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## COURT FOCUSED LAWFARE OVER LGBT RIGHTS: THE CASE OF UGANDA

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### 1 Introduction

World over, the law is used as a weapon to promote or hinder the realisation of sexual and reproductive health (SRHR) rights. Of recent, the struggle over lesbian, gay, bisexual and transgender (LGBT) rights has taken centre stage. Uganda, perhaps more than any other country in Africa has in the past 20 years been actively employing lawfare to realise/hinder LGBT rights. The main avenue for the anti-LGBT groups has been through the legislature and the executive, while that of the pro-gay groups has been through the judiciary. In 2005, anti-gay groups managed to push through a constitutional amendment prohibiting same-sex marriages, which was supported by the executive as part of an omnibus Constitutional Amendment Bill, and which was passed by the legislature almost without debate. The then nascent LGBT movement responded in 2007 by filing their first court case challenging the searching of the house of an LGBT activist, and the arrest and mistreatment of a guest that was found in the house. Since then, 12 cases have been brought before Ugandan and other courts by Ugandan pro-LGBT groups, with mixed results. At the same time, anti-LGBT activists have actively defended a few of these cases also with mixed results. They also went beyond court cases and took the offensive and drafted and secured the passing of the Anti-Homosexuality Act, 2014 (AHA) and have managed to have restrictive provisions included in other laws such as the Non Governmental Organisations Act, 2016. They have also made efforts to have the Constitution amended to prohibit same-sex conduct. LGBT activists have responded by fighting these developments mainly using judicial means. This chapter explores the increasing significance of the LGBT debate in Uganda showing why there is increased contestation and the politics around LGBT rights. It discusses how both sides of the LGBT divide have used the courts of law to further their ends and what influences the

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choice of court cases and other legal actions taken. It concludes with the impact of this lawfare and a peek into the future of lawfare on LGBT rights in Uganda.

## 2 The state of LGBT rights in Uganda

The current President of Uganda, Yoweri Museveni came to power in 1986 after a protracted civil war, and mass violations and restrictions of human rights in earlier regimes. He delivered on a new Constitution in 1995, which increased protections for human rights, and thus allowed for emergence of an active civil society.<sup>1</sup> A more independent judiciary also emerged that could protect the human rights of all persons.<sup>2</sup> However, increasingly, the President has presided over a corrupt and autocratic government that largely controls the legislature and even the judiciary, and clamps down on the opposition and civil society.<sup>3</sup> This has led to a regression in all the political and human rights gains that had been made earlier, including restriction of civic space and curtailing judicial independence. LGBT rights have therefore been a victim of this regress, and more so, they have been used as a bargaining chip with the United States of America and other western countries that are interested in the protection of LGBT rights, largely to the detriment of LGBT persons.<sup>4</sup>

At present, Uganda's Constitution prohibits same-sex marriages,<sup>5</sup> and consensual same-sex relations are primarily criminalised through section 145 of the Penal Code as 'carnal knowledge against the order of nature'. Nevertheless, there are protections of LGBT persons that have been won through court action, including nullification of the Anti-Homosexuality Act, 2014 which had made 'homosexuality' a crime and criminalised LGBT organising.<sup>6</sup> The Constitutional Court also upheld the right to a fair

1 See chap 4 of the Constitution of Uganda, 1995, which under article 29 provides for among others the right to freedom of association.

2 For a history of the judiciary in Uganda before the 1995 Constitution, see J Oloka-Onyango 'Judicial power and constitutionalism in Uganda: A historical perspective' in M Mamdani & J Oloka-Onyango (eds) *Uganda: Studies of living conditions, popular movements and constitutionalism* (1994) 463.

3 For a discussion of how the judiciary currently operates see, B Kabumba 'The practicability of the concept of judicial independence in East Africa: Successes, challenges and strategies' Paper presented at the 2016 Conference of the East African Magistrates and Judges Association (EAMJA), 30 October-2 November 2016, Speke Resort, Munyonyo (2016) 14-19. Also see, American Bar Association 'Judicial independence undermined: A report on Uganda' (2007) for the period before 2007.

4 See for example S Nyanzi & A Karamagi 'The social-political dynamics of the anti-homosexuality legislation in Uganda' (2015) 29 *Agenda* 24-38, 32-35.

5 Article 31(2)(a) of the Constitution.

6 This was in the case of *Prof J Oloka Onyango v Attorney General* Constitutional Petition

hearing for all persons including those regarded as ‘immoral and socially unacceptable’.<sup>7</sup> The High Court has upheld protections for LGBT persons against hate speech,<sup>8</sup> violations of their privacy<sup>9</sup> and of recent the right to liberty as well as the right to a fair hearing.<sup>10</sup> There is a ministerial directive on non-discrimination in the health sector and it expressly includes sexual orientation among grounds upon which health service providers cannot discriminate.<sup>11</sup> The HIV Strategic Plan 2020/21 - 2024/25 also expressly provides for services for men who have sex with men and transgender persons.<sup>12</sup>

Despite this, violations of LGBT rights are commonplace, and largely go without redress. In 2020 alone, Human Rights Awareness and Promotion Forum (HRAPF) recorded 398 violations against LGBT persons, based on their sexual orientation and/or gender identity.<sup>13</sup> COVID-19 exacerbated the situation as it made it easier for LGBT persons to be arrested on the pretext of ‘doing a negligent act likely to spread infection of disease’ under section 117 of the Penal Code, and also making it difficult for LGBT groups to access redress and legal representation due to the lockdown measures.<sup>14</sup>

No 8 of 2018 (*AHA* case).

- 7 This was through the case *Adrian Jjuuko v Attorney General* Constitutional Petition 1 of 2009 (*Equal Opportunities Commission* case).
- 8 This was in the case of *Jacqueline Kasha Nabagesera v Rolling Stone Ltd & Giles Muhame*, Miscellaneous Cause 163 of 2010 (*Rolling Stone* case).
- 9 *Victor Mukasa & another v Attorney General* (2008) AHRLR 248 (*Victor Mukasa* case).
- 10 *Mukiibi & others v Hajji Abdul Kiyimba & others* High Court Miscellaneous Cause 179 of 2020.
- 11 Republic of Uganda, Ministry of Health ‘Ministerial directive on access to health services without discrimination’ (2014) <https://www.scribd.com/document/233209149/MoH-Ministerial-Directive-on-Access-to-Health-Services-Without-Discrimination-19-June-14> (accessed 22 July 2022).
- 12 Uganda AIDS Commission ‘National HIV and AIDS Strategic Plan 2020/21-2024/25’ 5.
- 13 Human Rights Awareness and Promotion Forum (HRAPF) ‘The Uganda Report of Human Rights Violations Based on Sexual Orientation and Gender Identity’ (2020) 22.
- 14 See generally, Human Rights Awareness and Promotion Forum (HRAPF) ‘The impact of COVID-19 related restrictions on access to justice for key populations in Uganda: A case study of LGBT persons and sex workers in Kampala and Wakiso districts’ (June 2021) <https://www.hrapf.org/index.php/resources/research-reports/202-report-on-the-impact-of-covid-19-restrictions-on-access-to-justice-for-key-populations-in-uganda-a-case-study-of-lgbt-persons-and-sex-workers-in-kampala-and-wakiso-districts/file> (accessed 22 July 2022).

### 3 Setting the scene for LGBT lawfare in Uganda

Within President Museveni's current 36 year-old regime, early articulations of anti-homosexuality rhetoric comprised the 1990 amendment of the Penal Code to increase the punishment for consensual same-sex relations from 14 years' imprisonment to life imprisonment,<sup>15</sup> and the President's public denial of the existence of homosexual people in the country in 2002.<sup>16</sup> In 2004, the then Minister of Information, James Nsaba Buturo cautioned the Joint United Nations Programme on HIV/AIDS (UNAIDS) Office against organising LGBT people to discuss prevention of HIV/AIDS among homosexual people.<sup>17</sup> In May 2008, Dr Kihumuro Apuuli, the then Director-General of the Uganda AIDS Commission publicly declared that no funds would be redirected to targeting HIV/AIDS services for men who have sex with men (MSM), although he acknowledged that they were among the key drivers of the epidemic at the time.<sup>18</sup> LGBT activists demonstrated against this decision by storming an international conference while holding placards and distributing leaflets, leading to the arrest and detention of three of them.<sup>19</sup>

Alongside these early official public discourses were reports in the newspapers about and the first publicised marriage between two Ugandan men in 1997, allegations of homosexuality among students in single-sex boarding schools, and Anglican bishops' preparation for the 2008 Lambeth Conference that came at the backdrop of a discussion on allowing gay clergy in the Anglican church, alongside pro and anti-LGBT letters from readers, and news articles in the daily newspapers which were collected in Sylvia Tamale's *Homosexuality: Perspectives from Uganda*.<sup>20</sup> Framed within the spheres of health rights – specifically access to HIV/AIDS services – the initial politicisation of homosexuality appropriated the official denial of homosexuals' existence, criminalising appropriate sex education, and refusal to prioritise MSM as key populations deserving targeted intervention.

