LIVING UP TO OUR HUMAN RIGHTS COMMITMENTS

A compilation of recent statements by the Uganda Human Rights Commission on Sexual Orientation and Gender Identity and the Anti-Homosexuality Bill

This document was compiled by the Civil Society Coalition on Human Rights and Constitutional Law. It draws on text from the Uganda Human Rights Commission Annual Reports of 2009 and 2010, and the Commission’s presentation to the Universal Periodic Review 2012. Full texts can be found at the Uganda Human Rights Commission Website at http://www.uhrc.ug
Dear Reader,

In 2011 the Uganda Human Rights Commission report for the year 2010 highlighted the call by Committee on the Elimination of All forms of Discrimination Against Women (CEDAW) for the decriminalization of homosexuality. This set an important precedent for the Kenyan National Human Rights Commission which, in 2012, called for the decriminalization of homosexuality and of sex work. What these two reports show is a wave of progressive human rights thinking within Government institutions in the East African region.

In support of raising awareness of the UHRC’s progressive analysis, the Civil Society Coalition on Human Rights and Constitutional Law is reproducing the most important of the Commission’s findings and positions. We also include the Uganda Human Rights Commission’s statement read at the 19th session of the UN Human Rights Council at the occasion of the adoption of Uganda’s Universal Periodic Review (UPR) report in March 2012.

This new wave of progressive human rights thinking in the East African region needs to be reflected in changes in legislation, and a rejection of proposed legislation such as the notorious Anti-Homosexuality Bill in Uganda, a bill which continues to plague civil society and sexual minorities in Uganda, alongside outdated leftovers from colonial laws criminalizing same-sex sexual acts.
We therefore urge all Ugandans and Members of Parliament to join with us civil society in echoing the words of Kenya’s Chief Justice Willy Mutunga when he said referring to the rights of sexual minorities;

“As far as I know human rights principles that we work on do not allow us to implement human rights selectively. We need clarity on this issue within the human rights movement in East Africa.”

This booklet is structured chronologically, beginning with the statements in the Annual Report of 2009, followed by those of the Annual Report for 2010, and ending with the Statement read at the Universal Peer Review in 2012.

All statements in these documents are direct reprints of the Uganda Human Rights Commission texts.

Enjoy the reading!
CHAPTER 14:

UHRC Position on
the Anti-Homosexuality Bill
As part of fulfilling its mandate that has already been summarized in this report, the UHRC analyses and reviews bills before Parliament in order to ensure that they comply with human rights standards as enshrined in the Constitution and the international human rights instruments ratified by Uganda, as well as other relevant laws. This chapter provides the background to the Anti-Homosexuality Bill, summarizes the contents of the bill and points out the human rights concerns that the bill raises. The chapter also makes appropriate recommendations. In summary, it is submitted that some of the provisions in the bill are unnecessary, and that most of them violate international human rights standards.

HUMAN RIGHTS CONCERNS IN THE BILL

Prohibition of Homosexuality

The bill provides for the offences of homosexuality, aggravated homosexuality and attempted homosexuality. It also defines acts that are homosexual. *There are problems with the definition and violations of the right to privacy and to equality and non-discrimination and the fact that this is a matter that had already been legislated on in the Penal Code.*

Problems with the Definition of Homosexuality - Clause 2

Homosexuality is defined broadly to include, among other things, touching another person with the intention of committing the act of homosexuality. *Such a provision would make it very easy for one person to witch-hunt another or to bring false accusations against another.* Furthermore, there would be difficulty in determining whether the intention behind a particular touch was to commit a homosexual act.
Violations of the Right to Privacy and Equality and Non-Discrimination

The prohibition of homosexuality is a violation of the right to privacy and to equality as well as non-discrimination. These rights were expounded by the UN Human Rights Committee, which monitors states’ compliance with the International Covenant on Civil and Political Rights (ICCPR), including handling of individual complaints, as in the case of Toonen vs. Australia, 1994. In the case of, 1994, where Nicholas Toonen challenged Tasmania’s prohibition of homosexual activity, the UN Human Rights Committee held that laws criminalising consensual homosexual conduct violate protections for privacy contrary to Article 17 of the ICCPR, and are also discriminatory contrary to Articles 2 and 26 of the ICCPR.

The committee decided that according to Article 17 of the ICCPR which provides for the right to privacy, adult consensual sexual activity in private is covered by the concept of privacy, and that the existence of laws criminalising such activities affect this right. Furthermore, it held that the anti-discrimination provisions in Articles 2 and 26 of the ICCPR should be understood to include sexual orientation. The committee found that the ICCPR covered sexual orientation in the reference to prohibition of discrimination on the basis of ‘sex’ and that this included sexual orientation.

The committee dismissed public health and moral grounds to prevent the spread of HIV/ AIDs as a basis for criminalizing consensual homosexual conduct. With regard to public health, the committee noted that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. It also noted that laws criminalizing homosexual activity tend to impede public health programmes ‘by
driving underground many of the people at the risk of infection, which is counterproductive to HIV/AIDS prevention. Moreover, the committee noted that no link had been shown between the continued criminalization of homosexual activity and the effective control of the spread of HIV. The committee refused to accept that for the purpose of Article 17 (right to privacy) moral issues are exclusively a matter of domestic concern. It held that the article had been violated.

