provisions of the Bill if passed into law will infringe the rights of Ugandans, specifically the rights and freedom of expression, association, and liberty, privacy, Equality and Freedom from Discrimination, Inhuman and Degrading Treatment, right to fair hearing and finds that if Parliament enacts this law, it will be challenged before the Constitutional Court and struck off.

3.5. The reverses the gains registered in the fight against gender based violence especially against women and girls

Some clauses of the Bill reverse the gains registered in the fight against gender based violence, especially of women and children. The Bill in clauses 2 and 3 of the Bill makes provision for the offence of homosexuality and aggravated

homosexuality. The provisions prescribe sanctions of ten years against a person who infringes the provisions of the Bill.

The minority has examined these provisions and finds them to infringe section 123 and 129 of the Penal Code Act which create the offence of rape and defilement, respectively. These offences prescribe varying sentences against a person who conducts himself or herself in a manner that constitutes the offence ranging from death and life imprisonment. The Bill now proposes to make various indirect amendments to those provisions of the Penal Code Act by reducing the penalties for the same conduct that is prohibited under sections 123 and 129 of the Penal Code Act from death and life imprisonment to 10 years imprisonment. This makes the provision regressive, affects the fight against gender based violence against girls and women and reverses the gains so far registered in the fight against rape and defilement by reducing the severity of the penalties prescribed for those offences.

4.0. CONCLUSIONS AND RECOMMENDATIONS

The minority have examined the Bill and are of the considered opinion that the Bill is misconceived, it contains provisions that are unconstitutional, reverses the gains registered in the fight against gender based violence and criminalizes individuals instead of conduct that contravenes legal provisions. The Bill does not introduce any value addition to the statute book and available legislative framework. In light of the above, the minority recommend the following-

- (a) The spirit of the Anti-Homosexuality Bill, 2023 guides the enrichment of a comprehensive non-discriminatory sexual offences Bill;
- (b) The proposals contained in the Bill should be presented to the Law Reform Commission to study and advice Government on the possible reforms of sexual offences laws.
- (c) That Government should introduce legislation and a framework for the provision of rehabilitation of victims of sexual and gender based violence.
- (d) That the existing legislation ne amended to provide clarity where necessary.

**ENDORSEMENT OF THE MINORITY REPORT TO THE REPORT OF
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NO.	NAME	CONSTITUENCY	SIGNATURE