15 The Penal Code Amendment Statute, 1990.

16 'Uganda has no homosexuals, says Museveni' *The Monitor* 6 March 2002.

17 'Govt warns UNAIDS over gays' *The Monitor* 29 November 2004.

18 'Gays excluded from HIV work in Uganda' *Pink News* 2 June 2008 <https://www.pinknews.co.uk/2008/06/02/gays-excluded-from-hiv-work-in-uganda/> (accessed 22 July 2022).

19 International Gay and Lesbian Human Rights Commission and Sexual Minorities Uganda 'Human Rights Groups demand immediate release' (5 June 2008) <https://outrightinternational.org/content/uganda-lgbt-arrested-international-hivaids-meeting> (accessed 22 July 2022).

20 See generally, S Tamale *Homosexuality: Perspectives from Uganda* (2007).

The greatest setback, however, was the systematic introduction of state-sponsored homophobia that relied upon the complicity and collaboration of the legislature and Executive. For five years, members of parliament with the support of members of the Executive debated and revised the Anti-Homosexuality Bill, 2009<sup>21</sup> which in its original form inter alia proposed the offence of homosexuality which had been defined widely to include touching with the intention of committing the act of homosexuality,<sup>22</sup> and sought to create the offence of aggravated homosexuality punishable by the death penalty,<sup>23</sup> imposing reporting obligations on lawyers, doctors and other ‘persons in authority’,<sup>24</sup> as well as nullifying international instruments that were seen to be in favour of homosexuality.<sup>25</sup> In February 2014, President Museveni assented to the Anti-Homosexuality Act, amidst claims that his decision was informed by the findings contained in a scientific report produced by a multi-disciplinary committee of experts in Uganda which had concluded that homosexuality was neither entirely an outcome of nature or nurture.<sup>26</sup>

As homophobic discourses were reproduced and circulated in Ugandan society as part of the conversations surrounding the Bill, LGBT individuals and groups increasingly experienced actual or threatened violations of a range of their human rights.<sup>27</sup> The multitude of human rights violations reported during this period include outing of LGBT persons in the public media, arbitrary arrests, blackmail and extortion, corporal punishment – beatings, mob violence, eviction from accommodation, expulsion from school, termination from employment, and forced heterosexual marriages.<sup>28</sup> Sexual Minorities Uganda, an LGBT umbrella organisation,

21 The Anti-Homosexuality Bill 18 of 2009, Bills Supplement to the Uganda Gazette 47 Volume CII, 25 September, 2009. This Bill was tabled before Parliament by Ndoorwa West Member of Parliament, Hon David Bahati in October 2009.

22 Clause 2(1)(c) of the Anti-Homosexuality Bill.

23 Clause 3(2) of the Anti-Homosexuality Bill.

24 Clause 14 of the Anti-Homosexuality Bill.

25 Clause 18 of the Anti-Homosexuality Bill.

26 ‘Battle of scientists as gay law storm persists’ *The Observer* 16 March 2014 <https://www.observer.ug/viewpoint/guest-writers/30702--battle-of-scientists-as-gay-law-storm-persists> (accessed 22 July 2022).

27 For a discussion of the implications of the Bill on human rights, see S Tamale ‘A human rights impact assessment of the Ugandan Anti-Homosexuality Bill 009’ (2009) 4 *The Equal Rights Review* 49.

28 See Sexual Minorities Uganda (SMUG) ‘From torment to tyranny: Enhanced persecution in Uganda following the enactment of the Anti-Homosexuality Act’ (2014); Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation ‘Uganda report of violations based on sex determination, gender identity and sexual orientation’ (2015) <http://hrapf.org/?mdocs-file=1600&mdocs-url=false> (accessed 25 July 2017).

was denied registration while others feared to register with their actual names, and organisations that were part of the Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL) that had been formed to oppose the Bill were threatened with deregistration.<sup>29</sup> The operations of the host organisation of the coalition, Refugee Law Project were suspended for some time.<sup>30</sup> These varied forms of persecution partly led to the exodus of a considerable number of members of the local LGBT community including activists to second countries of refuge, or else third countries where they were resettled after obtaining asylum.<sup>31</sup>

Many others who remained in Uganda mounted a range of strategies to challenge, contest and resist the varied forms of state-promoted homophobia. The most visible of these were through the use of courts. The strategies were undertaken in collaboration with allies formed at the local, national, regional and international levels. While this chapter mainly focuses on forms of court lawfare, there were other forms of resistance that were undertaken, including: advocacy and lobbying via key stakeholders; formation of support organisations, alliances, networks and coalitions; establishment of security and emergency response mechanisms; public media engagements to enhance accurate representation of issues and sustained social media engagement; public demonstrations such as the annual Pride March, but also joining other annual marches such as the annual AIDS Day Marches; creation of parallel health services provided by LGBT support organisations – especially for safe sex education, and provision of safe sex commodities, as well as accessing mainstream inclusive health service providers such as Most At Risk Populations Initiative (MARPI) that is run under a public-private partnership by the Ministry of Health and headquartered at the national referral hospital at Mulago; inclusion in the National HIV/AIDS policy and programme; targeted training, information and communication to key stakeholders such as public health-carers, police officers; and local production of

29 '38 NGOs to be de-registered for promoting homosexuality' *Uganda Radio Network* 20 June 2012 <https://ugandaradionetwork.net/story/38-ngos-to-be-de-registered-for-promoting-homosexuality> (accessed 22 July 2022).

30 'Ugandan government launches investigation of leading NGO for "promoting homosexuality"' *BuzzFeed News* 5 June 2014 <http://www.buzzfeed.com/lesterfeder/ugandan-government-launches-investigation-of-leading-ngo-for#.fjLpvP3Dd> (accessed 22 July 2022).

31 For details on some of these see, A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' in N Nicol et al (eds) *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, resistance and hope* (2018) 269, 271-272.

creative productions in the arts, music, drama, film and literature which address issues of homosexuality.<sup>32</sup>

## 4 How is sexuality constructed?

The matrix of politicised issues discussed above reveals the multiple layers through which human sexuality including non-heteronormative sexualities are locally constructed. Uganda is predominantly a patriarchal and heterosexist society.<sup>33</sup> Binary polarisation of gender prescribes fixed gender roles that assign men the duties of protector and provider, while women are nurturers and caregivers. Thus non-conforming gender identities are widely denigrated and pathologised for going against these rigid gender norms. Heterosexual marriage which can be customary, civil, Hindu, 'African', Christian or Mohammedan takes the forms of monogamy or polygyny and is socially valued and legally sanctioned.<sup>34</sup>

Reproduction is firmly tied to local notions of masculinity and femininity. Procreation is socially rewarded with improved status that comes with transitioning into the maturation stage of adulthood. It is socially valued because it extends generations of patrilineal and matrilineal kinship. Inversely, homosexuality is disparaged because of erroneous beliefs that homosexual people cannot reproduce. Reproductive heterosexuality is an important anchor for establishing the future of Uganda. Thus, homosexuality is perceived as a threat to Uganda's future existence. This perception is enhanced by claims that promoters of homosexuality specifically target children for recruitment into the homosexual agenda.<sup>35</sup>

The framing of homosexuality as an importation from the West reinforces its associations with neo-colonialism, foreignness, and un-Africanness. Fighting against homosexuality is thus projected as a form of patriotically protecting Uganda's sovereignty from the infiltration

32 For details of these approaches, see A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381, 400-406.

33 S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15 *Culture, Health and Sexuality* 955.

34 The different types of marriages are regulated under the Marriage Act Cap 251; Marriage and Divorce of Muhammedans Act Cap 252; Hindus Marriage and Divorce Act Cap 250; the Customary Marriage (Regulation) Act Cap 248 and the Marriage of Africans Act, Cap 253.