**Aggravated Homosexuality – Clause 3**

The bill under clause 3 goes further than the existing law by providing for the death penalty for aggravated homosexuality for serial offenders or where the victim is a person with disability and for offenders who are HIV positive, among others. Under International human rights law, the death penalty can only be imposed for the ‘most serious crimes’, excluding same-sex activities involving two consenting adults.

The provisions in clauses 3 (1) (a), 3 (1) (c) and 3 (1) (d) of the bill provide for punishable offences where a person is involved in homosexual acts with a person below the age of 18, and where the offender is a parent or guardian of the victim. *Such offences are already covered under sections 129 (1), (2) and 4 (b) of the Penal Code Amendment Act, 2007, and as such, those similar provisions in the bill are unnecessary.*

Regarding the provision in clause 3 (1) (b) where the offender is a person living with HIV/AIDS, liability should be limited to cases where there was intentional transmission: that is, where a person knows his or her HIV positive status and then acts with the intention to transmit it and does, in fact, transmit it.

Regarding the provision in clause 3 (1) (e) where the victim is a person with disability, the guiding principle should be whether it was consensual or not. *If it was consensual, the general principle is that the act should not be criminalised.* However, where there was no consent and
the disabled person is taken advantage of – this should or would be regarded as rape. The definition of rape in the Penal Code refers to only cases where women or girls are involved. It may therefore be necessary to include men. With regard to clauses 3 (1) (g) providing for where the offender uses drugs or other substances to stupefy or overpower the victim in order to have same sex, it should be to the effect that what was administered impaired the victim’s ability to consent. This could be covered in the Penal Code.

**Attempt to Commit Homosexuality – Clause 4**

Clause 4 provides that it is an offence to attempt to commit homosexuality, and therefore it sets imprisonment for seven years as punishment. Attempts to commit aggravated homosexuality are punished by imprisonment for life. *This provision cannot stand considering that Uganda is party to the ICCPR which obliges States to protect the right to privacy by not criminalizing sexual activity between consenting same-sex adults.* Under international human rights law, the only same-sex act that can be punished is where there was rape, or where it was with a person below the age of 18, with due regard to conditions where both the offender and the victim are children.

**Protection, Assistance and Payment of Compensation to Victims of Homosexuality and Confidentiality - Clauses 5 and 6**

Clauses 5 and 6 provide for the protection, assistance and payment of compensation to victims of homosexuality and confidentiality. Following the reasoning that sexual activity between consenting same-sex adults should not be criminalised, the provision on protection, assistance and payment of compensation to victims should apply only to victims of same sex rape. *There can be no victim where the sexual activity was between consenting same-sex adults.* The provisions on confidentiality also can only apply to victims of same-sex rape and
other rape victims.

**Aiding and Abetting Homosexuality and Conspiracy to Engage in Homosexuality - Clauses 7 and 8**

Given that under international human rights law the State is obliged not to criminalise sexual activity between consenting same-sex adults, *these clauses cannot stand.* Punishment for aiding and abetting and conspiracy can only apply where there was no consent, that is, in cases of same-sex rape.

**Procuring Homosexuality by Threats, Detention with Intent to Commit Homosexuality and Brothels - Clauses 9, 10 and 11**

The clauses on procuring homosexuality by threats, detention with intent to commit homosexuality and brothels in clauses 9, 10 and 11 are similar to provisions 132, 134 and 136 of the Penal Code Act. Therefore the clauses in the bill can only be applicable where there are victims of unlawful same-sex conduct that are not covered under the Penal Code Act.

**Punishment for Contracting a Same-Sex Marriage – Clause 12**

Clause 12 provides that it is an offence for anyone to purport to contract a same-sex marriage, and sets life imprisonment as the sentence. Life imprisonment is disproportionate for an act that does not really have any legal implications, or which does not cause grievous harm. The Penal Code has a similar provision in section 155 that could apply in these circumstances, which states that:

“Any person, who dishonestly or with a fraudulent intention goes through the ceremony of marriage, knowing that he or she is not thereby lawfully married, commits a felony and is liable to imprisonment for five years.”

**The Offence of Promoting Homosexuality - Clause 13**

Clause 13 of the bill criminalises ‘promotion of homosexuality’ in form
of funding and sponsoring of promotion activities, or broadcasting, publishing, or marketing materials on homosexuality; and it punishes these acts with a fine of about UShs. 100 million or five-seven years of imprisonment, or both. *This part of the bill is a clear violation of the rights to freedoms of speech, expression, association, and assembly contained in Article 29 of the Constitution*, and which are also contained in international treaties ratified by Uganda, such as the ICCPR and the ACHPR. *The bill stifles expression or dissemination of views, opinions or information, and would affect donors, human rights activists, the media, academics, and non-governmental organisations.*

**The Offence of Failure to Report Homosexuality – Clause 14**

The bill provides that any person in authority who fails to report known violations of the law within 24 hours will also be subject to a significant fine and up to three years in prison - even when this means turning in their colleagues, family members or friends. *In this regard, the bill requires breach of trust and confidentiality of parents, priests, doctors or lawyers who may be approached in confidence for advice, otherwise they would be arrested.* This provision puts a huge burden on people on matters that may be considered private.