35 See for example '90% of Ugandan Children "Recruited into homosexuality"' *Business Focus* 19 July 2017 <https://businessfocus.co.ug/90-of-ugandan-children-recruited-into-homosexuality/> (accessed 22 July 2022).

of neo-colonisers.<sup>36</sup> Similarly, among conservative Christians, fighting homosexuality is constructed as combating sin and immorality.<sup>37</sup>

## 5 Court focused LGBT lawfare in Uganda

Gloppen and St Clair use the term lawfare to mean the use of courts of law, and other legal process to advance or resist a particular cause.<sup>38</sup> Lawfare is thus not only about court action but also about other legal processes. In Uganda, both court action and other legal processes have been employed in the struggle for and against the realisation of LGBT rights. However, court action has been employed more, and it has been opined that this has to do with the legal opportunity structure that at the moment favours courts over the legislature and the executive.<sup>39</sup> The legal opportunity structure thesis is to the effect that strategies employed are in line with the level of access that the persons employing these strategies have to the legal system.<sup>40</sup> Just like in Costa Rica,<sup>41</sup> activists in Uganda can access the courts more than any other avenue, as unlike parliament or the executive, which are far more hostile and depend on the individual goodwill of those who occupy offices, courts are bound to hear cases and make a binding decision, and the courts have proven themselves capable of upholding the Constitution and delivering justice for LGBT persons despite the general hostility to LGBT equality in the country.<sup>42</sup>

As at 2022, it has been 16 years since the first LGBT case, *Victor Mukasa & Yvonne Oyoo*, was filed before the High Court in 2006. This period has seen twelve cases on LGBT issues filed in courts in Uganda, in

- 36 S Tamale 'Confronting the politics of non-conforming sexualities in Africa' (2013) 5 *Africa Studies Review* 31; S Nyanzi 'Queer pride and protest: A reading of the bodies at Uganda's first gay beach pride' (2014) 40 *Signs: Journal of Women in Culture and Society* 36.
- 37 J Sadgrove et al 'Morality plays and money matters: Towards a situated understanding of the politics of homosexuality in Uganda' (2012) 50 *Journal of Modern African Studies* 103.
- 38 S Gloppen & AL St Clair 'Climate change lawfare' (2012) 79 *Social Research* 899-930 at 899.
- 39 See A Jjuuko *Strategic litigation and the struggle for lesbian, gay and bisexual equality in Africa* (2020).
- 40 G Fuchs 'Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries' (2013) 28 *Canadian Journal of Law and Society* 189 at 192.
- 41 BM Wilson & JC Rodríguez 'Legal opportunity structures and social movements: The effects of institutional change on Costa Rican politics.' (2006) 39 *Comparative Political Studies* 325.
- 42 For more discussions on how strategic litigation can lead to social change in common law in Africa, including Uganda, see generally, Jjuuko (n 39).



federal courts in the United States of America (USA), and at the regional East African Court of Justice, all concerning LGBT rights in Uganda. The cases are exclusively filed by the pro-LGBT groups, comprised of LGBT led groups and allies, usually in reaction to a legislative, executive or individual action. The anti-LGBT groups, composed of some persons who refer to themselves as ‘ex-gays’, conservative churches and some state officials, have always intervened in these cases through lobbying the executive, attending court and through religious sermons and preaching. However, of late, they have also directly moved into the court arena and have actively started to oppose the cases through legal processes including applying to be joined as parties to cases, as it was in the *AHA* case,<sup>43</sup> or actively attending court and observing court processes as they did in the *Equal Opportunities Commission* case. They also use legislative and citizen mobilisation efforts to counter/reverse the gains made in court as well as demonstrate their positions while in court. Both sides mobilise constituents to attend court sessions, and as such outside the courtrooms, there are usually arguments and clashes between the two sides and sometimes demonstrations.

The courts cases can be classified into three categories: those filed in courts and before quasi-judicial bodies in Uganda; those filed in courts of other countries; and those filed in international courts.

## 5.1 Cases before Ugandan courts

Ten cases in total have been filed before courts in Uganda. Of these at the textual level, five cases have so far been won, three have been lost, of which two of which are on appeal, and two cases are pending determination by the High Court.

### 5.1.1 Successful cases

The successful cases (at the textual level) from the latest to the earliest are:

#### *The Access to Lawyers case*<sup>44</sup>

On 29 March 2020, just a day before the President of Uganda announced a complete ban of all ‘non-essential’ vehicles on Uganda’s roads due

43 See *Inter Religious Council of Uganda (IRCU), the Family Life Network and the Uganda Centre for Law and Transformation v The Attorney General of Uganda* Miscellaneous Constitutional Application 23 of 2014.

44 *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General and The Commissioner General of Prisons* High Court Miscellaneous Cause 81 of 2020.

to COVID-19, 25 youths were arrested from a crisis shelter run by the Children of the Sun Foundation (COSF). They were arrested for ‘being homosexuals’ and 20 of them were eventually charged with ‘doing a negligent act likely to spread infection of disease’ contrary to section 171 of the Penal Code on the basis that there were many of them staying in one house. Lawyers from HRAPF were denied access to the 20 in prison, because the Commissioner General of Prisons had issued a directive restricting access to prisons to the public, including lawyers, due to COVID-19. HRAPF challenged this decision before the High Court. The Court declared that the refusal amounted to a violation of the accused persons’ non-derogable right to a fair hearing and the right to liberty. For these violations, the Court awarded 5 million Uganda shillings (about USD 1 340) to each of the accused persons. This is an outstanding victory as pro-LGBT groups successfully fought back against state excesses that were perpetrated in the name of fighting COVID-19.

***The Equal Opportunities Commission case***<sup>45</sup>

In 2007, the Equal Opportunities Commission Act (EOC Act) was passed by the Parliament of Uganda. The Equal Opportunities Commission is constitutionally mandated to investigate and provide redress for cases of discrimination against marginalised persons. Section 15(6)(d) of the EOC Act however stopped the Equal Opportunities Commission (EOC) from investigating any matter involving behaviour considered to be ‘immoral and socially harmful’, or ‘unacceptable’ ‘by the majority’ of the ‘cultural and social groupings in Uganda’. Homosexuality had been expressly pointed out as the reason why this provision was included in the Act as there was a need to lock out ‘homosexuals and the like’ from claiming marginalisation.<sup>46</sup> The petitioner argued that the section inter alia violated the constitutional guarantees of the right to a fair hearing. The Court agreed and nullified the provision on the basis that it violated the right to a fair hearing, which it stated was ‘at the heart of the very foundation of the Equal Opportunities Commission’.

The case is significant to lawfare since it is a Constitutional Court pronouncement on issues of marginalisation. Also, the evangelical groups had clearly identified it as a case to closely watch and follow. Whenever hearings would take place, the evangelicals, usually represented by Pastor

45 *Adrian Jjuuko v Attorney General* (n 7).

46 For a full discussion of the process that led to the inclusion of the provision in the Act, see S Tamale ‘Giving with one hand, taking away with the other: The Ugandan Equal Opportunities Commission (EOC) Act, 2007’ in Human Rights Awareness and Promotion Forum (HRAPF) “‘Still nowhere to run’: Exposing the deception of minority rights under the Equal Opportunities Commission Act’ (2010) 19.

Martin Sempa,<sup>47</sup> and his followers would throng the court wearing T-shirts with messages against ‘sodomy’.

***The Anti-Homosexuality Act petition***<sup>48</sup>

This is undoubtedly the biggest legal victory for the pro-LGBT rights groups in Uganda. This is because the case led to the nullification of the biggest legal obstacle to the enjoyment of human rights by LGBT persons in Uganda. It challenged the constitutionality of the Anti-Homosexuality Act (AHA). The AHA was passed as an Act of Parliament on 20 December 2013 during a parliamentary session that had less than the constitutionally mandated number of Members of Parliament (MPs). It was assented to by the President on 24 February 2014 and it came into force on 10 March 2014. It had provisions that expanded criminalisation of consensual same-sex relations through the creation of offences such as ‘homosexuality’ and ‘aggravated homosexuality’. The offence of homosexuality covered a wide range of conduct beyond sexual penetration, which included things like ‘touching’. The offence of aggravated homosexuality included having ‘homosexuality’ repeatedly, or with a minor, a person with disabilities or where the offender was a person living with HIV. It also created the offence of operating brothels, which virtually turned every house accommodating persons who engaged in same-sex relations into a ‘brothel’. It also criminalised aiding, abetting and promotion of homosexuality which were defined in very broad terms that could easily encompass legitimate civil society activities like sex education, and advocacy as well as philanthropy work. The Act was challenged on ten grounds. The first one concerned the failure by the Speaker of Parliament to follow the procedure laid down in the Constitution as regards enactment of a law by parliament, and the other nine were concerned with the inconsistency of the law with various constitutional provisions protecting human rights including the rights to: equality and freedom from discrimination; freedom from inhuman and degrading treatment; privacy; fair trial; and protection of minorities. The Court found that the procedure used to pass the Act was not in accordance with the constitutionally mandated procedure as there was no requisite quorum and therefore found the Act unconstitutional and a nullity. The Court did not determine the issues on violation of human rights as this was deemed to be a merely academic exercise as the finding on the procedure

47 Pastor Martin Sempa is a Ugandan-US citizen. He is the founder of the Makerere Community Church, and one of the leading anti-gay crusaders in Uganda. As a US citizen, he was subpoenaed to give evidence in the case of *Sexual Minorities Uganda (SMUG) v Scott Lively* which was by then ongoing in the federal courts in Massachusetts, USA. He has rarely appeared in public during the period when the case was ongoing.

48 *Prof J Oloka Onyango & others v Attorney General* Constitutional Petition 008 of 2014.

of passing the Act disposed of the matter of the constitutionality of the Act.

This is the most contested case in the history of lawfare in Uganda. Two things that are relevant to lawfare stood out in this case. The first was the formal application by anti-LGBT groups to be added to the cases as parties to the petition.<sup>49</sup> They argued that they wanted to defend the petition since they played a crucial role in the passing of the Act. This was an express admission of their role in pushing for the Act, and it also marked the first time in the history of LGBT lawfare in Uganda that the evangelical groups directly intervened in the formal court processes. The second was the uncharacteristically short time taken to hear the petition and the Court's disregard of any attempts to delay the case. The case only spent three months in the Court, and it took the Court only three days to hear the case to conclusion and deliver judgment.<sup>50</sup> Although the Constitution requires constitutional matters to be heard expeditiously, the huge case backlog in the Court makes it difficult for this to be achieved, and some constitutional cases are known to take many years to be determined including a case concerning LGBT issues. For example the Equal Opportunities Commission case,<sup>51</sup> took eight years before judgment was delivered. Some commentators point to the fact that the President was due to travel to the US for the US-Africa Summit as perhaps having been the factor that determined the extra-ordinary speed with which the case was heard,<sup>52</sup> and if this is true, it shows the high stakes involved in this case and also exposes the weakened state of the judiciary in Uganda.<sup>53</sup>

49 *The Inter Religious Council of Uganda, Family Life Network and the Uganda Centre for Law and Transformation (UCLT) v The Attorney General of Uganda & others* Miscellaneous Constitutional Application 23 of 2014.

50 For a detailed discussion of how the petition was swiftly heard and decided see generally, A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' in N Nicol et al (eds) *Envisioning global lgbt human rights: (Neo)colonialism, neoliberalism, resistance and hope* (2018) 269.

51 N 8.

52 See for example F Golooba-Mutebi 'Why was Uganda's anti-homosexuality law struck down?' *Al Jazeera* 15 August 2014 <http://www.aljazeera.com/indepth/opinion/2014/08/why-was-uganda-anti-homosexuali-201481194426136709.html> (accessed 22 July 2022).

53 Indeed, the fact that the Court was presided over by the Deputy Chief Justice, Steven Kavuma, a former long serving minister in the Museveni government and the then Deputy Chief Justice, seems to support this view. During his tenure, he issued controversial interim orders in favour of the state and was largely seen as a stooge of the regime. See for example 'Political judge Steven Kavuma, a disgrace to justice' *The Spear* 25 February 2017 <http://thespearnews.com/2017/02/25/political-judge-steven-kavuma-disgrace-justice/> (accessed 22 July 2022).

***Rolling Stone case***<sup>54</sup>

On 2 October 2010, the *Rolling Stone* newspaper was published with the headline, '100 pictures of Uganda's Top homos leak' and the sub headline 'Hang them'. The newspaper also contained allegations that gays had a grand plan to 'recruit children' and were targeting schools. They published names, pictures, and addresses of LGBT persons and suspected LGBT persons, and promised to release more pictures, names, and addresses in the next edition. The case was brought by three LGBT activists who were among those named in the publication seeking damages for the violation of their rights, and an injunction to stop the newspaper from publishing further details. The newspaper argued that they had a duty to inform Ugandans about criminal activity and since homosexuality was a criminal act in Uganda, their publication was in public interest. On 30 December 2012, the High Court issued its decision. Justice Musoke Kibuuka agreed with the applicants and awarded them damages for the violation of their rights as well as an injunction stopping further publication of the personal details of real or suspected LGBT persons. The Court found that the publication of the information violated the applicants' rights to dignity and privacy. The case also defined the scope of section 145 of the Penal Code, which criminalises same-sex conduct as applying only when one has committed a prohibited act and not 'gayism' generally.

This was the second case in Uganda in which the rights of LGBT persons to privacy and dignity were upheld. Unfortunately, a few weeks after the case was decided in the applicants' favour, one of the applicants David Kato was found murdered in his home, and one of the respondents, Giles Muhame, the editor of *Rolling Stone* newspaper issued a statement celebrating his death.<sup>55</sup>

***Victor Mukasa case***<sup>56</sup>

On 20 July 2005, Local Council (LC) officials forcefully entered the house of Victor Mukasa, an LGBT activist without a search warrant or an arrest warrant. They searched the house and took away documents. They also ordered the second applicant, a guest whom they found in the house to dress up and go with them. They took her to a place she assumed was

54 *Nabagesera & others v Attorney General & another* (Miscellaneous Cause 33 of 2012) [2014] UGHCCD 85 (24 June 2014).

55 See X Rice 'Ugandan "hang them" paper has no regrets after David Kato death' *The Guardian* 27 January 2011 <https://www.theguardian.com/world/2011/jan/27/uganda-paper-david-kato-death> (accessed 22 July 2022).

56 *Victor Juliet Mukasa & another v Attorney General* High Court Misc Cause 247 of 2006.

the LC chairman's office, and while there, they denied her toilet facilities, and later made her go to an open toilet with a male local defence officer keeping guard. After some time, she was physically manhandled and taken to an unknown place, and later to Kireka Police Post. At the police post, the chairman informed the police that he had found 'this creature' in his area and arrested her. The Officer in charge asked her whether she was male or female and despite being informed that she was 'male', the police officers undressed her and fondled her breasts. She was released without any charges. The two applicants filed the case seeking damages for violation of their rights. The respondents stated that the arrest was carried out in order to rescue the second applicant whom the residents wanted to lynch because she and the first applicant had been seen kissing in the area. They denied the allegations of illegal search and entry as well as the sexual violation and humiliation. Justice Arach Amoko found the true facts to be as stated by the applicants. She found that the applicants' rights to privacy and dignity had been violated. She found that the rights in the Constitution applied to all Ugandans without discrimination. She also emphasised that the case was 'not about homosexuality but about human rights'. They were awarded compensation and costs of the suit.

This was the first case on LGBT rights in Uganda. It is the foundation upon which all the other cases are based. This victory however whipped up anti-gay sentiments and is thought to be the real reason why the AHB was tabled the next year.<sup>57</sup>

### 5.1.2 *Unsuccessful cases (so far)*

There have so far been three unsuccessful case concerning LGBT rights in Uganda at the time of writing. These are:

#### *The COSF-20 private prosecution case*<sup>58</sup>

As a follow up to the *Access to Lawyers* case, six of those released from prison brought private prosecution proceedings against then Kyengera Town Council Mayor, Hajji Kiyimba and Prisons Principal Officer Philemon Woniata, who had inflicted torture/inhuman treatment against them

57 See A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' LLD Thesis, Centre for Human Rights, University of Pretoria, 2018, 84-85 <https://repository.up.ac.za/handle/2263/68335> (accessed 22 April 2022). Also see A Jjuuko & F Tumwesige 'The implications of the Anti-Homosexuality Bill 2009 on Uganda's legal system' Evidence Report 44: Sexuality, Poverty and the Law (2013) 7.

58 *Mukiibi Henry & others v Hajji Abdul Kiyimba & another* Criminal Case 505 of 2020 (Wakiso Chief Magistrates' Court).

during their arrests and while they were detained in Kitalya Mini-Max prison respectively. This was under the provisions of sections 12(1)(c) and 12(3) of the Prevention and Control of Torture Act, 2012 which allows private individuals to institute criminal cases against officials accused of torture. The case was filed in Wakiso Chief Magistrates' Court, which exercised jurisdiction over Kitalya prison. However, on 19 January 2021, the matter was summarily dismissed by the Magistrate on grounds that the court lacked jurisdiction. This was done without hearing any of the parties.

The matter was important since it was the first time that LGBT persons had brought private criminal proceedings against state officials who had violated their rights based on their sexual orientation and gender identity. The dismissal was done by the magistrate without hearing the parties and in contravention of the law which clothed the court with the requisite jurisdiction as Kitalya Mini Max Prison is located within the territorial jurisdiction of the court.

#### ***The SMUG Registration case***<sup>59</sup>

This case was decided on 27 June 2018. On 16 February 2015, the Uganda Registration Services Bureau (URSB) wrote to HRAPF, the lawyers of the promoters of Sexual Minorities Uganda (SMUG) stating that the name 'Sexual Minorities Uganda' had been rejected under section 36 of the Companies Act 2012, which gives the URSB powers not to reserve a name if in their opinion, it is 'undesirable'. The applicants who were SMUG's promoters brought the application before the High Court contending that the URSB's refusal to reserve the name violated their constitutional rights to equality and freedom from discrimination as well as freedom of association, while the two-year delay to make and communicate a decision on registration constituted a violation of their right to a fair hearing. The URSB responded that the name 'Sexual Minorities Uganda' was undesirable and un-registrable under section 36 of the Companies Act, 2012, as the proposed company was formed to advocate for the rights and well-being of people engaged in activities labelled 'criminal acts' under section 145 of the Penal Code Act, including lesbians and gay persons.