**Jurisdiction, Extraterritorial Jurisdiction and Extradition- Clauses 15, 16 and 17**

The bill provides for jurisdiction over homosexuality and all other offences by the Magistrate Courts while cases of aggravated homosexuality shall be tried by the High Court. Such jurisdiction should be over acts of homosexuality that constitute rape, and not where sexual conduct is consensual. The bill also aims at creating jurisdiction over Ugandans who violate its provisions abroad. This will be very difficult to implement because of the State’s limited capacity to monitor sexual conduct of Ugandans in other countries. More importantly and as mentioned
before, criminalisation of consensual same-sex sexual conduct violates the right to privacy. It will be difficult to implement these clauses abroad especially in countries where homosexuality is not a crime, as it is unlikely that such countries would be willing to extradite a person for engaging in consensual same-sex sexual acts.

NULLIFICATION OF INCONSISTENT INTERNATIONAL TREATIES

The bill proposes to nullify the effect of international obligations undertaken by Uganda. In the bill, clause 18 stipulates that any international agreement contrary to the act shall be null and void. This is against Article 287 of the 1995 Constitution which obliges Uganda to fully subscribe to all its international treaties obligations entered into prior to the passing of the Constitution. Furthermore, revocation of international obligations by domestic law is unprecedented in international law, and would certainly be a violation of the principles of the Vienna Convention on the Law of Treaties. The bill’s revocation of international law commitments would also seriously undermine the country’s reputation and credibility in the international arena and its foreign relations.

CONCLUSION AND RECOMMENDATIONS

The Anti-Homosexuality Bill contradicts international human rights standards. It should therefore be reviewed. In particular, the bill has the potential to violate the right to privacy, equality and non-discrimination, as well as the freedoms of speech, expression, association and assembly, among others. It is also recommended that Parliament should address cases of same-sex rape and abuse which are not currently covered by law.
Highlights from 2010 Report

CHAPTER 11: Sexual Orientation and Gender Identity
11.3.19 Sexual orientation and gender identity

Of grave concern to the Committee¹ was that homosexual behavior was criminalized in Uganda, as well as the reported harassment, violence, hate crimes and incitement of hatred against women on account of their sexual orientation and gender identity. The Committee was further concerned that homosexuals face discrimination in employment, health care, education and other fields, as well as about the private member’s proposed Anti-Homosexuality Bill, the contents of which would result in further discrimination of women on the basis of sexual orientation and gender identity.

The Committee called on the government to:

• Decriminalize homosexual behavior and to provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity.

• Intensify its efforts to combat discrimination against women on account of their sexual orientation and gender identity, including by launching a sensitization campaign aimed at the general public, as well as providing appropriate training to law enforcement officials and other relevant actors.

The Committee called for opposition to the private member’s proposed Anti-Homosexuality Bill.

¹ “Committee” refers to the Committee on the Elimination of All forms of Discrimination against Women.
UGANDA HUMAN RIGHTS COMMISSION

Statement at the 19th Session of the Human Rights Council
GENEVA, SWITZERLAND
28th February to 23rd March 2012
In regard to civil and political rights, the Uganda Human Rights Commission would like to reiterate its position on the Anti-Homosexuality Bill, which is a private member’s bill, and to state that some of the provisions of the Bill are unnecessary and violate international human rights standards. Instead of a new bill, the existing legislation should be strengthened to address such things as same sex rape and abuse.

Presented by Med S.K. Kaggwa
Chairperson, Uganda Human Rights Commission
The Anti-Homosexuality Bill has the potential to violate the right to privacy, equality and non-discrimination, as well as the freedoms of speech, expression, association and assembly, among others. The Uganda Human Rights Commission said some of the provisions in the bill are unnecessary, and that most of them violate international human rights standards. According to the Uganda Human Rights Commission, provisions of the anti-homosexuality bill constitute:

- “a clear violation of the rights to freedoms of speech, expression, association, and assembly contained in Article 29 of the Constitution.” (UHRC, 2009 report, p. 170)
- “a violation of the right to privacy and to equality as well as non-discrimination.” (UHRC, 2009 report, p. 167)
- “would make it very easy for one person to witc-hunt another or to bring false accusations.” (UHRC, 2009 report, p. 167)
- “requires a breach of trust and confidentiality of parents, priests, doctors or lawyers.” (UHRC, 2009 report, p. 170)
- “cannot stand considering that Uganda is party to the ICCPR which obliges States to protect the right to privacy by not criminalising sexual activity between consenting same-sex adults.” (UHRC, 2009 report, p. 169)
- “would also seriously undermine the country’s reputation and credibility.” (UHRC, 2009 report, p. 171)
DECRIMINALIZE

Extracted from the Uganda Human Rights Commission 2010 Report