Justice Patricia Wasswa Basaza held that the refusal of the URSB to reserve the name, and consequently to register the proposed company, did not contravene the Constitution of Uganda. This is because the rights claimed were subject to limitation as provided for under article 43 of the

59 *Frank Mugisha & others v Uganda Registration Services Bureau* Miscellaneous Case 96 of 2016.

Constitution. The article subjected human rights to the public interest. The proposed company was formed to promote prohibited and criminal acts since article 31(2)(a) of the Constitution, as amended by section 10 of the Constitution (Amendment) Act, 2005, prohibits same-sex marriages, and section 145 of the Penal Code Act prohibits ‘having carnal knowledge against the order of nature’. The Court further ruled that the proposed company’s objectives go against the values and norms of the Ugandan people and are prejudicial to the public interest.

The case was a shocking check on the hitherto winning streak by LGBT groups as it was the second time in three months that LGBT groups lost a High Court case. It also demystified reliance on international and even regional decisions on LGBT rights, as it relied on the European Court on Human Rights’ margin of appreciation decision in *Schalk and Kopf v Austria*,<sup>60</sup> and rejected progressive precedents from Kenya and Botswana stating that ‘what happens or is allowed in other jurisdictions ... does not apply here and indeed in most African States’.<sup>61</sup> The Court agreed with the earlier judgment of Justice Stephen Musota in the *Lokodo* case, which was issued only three months earlier in which he had held that the Minister of Ethics and Integrity was justified in stopping an LGBT skills training workshop, and also distinguished the *Rolling Stone* case<sup>62</sup> where section 145 of the Penal Code was held to apply to specific sexual acts rather than being gay generally.

### ***The Lokodo case***<sup>63</sup>

On 14 February 2012, the Minister of State for Ethics and Integrity, Rev Fr Simon Lokodo stopped a ‘Project Planning, Advocacy and Leadership’ workshop organised by Freedom and Roam Uganda (FARUG) for LGBT persons. He alleged that the workshop was an illegal gathering of homosexuals, and that it sought to promote homosexuality, which is contrary to the laws in Uganda. He also made attempts to arrest the organisers of the workshop. The applicants argued that the Minister’s actions violated their rights to freedom of expression, association and assembly, the right to political participation, and equality before and under the law. The applicants sued the Attorney-General and the Minister in his personal capacity. The respondents argued that the meeting was convened for a criminal purpose since homosexuality is criminalised in Uganda and thus LGBT people cannot be said to be covered under

60 Application 30141/04.

61 *Frank Mugisha & others* (n 59) para 40.

62 Miscellaneous Cause 163 of 2010 (High Court of Uganda).

63 *Nabagesera & others* (n 54).



the said rights. The High Court (Justice Stephen Musota) agreed with the respondents and stated that although LGBT persons are entitled to the rights in the Constitution, the limitation clause in article 43 of the Constitution limits the rights and the protection of morals is a legitimate reason to limit rights. They also relied on articles 17, 27 and 29 of the African Charter on Human and Peoples' Rights (ACHPR)<sup>64</sup> to show that promotion and protection of moral values is a responsibility of the state and that the criminal law can be a valid reason to limit rights. The Court also used the provisions of the Penal Code on parties to an offence to assert that those organising meetings to train LGBT persons on safe gay sex and other such actions could be covered under section 145 as they were party to a conspiracy to commit carnal knowledge against the order of nature. It also held that the minister could not be sued in his individual capacity as his actions were not taken for his personal benefit but he acted in his official duties as a government minister. The suit was dismissed with costs awarded against the applicants.

The Minister of Ethics and Integrity and the Attorney-General worked with religious leaders and the 'ex gay' movement and collected affidavits to the effect that FARUG and other LGBT organisations were involved in 'promotion of homosexuality'. This was classic lawfare and the anti-LGBT groups came out victorious on all fronts. It also marked a check in the lawfare as it was a wakeup call for pro-LGBT groups that victory was not always guaranteed and the law could be interpreted differently depending on the perspectives of the judge and the arguments put forward by the other parties. Perhaps, another mistake made by the pro-LGBT groups was suing the Minister in his personal capacity, as that meant that individual actions of the minister were brought into the spotlight and the Minister had to take a personal interest in the matter. Another point to note is how the judge distinguished the different progressive decisions of the African Commission on Human and Peoples' Rights as well as the provisions of the African Charter on Human and Peoples' Rights to limit rights.

### **5.1.3 Pending cases**

Four cases are pending before different courts of law.<sup>65</sup>

64 OAU, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

65 There are two other cases pending before the Uganda Human Rights Commission which is Uganda's national human rights institution. It has a tribunal that hears and determines cases involving human rights violations. It has the powers of a court to summon witnesses, and issue binding decisions under article 52 of the Constitution of the Republic of Uganda (1995).

***COSF-20 Torture case***<sup>66</sup>

This is a case filed before the High Court of Uganda in 2020. It was brought under section 10 of the Human Rights Enforcement Act, 2019 which allows a person to sue both the state officials directly responsible for the violations as well as the responsible state agencies. The case seeks a declaration that the various forms of violence perpetrated against the 20 youths – beatings, burnings, and anal examinations committed during their arrest in Kyengera and detention at Kitalya Mini-Maxi Prison amount to a violation of their right to freedom from torture, inhuman and degrading treatment; their right to privacy; and their right to freedom from discrimination. The applicants also seek compensation for the human rights violations suffered by the 20 youths. The case is pending hearing.

***The ‘rogue and vagabond’ case***<sup>67</sup>

This case was filed before the Constitutional Court in 2019. It challenges the constitutionality of sections 168(1)(c) and 168(1)(d) of the Penal Code Act Cap 120 which criminalise specific acts regarded as being ‘rogue and vagabond’ for contravening and violating various provisions of the Constitution of Uganda, 1995. Section 167(1)(c) provides that ‘every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself’ shall be deemed to be a rogue and vagabond, and commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year. Section 167(1)(d) provides that a person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year. The petitioner argues that the provisions contravene articles 28(12), 28(3)(a), 21(1), 21(2), 23(1)(c) and 23(4)(b) of the Constitution as they are too vague and facilitate arbitrary arrests of people who have not committed any criminal offences, targets people of low means and social status, disregards the presumption of innocence and does not define the prohibited criminal conduct with the clarity required under the Constitution. The case is still pending hearing. It is significant since LGBT persons are among groups that are usually arrested and charged under these provisions.

66 *Mukiibi* (n 10).

67 *Francis Tumwesige v Attorney General* Constitutional Petition 36 of 2019.

***Frank Mugisha & others v Uganda Registration Services Bureau***<sup>68</sup>

This is the appeal in the *SMUG Registration* case. It was also pending before the Court of Appeal. This is pending before the Court of Appeal. It challenges the decision of the High Court in as far as it applied the limitation clause to make the right to freedom of association illusory.

***Kasha Nabagesera & 3 others v The Attorney General and Hon Rev Fr Simon Lokodo***<sup>69</sup>

This is the appeal in the *Lokodo* case. The appeal was filed in 2014 challenging the High Court's decision on the grounds that the Court erred when it found that the Minister of Ethics and Integrity was justified in stopping the skills training workshop.

**5.2 Cases filed in courts of other countries**

Ugandan LGBT activists have gone across borders and filed a case in the United States of America (US). This is the case of *Sexual Minorities Uganda (SMUG) v Scott Lively*.<sup>70</sup> In March 2009, Scott Lively of Abiding Truth Ministries in the US, spoke at an anti-gay conference organised by Family Life Network headed by pastor Steven Langa. While in Uganda, Lively met with Ugandan lawmakers including David Bahati who was later in the year to table the Anti-Homosexuality Bill, 2009. Lively later described his activities as a 'nuclear bomb' on LGBT organising in Uganda. He was sued by SMUG on claims of persecution of LGBT persons through his conspiracy with Ugandan actors to strip away fundamental human rights of LGBT persons in Uganda, which led to the tabling of the Anti-Homosexuality Act 2009 and its effect of spurring violations against LGBT persons in Uganda. The case was brought under the US Alien Torts Statute which makes it possible to hold American citizens liable for actions overseas that lead to crimes against humanity and persecution is one of these. The US District Court in Springfield, Massachusetts, condemned the actions of Scott Lively as amounting to persecution as defined in international law, but he did not find sufficient activity carried out on US soil by the pastor to invoke the court's jurisdiction under the Alien Tort Statute. Scott Lively appealed against the criticism of his actions by the judge and the appeal was thrown out in August 2018 since a winning party had no right of appeal. (*Sexual Minorities Uganda v Scott Lively*, No 17-1593

68 *Frank Mugisha & others* (n 59).

69 Civil Appeal 195 of 2014.

70 *Sexual Minorities Uganda v Scott Lively* Civil Action 3:12-CV-30051-MAP.

(United States Court of Appeals for the First Circuit) – The *Scott Lively* Appeal).

This was the first time that African LGBT activists were taking a case challenging actions of American evangelicals before the US courts.

### 5.3 Cases filed before international courts

LGBT lawfare in Uganda has also moved to the international arena. LGBT activists brought a case challenging Uganda's Anti-Homosexuality Act at the East African Court of Justice (EACJ). The case, *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)*<sup>71</sup> was filed almost simultaneously with the challenge to the AHA at the Constitutional Court of Uganda. It originally challenged certain provisions of the AHA as being contrary to the rule of law and good governance principles of the East African Community Treaty. After the nullification of the AHA by the Constitutional Court of Uganda, the reference was amended to limit it to challenging the enactment of the Act with three specific sections which were stated to be directly in violation of the fundamental principles of good governance, rule of law and human rights, enshrined in the Treaty for the Establishment of the East African Community. UNAIDS was admitted as *amicus curiae*. The Attorney-General raised a preliminary objection that the reference was moot as the AHA had been nullified by a competent court of a member state of the East African Community, and as such the matter was only of academic importance. HRAPF argued that they were not challenging the Act but the passing of the Act with the three provisions that led to the violation of the rights of LGBT persons during the period when the law was in force, and that in any case, this was a matter of public interest that the Court could hear as an exception to the mootness rule. The Court decided that the amendment was not validly done, and as such it was struck out. Therefore the case was moot since the reference challenged a law that had been nullified by the Court. The Court considered the public interest exception to the general rule and found that it did not find the evidence sufficient to 'establish the degree of public importance attached to the practice of homosexuality in Uganda'.

This was the first time that an international human rights court in Africa decided a case concerning violations against LGBT. The case thus took LGBT lawfare in Africa to the international arena, and despite failing

71 Reference 6 of 2014.

to proceed on the substantive grounds, showed that LGBT activists will not sit by as governments violate their rights through such laws.

## 6 Key features of the Uganda LGBT lawfare

Ugandan LGBT lawfare is quite unique from that of many countries in Africa. Uganda has the highest number of cases brought before courts in Africa on LGB rights, except for South Africa, which has a completely different legal situation as LGBT persons are expressly protected from discrimination in the Constitution.<sup>72</sup> This exceptional set of circumstances perhaps arises from Uganda being the first country in Africa to table comprehensive legislation further criminalising same-sex relations, and criminalising all other actions done in support of or in relation to same sex-relations. The 2008 court victory in the *Victor Mukasa* case spurred a set of reactions from the evangelical groups and their political allies that resulted in the Anti-Homosexuality Bill (AHA) being tabled the following year. The rest of the cases are connected to the AHA. The AHA was the Anti-LGBT group's ultimate weapon, which would have the impact of imposing a chill on all pro-LGBT activities in the country. This was clearly discernible to the pro-LGBT groups, and they thus staged a strong, no holds barred defensive campaign that put litigation as strategy since the more populist legislative and executive routes were largely cut off from them. The battlelines were thus drawn and the lawfare raged. Below are the key features of this lawfare.

### 6.1 The issues

The main ground of contestation is the scope of human rights *vis-a-vis* reified religious and cultural values. The anti-LGBT group regards homosexuality as immoral, unnatural, unAfrican and against the values of Ugandans.<sup>73</sup> They assert that it is against religious and cultural values and therefore unacceptable and criminal and that human rights should be limited by laws criminalising consensual same-sex relations. They thus support the criminalisation of same-sex relations. The pro-LGBT groups on the other hand regard homosexuality as a matter of human rights rather than morality or religion. As far as religion and culture are concerned, they see them as being capable of changing and embracing diversity. The inclusive language of human rights appeals to these groups more, and all

72 For a comparison of the number of cases in the different countries in Common Law Africa, see A Jjuuko 'Strategic litigation and the struggle for lesbian, gay and bisexual equality in Africa' (2020) 24 -51.

73 See generally, S Kaduuli 'Perceptions of LGBT in Uganda and Africa' (2009).

cases without exception are based on human rights. Criminalisation of same-sex relations is thus opposed and seen as anti-human rights.

This struggle between human rights and reified religious and cultural values also manifests in the contest over the origin of homosexuality and homophobia. The anti-LGBT groups firmly believe that homosexuality is a western import as Africa had no homosexuals before colonialism. On the other hand, the pro-LGBT groups regard homosexuality as being part of human sexuality and therefore incapable of being imported. They instead assert that it was homophobia that was imported into the country by the colonialists through the criminal laws. The fact that pro-LGBT groups get western funding and use adversarial approaches that are largely viewed as western in origin portrays them as the local fronts for a western campaign to spread homosexuality in Africa. However, the anti-LGBT groups themselves get funding and support from western groups making the argument applicable to both sides.

Another argument concerns the widely held perception of homosexuals as evil persons, who recruit children into homosexuality and are paedophiles.<sup>74</sup> This is perhaps the most compelling explanation for homophobia in Uganda, and it explains why the occasional criminal case involving homosexual sex with a child attracts far much more attention than the everyday cases of men having sex with underage girls.<sup>75</sup>

These issues underlie every single case before the courts, even if the case does not acknowledge them. They are the proverbial elephant in the room. They surface in the courtroom in form of the normative content of the right, and the extent of the limitation to the rights. The court judgments that give recognition to the rights are usually in favour of the pro-LGBT groups and those that apply the limitations are in favour of the anti-LGBT groups. The two Kasha Jacqueline Nabagesera cases at the High Court – the *Lokodo* case and the *Rolling Stone* case – clearly show how these battles manifest. Whereas the judge in the *Rolling Stone* case gave full extent to the rights to freedom from inhuman and degrading treatment and the right to privacy, the judge in the *Lokodo* case recognised the rights and subjected them to the limitation and found the limitation applicable in the situation.

74 Above.

75 For example, the case of *Uganda v Christopher Mubiru Kisingiri* Crim Case 0005/2014, where the facts show that he had a non-consensual same-sex relations with a person below 18 years, attracted a lot of media attention, far more than the many cases of 'defilement' of girls under 18.

## 6.2 The actors

The pro-LGBT actors are mainly LGBT activists and organisations, supported by some sections of the broader civil society.<sup>76</sup> At the height of the AHB, the groups supportive of LGBT rights came together in a loose Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL). The Coalition through its Legal Committee which was chaired by HRAPF<sup>77</sup> used to determine the cases to be taken to court, the issues to pursue, the lawyers to engage and the courts to go to. The choice of petitioners was determined strategically – sometimes having openly LGBT applicants like in the *Lokodo* and *Rolling Stone* cases, and sometimes non-LGBT identifying persons like in the *Equal Opportunities Commission* case, and in others a mix of LGBT persons, and non-LGBT persons like in the *AHA* case. In all the struggles however, persons who identify as LGBT are at the forefront. The lawyers used in the court cases are lawyers who have handled LGBT cases before or those sympathetic to the LGBT cause and who understand the issues.<sup>78</sup> The group relies quite heavily on foreign support in terms of provision of funds, and technical and diplomatic support.<sup>79</sup>

The anti-LGBT group is led by charismatic, conservative religious<sup>80</sup> and political leaders.<sup>81</sup> It is these same leaders who take keen interest in the legal processes, attend court, and counter-mobilise. Another group that is interested in the legal process is the ‘ex gay movement’.<sup>82</sup> These

76 A Jjuuko ‘The incremental approach: Uganda’s struggle for the decriminalisation of homosexuality’ in C Lennox & M Waites (eds) *Human Rights, sexual orientation and gender identity in The Commonwealth: Struggles for decriminalisation and change* (2013) 381-408.

77 And is made up of lawyers from member organisations of the Coalition and is advised by Makerere University Professors, Sylvia Tamale and Joe Oloka Onyango.

78 Usually, it is Ladislaus Rwakafuuzi, Henry Onoria, Francis Onyango, Adrian Jjuuko, Fridah Mutesi, Patricia Kimera, Francis Tumwesige, Caleb Alaka and Nicholas Opiyo.

79 For a discussion of the role of international solidarity in the pro-LGBT struggle in Uganda, see A Jjuuko ‘International solidarity and its role in the fight against Uganda’s Anti-Homosexuality Bill’ in K Lalor et al *Gender, sexuality and social justice: What is the law got to do with it?* (2016) 126.

80 Those that have directly participated in court processes are: Pastor Martin Sempa who attended court in the *Lokodo*, *AHA*, *Rolling Stone* and *EOC* cases; Pastor Solomon Male who attended court in the *Rolling Stone* case; Pastor Joseph Serwadda and Stephen Langa both of whom who swore affidavit in support of the application to join the *AHA* case.

81 Led by former Minister of Ethics and Integrity, the late Rev Fr Simon Lokodo, his immediate predecessor, Hon NsabaButuro and the sponsor of the Anti-Homosexuality Bill, Hon David Bahati.

82 These claim to have been cured of their homosexuality and claim that they used to recruit children and that they were misled into homosexuality. The most prominent

swear affidavits stating that they have been part of the LGBT movement and therefore are aware of the agenda and negative actions of the LGBT movement.<sup>83</sup> The anti-gay group is much more organised, mainstream and entrenched in the day-to-day life of the nation. The Inter-Religious Council of Uganda (IRCC) which brings together all Abrahamic religions in the country strongly supports this movement and took an active and visible role in the lawfare when they filed an application in court to join the *AHA* petition and they swore an affidavit admitting that they were behind the drafting of the AHA. They were joined by the family Life Network<sup>84</sup> and The Uganda Centre for Law and Social Transformation (UCLT) which was founded under the auspices of the Watoto church also joined the application.<sup>85</sup> There is a coalition known as the National Coalition Against Homosexuality & Sexual Abuses Uganda (NCAHSAU) led by Pastor Solomon Male. The conservative side receives support from conservative American and other western groups.<sup>86</sup> This group is actively supported by anti-gay politicians, usually the ministers of Ethics and Integrity, as well as MPs who see themselves as champions for their religions such as David Bahati<sup>87</sup> and Latif Ssebagala.<sup>88</sup>

### 6.3 The motivation

Each side regards itself as justified and right. The pro-LGBT groups include LGBT persons and organisations who are directly affected by violations of their rights based on their sexual orientation, gender identity or their work on these issues. It also includes those individuals and persons who believe in equality of all persons, as well as those who are employed in

ones are: George Oundo and Paul Kagaba and of late Elisha Mukisa.

- 83 Both Oundo and Kagaba swore affidavits in the *Lokodo* case in support of the respondents' case.
- 84 Whose vision is 'to restore the family values and morals in our society' [www.familylife.ug/about/](http://www.familylife.ug/about/) (accessed 2 April 2017).
- 85 It was founded at Watoto Church Central to among others ensure a prosperous Uganda that upholds and defends moral conduct as being indispensable for the wellbeing and survival of society <https://www.facebook.com/uclt.org/> (accessed 2 April 2017).
- 86 For example, Pastor Sempa was supported by Pastor Rick Warren, see Max Brumenthal 'Warren's Africa problem' *The Daily Beast* 7 January 2009 <http://www.thedailybeast.com/articles/2009/01/07/the-truth-about-rick-warren-in-africa.html> (accessed on 25 July 2013).
- 87 He is the MP who introduced the Anti-Homosexuality Bill, 2009. He is said to be a member of the Family, a powerful conservative US religious group. See 'Museveni, Bahati named in US "cult"' *The Observer* 25 November 2009 <http://www.observer.ug/component/content/article?id=6187> (accessed 22 July 2022).
- 88 He was the imam of Parliament at the time, and championed efforts to have the Anti-Homosexuality Bill retabled. See 'MPs start process to re-table gay bill' *The Daily Monitor* 3 September 2014.



organisations that are pro-LGBT equality. Therefore, the motivations for the pro-LGBT groups are different but they are driven by the need to stop violations against LGBT persons. Courts remain the only viable option left to LGBT groups as the legal opportunity structure and the political opportunity structure at the moment favour that. The court victories further motivate the groups as they realise the possibility of actually achieving their aims through litigation as the victories set precedents that should ideally be binding in future cases.

Different motivations also drive the anti-gay groups. For church leaders, they see opposition to homosexuality as an easy way to fame, and eventually to funding from anti-gay groups in the west.<sup>89</sup> Political actors on the other hand seem more interested in the political gains that they get out of being on the 'right side' of public opinion and influential groups such as the churches. There is a fusion between the churches and government officials with leading opponents of LGBT rights within the political actors having strong ties to the churches.<sup>90</sup> There are also direct tangible benefits for political leaders, one of which is being assured of re-election in reward for the campaign against LGBT persons, and the other is catching the eye of the President who may promote one to become a Minister. An inspiration for this is David Bahati who was re-elected unopposed as Member of Parliament for Ndurwa West constituency, later elected as the Vice Chairperson of the National Resistance Movement caucus in parliament and was later appointed State Minister of Finance in charge of Economic Planning, and was as of 2022 the Minister of State for Trade, Industry and Cooperatives. All the appointments happened after his tabling of the AHB. Although, not all politicians who publicly oppose LGBT rights have been able to rise to the stature of Bahati, the hope remains for many, who think that that would be an easier way to attract the President's attention.

As a collective, the government seems to want to play off the calls from other countries, more especially the US and allies in the west, to protect LGBT rights while at the same time maintain the foreign support and funding it has become accustomed to. As such court battles come in handy as the government can always use the court cases to stave off the extra pressure. An example is when the Constitutional Court suspiciously

89 For a discussion of this, see Jjuuko (n 76) 239 -240.

90 For example, both President Museveni and the mover of the AHB, David Bahati are said to belong to a powerful US evangelical lobby known as the Family. See for example *The Observer* (n 87). Rev Fr Simon Lokodo was a catholic priest and the first lady and Minister of Education Janet Museveni is an avid Pentecostal Christian.

rushed the hearing and decision in the *AHA* case just ahead of the US-Africa Summit in the US that President Museveni was poised to attend.<sup>91</sup>

There are also persons who have been ‘victims’ of homosexuality related offences including rapes, and defilement of children and these therefore have a genuine motivation to fight ‘homosexuality’. There are also ‘ex-gays’ who allege to have been recruited into ‘homosexuality’ and abused and who now want to help to end the ‘vice’. There are also conservative believers in religion and culture who believe that homosexuality is against their value systems and thus have an interest in fighting it through whatever means possible and indeed there are also those who work for entities that are anti-LGBT and thus have no option but to toe the line. The courts are seen as an avenue that can legitimate LGBT rights and therefore increasingly the conservative groups are paying more attention to the courts.

#### 6.4 The strategy

The pro-LGBT groups use the courts more than legislative means or executive action. The court action is based on an unwritten loose strategy developed, agreed upon and revised by the LGBT groups from time to time, which is ultimately aimed at decriminalisation of same-sex relations.<sup>92</sup> Not every case of violation is taken to court by the pro-LGBT groups, but only a few strategically selected ones. During the time of the CSCHRCL, these cases were discussed by the Legal Committee and in legal strategy meetings by the different stakeholders and agreed upon. After the CSCHRCL, legal strategy meetings continue to be held with different stakeholders in order to agree on the way forward. Almost all these cases are reactive, coming after a particularly bad case of violation of LGBT rights. The Anti-LGBT groups also pay attention to only those cases that they think threaten their gains, for example the *EOC* case and the *AHA* case. Each case has its own legal and advocacy strategy meetings involving different stakeholders. The choice of the court to go to is determined by what the group seeks – if it is broader protections then the choice is usually the Constitutional Court, and if it is enforcement of rights, then it is the High Court.

The anti-gay groups rely more on the legislative and executive avenues and only attend to court action in a reactionary offhanded way. As such their actions are usually in response to what the pro-LGBT groups do, and are usually not very effective. Until recently, their involvement in cases lay in them mobilising people to attend court and show opposition to some of

91 See Golooba-Mutebi (n 52).

92 See Jjuuko (n 75).

the cases. Pastor Sempa was more successful in this, mobilising university students to come to court and engage LGBT activists. However, recently the groups have become more proactive in the courtrooms, with the application to take over the *AHA* case from the Attorney-General. They also use the Legislature and the Executive to reverse the court gains. For example, there is a real connection between the court victory in the *Victor Mukasa* case and the tabling of the *AHA*. They also held a demonstration outside the court after the *AHA* victory and also criticised the judges who made the *AHA* decision.

## **7 The trends of court decisions and attitudes in LGBT cases**

LGBT cases in Uganda are generally treated by the courts like any other cases, and usually legally sound decisions are given by the courts. Despite this, a few trends stand out that may distinguish them from other cases – these are: courts being apparently eager to avoid the issues of homosexuality; and the odd timeframes that the cases sometimes have.

### **7.1 Courts are apparently uncomfortable discussing homosexuality**

Many of the judges prefer to avoid the issues of homosexuality whenever it is possible to do so. In the *Victor Mukasa* case, the judge stated that the case was ‘not about homosexuality. The judgment is therefore strictly on human rights’. She indeed went ahead and decided the case as if there was no allegation of homosexuality involved. Similarly, in the *AHA* case, homosexuality was avoided as the court ordered the parties to only address them on the issue of quorum. In the *EOC* case, homosexuality was not at all mentioned despite the petitioner referring to the Hansard records showing the motivations behind the provision in their submissions. In cases where homosexuality was at the centre of the case like in both *Kasha Jacqueline* cases, the judges certainly addressed it, but in the *Rolling Stone* case, the judge had to repeat that the case was still not about homosexuality. In the *Access to Lawyers* case, homosexuality was not mentioned at all despite the records showing that the persons had been arrested because of their sexual orientation and/or gender identity. In an ideal situation, this would be a good thing, as it implies that the courts pay no regard to sexual orientation or gender identity, and treat everyone equally. However, in a country with a lot of homophobia, violence and violations based on one’s sexual orientation and/or gender identity, the root causes of the violations which

is the sexual orientation and gender identity of the applicants, needs to be expressly addressed by the judiciary.

## 7.2 Odd timeframes in handling LGBT cases

The *EOC* case took eight years to decide while the *AHA* case took three months from the time of filing to the time it was decided, by the same Constitutional Court. This shows that for some reason the former case was not seen as a priority and for some other reason the latter case was seen as a priority. Normally, cases in Ugandan courts are delayed, but an eight-year delay at the Constitutional Court was too long, and a decision given three months after filing of the case was too fast. Either way, there seem to be extraneous factors that lead to such cases being treated the way they are and these factors are unique to cases concerning LGBT issues and other issues seen as controversial, and may be indicative of the lawfare nature of these cases. The *Lokodo* case appeal and the *SMUG Registration* case appeal have been pending before the Court of Appeal since 2014 and 2016 respectively – and strictly speaking these are the first LGBT cases to go to the Court of Appeal.

## 8 The impact of LGBT lawfare

LGBT lawfare in Uganda has had a lot of impact on the protection of LGBT rights. The impact is both positive and negative.

### 8.1 Legal changes

LGBT rights activists have through litigation managed to keep the legal status on same-sex relations as it has always been – criminalised only in the Penal Code. This was through nullifying the highly repressive and restrictive Anti-Homosexuality Act, 2014. They have also managed to gain positive protections despite the criminalisation, with the Constitutional Court declaring section 15(6)(d) of the Equal Opportunities Commission Act, which stopped the commission from investigating matters regarded as ‘immoral or socially unacceptable’ by the majority, unconstitutional. The Commission can now investigate matters concerning marginalisation of LGBT persons. They have had the High Court declare that the rights to dignity, privacy, liberty and fair hearing apply to all persons and therefore their houses cannot be forced open or their bodies touched; or personal details published and hate speech used against them based on their sexual orientation or gender identity; or them being denied access to their lawyers. Although the same High Court has also declared that a skills training workshop organised for LGBT persons can be legally stopped by a minister it made it clear that LGBT persons have the same rights as

everyone else and these rights can only be limited in light of the limitation clause in article 43 of the Constitution.

Nevertheless, there is still a long way to go as the Constitution prohibits same sex marriages; the Penal Code provisions remains fast in place; and more restrictive laws like the NGO Act 2016, the HIV Prevention and Control Act, and of recent the Sexual Offences Bill, 2019 continue to be passed. Also parliamentarians and citizens continue to push for and support laws that seek to further criminalise same sex relations; and the President and cabinet remain firmly against legalising same-sex relations.

## **8.2 Political changes**

There have been several visible positive changes in the political environment for LGBT persons in Uganda. More government agencies have been actively involved in discussions on protection of LGBT rights, including the Uganda Human Rights Commission,<sup>93</sup> the Uganda Police Force,<sup>94</sup> the Ministry of Health,<sup>95</sup> and the Equal Opportunities Commission.<sup>96</sup> The Uganda AIDS Commission expressly targets stigma and discrimination against key populations who include men who have sex with men.

However, generally the government remains hostile to LGBT rights, with continued police arrests,<sup>97</sup> which have of recent taken the form of mass

93 The Uganda Human Rights Commission is the national human rights institution. It publicly opposed the Anti-Homosexuality Bill on human rights grounds. see generally Civil Society Coalition on Human Rights and Constitutional Law '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' (2012). The Commission also carries out awareness campaigns on marginalisation among judges, civil society and the Uganda Police Force focusing on LGBT rights. Two cases are pending before the Commission concerning the violations of the rights of LGBT persons in police custody.

94 The Directorate of Legal and Human Rights of the Uganda Police Force partners with the HRAPF and the Uganda Human Rights Commission to hold trainings on LGBT rights.

95 The Ministry of Health has guidelines for non-discrimination in provisions of health services including on grounds of sexual orientation and gender identity, and runs the Most at Risk Populations Initiative (MARPI) which provides specialised treatment for LGBT persons.

96 The Commission has met with LGBT persons and invited them to file complaints in cases of violations.

97 It is documented that in 2014 alone, 47 arrests against LGBT persons were verified in Uganda. See The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'Uganda Report of violations based on gender identity and sexual orientation' (2015) [https://www.outrightinternational.org/sites/default/files/15\\_02\\_22\\_lgbt\\_violations\\_report\\_2015\\_final.pdf](https://www.outrightinternational.org/sites/default/files/15_02_22_lgbt_violations_report_2015_final.pdf) (accessed

arrests, and more targeted arrests more especially during the COVID-19 lockdown. Politicians including the President have also recently made statements linking LGBT persons to terrorists.<sup>98</sup> Since the Ministerial Directive on Non Discrimination, no more firm directives have been made on non-discrimination by state agencies, except perhaps for the Uganda AIDS Commission's HIV/AIDS Strategic Plan.

### 8.3 Social changes

The media is less hostile to LGBT persons than before, with the *Observer*<sup>99</sup> and the *Independent* newspapers being more open and the *New Vision* and the *Red Pepper* publications being more hostile.<sup>100</sup> A number of mainstream civil society organisations continue to protect LGBT rights, including HRAPF, DefendDefenders, and the Uganda Network on Ethics, Law and HIV/AIDS (UGANET). Many LGBT persons have as a result come out of the closet and even Pride celebrations have been held every year since 2012 in different forms and in many cases with the police being aware.

Despite the victories and progress made, on the other hand homosexuality continues to be hugely unpopular in Uganda. The latest Afrobarometer survey on this issue found that 95 per cent of Uganda would not welcome a homosexual neighbour,<sup>101</sup> while the Pew Research Centre found that 96 per cent of the population was against homosexuality.<sup>102</sup> This implies that LGBT rights are far from being realised. They are still seen by the majority as unacceptable. The lawfare is largely seen as elitist

22 July 2022). See also Sexual Minorities Uganda 'From torment to tyranny: Enhanced persecution in Uganda following the passage of the Anti-Homosexuality Act 2014' (2014) <https://sexualminoritiesuganda.com/wp-content/uploads/2014/11/SMUG-From-Torment-to-Tyranny.pdf> (accessed 22 February 2022).

98 See for example 'Museveni warns protestors over attacking NRM supporters' *Observer* 20 November 2020. See also 'Government investigating People Power links with "hybrid" terror group called Red Movement' *Nile Post* 4 October 2019 <http://nilepost.co.ug/2019/10/04/government-investigating-people-power-links-with-hybrid-terror-group-called-red-movement/> (accessed 22 February 2022).

99 The *Observer* usually features LGBT-friendly articles.

100 The Vision Group's Editorial Policy stops the group from publishing content on homosexuality except when it is from the President, parliament or the courts, and they have largely lived up to it. Vision Group 'Editorial policy' (2014) <https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete> (accessed 22 February 2022).

101 B Dulani, G Sambo & KY Dionne 'Good neighbours? Africans express high levels of tolerance for many, but not for all' Afrobarometer Dispatch 74 (2016) 12.

102 'The Global Divide on homosexuality: Greater acceptance in more secular and affluent countries' *Pew Global* 4 June 2013 <http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf> (accessed 22 February 2022).

pursuing elitist aims and objectives which are quite hazy to the common person. The battles are fought by organisations led by elites, and lawyers, judges, and government officials. So, in most cases, the battle is lost on the public. The impact of court cases on the people is limited since court cases usually only directly affect the litigant, and also the law is largely disconnected from reality – understood by lawyers and such other similarly elite persons.

## **9 Conclusion**

The legal opportunity structure and the political opportunity structure prevalent at the time in Uganda have ensured that Ugandan LGBT activists resort to the courts of law as their main avenue of ensuring protection of their rights. The courts are bound to receive cases and make decisions and in many cases the courts have made positive decisions based on sound legal reasoning. At the same time, anti-LGBT groups have reacted to the gains made through court by directly descending into this arena and opposing cases brought by pro-LGBT groups. They have also hastened to use their political opportunity structure which favours the use of the legislature and the executive to block LGBT rights. The Anti-Homosexuality Act was one such huge attempt which if it had fully succeeded would have had the effect of largely stifling LGBT organising in Uganda. Nevertheless, new and proposed laws such as the NGO Act 2016, and recently the Sexual Offences Bill 2019 contain provisions that seek to have the same effect as provisions of the AHA. The Executive led by the President also seems to be engaged in its own struggle mainly targeted at foreign (state and supra national organisations) supporters of LGBT rights, in a high-stakes game of balancing international support for the current regime while at the same time not doing enough to protect the rights of LGBT persons. What is clear is that LGBT lawfare in Uganda is far from over, and it remains to be seen what direction it will take now, with increasing losses in the courts of law, and delayed decisions.

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