

**ASSESSING THE ENJOYMENT AND REALIZATION OF THE RIGHT NOT TO BE
DISCRIMINATED BY SEXUAL MINORITY GROUPS IN UGANDA**

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DECLARATION BY STUDENT

I **Ssekasamba Allan** do hereby declare that this is my original work. Where other people's works have been quoted, they have been duly acknowledged. I further declare that this work has never been submitted before to any institution whatsoever and for any academic award of any kind.

Signature:

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APPROVAL BY SUPERVISOR

This research has work has been submitted for review with my approval as University supervisor.

Signature:

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Date:



DEDICATION

This research is dedicated to the following: my brothers; Luggya Ian Hillary, Kulumba Jonathan; to my Best friend; Nabatanzi Vannessar; to the late Nassolo Florence Birungi; to all human rights activists and to all Non-Governmental Organizations in Uganda that advocate for human rights.



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LIST OF ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CMW	International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law
FARUG	Freedom and Roam Uganda
HRAPF	Human Rights Awareness and Promotion Forum
HURINET	Human Rights Network
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
LGBTQI	Lesbian, Gay, Bisexual, Transgender, Queer and Intersexual
NGO	Non-Governmental Organization

POC	People Of Color
SANDF	South African National Defense Force
SMUG	Sexual Minorities Uganda
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
UHRC	Uganda Human Rights Commission



LIST OF CASES

Adrian Jjuuko v Attorney General Constitutional Court Petition No.1 of 2009

Bwegye v Bishop Stuart University (Equal opportunities Commission Tribunal) (EOC/CR 20 of 2018) [2018] UGEOC 1 (18 July 2018)

Hon Justice(Rtd) Dr Yorokamu Bamwine v Attorney General [2022] Constitutional Court of Uganda constitutional petition number 15 of 2021

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National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others CCT11/98 (1998) [1998]

Navtej Singh Johar v Union of India (2018) 10 SCC1

NGOs Coordination Board v Eric Gitari, Petition No.16 of 2019.

Toonen v Australia (UN Human Rights Committee) 488/1992, (1994)

Victor Mukasa & Yvonne Oyo v Attorney General (High Court of Uganda (Civil Division) Misc Cause No247/06)

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International Instruments

The African Charter on Human and People's Rights (ACHPR, 1979)

The International Covenant on Civil and Political Rights (ICCPR, 1966)

The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)

The Universal Declaration of Human Rights (UDHR, 1948)

National Legislation

The Anti- homosexuality Bill, 2023

The Companies Act, 2012

The Constitution of Uganda, 1995 (as amended)

The Divorce Act, Cap 249

The Employment Act, 2006

The Equal Opportunities Act, 2005

The Marriage Act, Cap 251

The Non-Governmental Organizations Act, 2016



The Penal Code Act, Cap 120

The Uganda Registration Services Bureau Act, Cap 210



ABSTRACT

The general objective for this study was to assess the enjoyment and realization of the right not to be discriminated by sexual minority groups in Uganda. In respect to this objective, the following specific objectives were made; To analyze Uganda's policy and legal framework on non-discrimination; To assess the enjoyment and realization of the right to non-discrimination by sexual minority groups in Uganda; To examine the extent to which Uganda's policy and legal framework on non-discrimination has protected sexual minority groups from being discriminated against; and to finally make appropriate conclusions and recommendations.

The study points out different forms of discrimination attributed to sexual minority groups in Uganda and points out different problems the sexual minorities face in realizing their rights. Best practices from other jurisdictions that recognize the rights of sexual minority groups. For purposes of this study, this research focused on African countries especially South Africa which legalized same sex marriages. Single reference is made to India.

The key findings of the study as derived from the objectives of the study are that Uganda recognizes the right to non-discrimination however the sexual minority groups' enjoyment of this right is very limited as Uganda has laws that criminalize homosexuality. The Anti-homosexuality bill 2023 which proposes offences of homosexuality and aggravated homo sexuality was tabled in parliament on 9th March 2023 by Hon. Basalirwa for the first reading and was voted in by members of parliament 3/21/2023 waiting for the president's assent for it to become law. Once it is passed into law offenders of aggravated homosexuality shall be liable to death.

While concluding this study, this study notes that sexual minorities in Uganda do not generally enjoy the legal and constitutional liberties enjoyed by other citizens and recommends that Uganda needs to reform her legal system to accommodate and appreciate the rights of sexual minority groups in Uganda the same way South Africa and other jurisdictions did.

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CHAPTER ONE

GENERAL INTRODUCTION TO THE STUDY

INTRODUCTION

The debate around the discrimination of sexual minority groups in Uganda has been increasing over years due to the resentment of people who identify themselves as Lesbian, Gay, Bisexual, Transgender, Queers and other sexual minority groups (LGBTQI+) by society basically on the basis that it is against African norms and Humanity.

This study is going to assess the enjoyment and realization of the right to non-discrimination by sexual minority groups in Uganda. This research identifies the laws that provide for non-discrimination domestically, regionally and internationally to which Uganda subjects herself to, identify and illustrate different forms of discrimination that are suffered by sexual minority groups hence limiting the realization to the right to non-discrimination and provide recommendations on what should be done to promote the realization of this right.

This chapter however, is going to tackle the background of the study, statement of the problem, objectives of the study, justification of the study, significance of the research, research questions, scope of the study, research methodology and lastly the Literature review.

1.1 Background of the study

During this study, we need to understand two key words, that is, “non-discrimination” and “sexual minorities”. These are defined here under to create a better understanding of the study.

The ICCPR and ICESCR neither define the term “discrimination” nor indicate what constitutes discrimination. A useful definition of non-discrimination is contained in Article 1(1) ILO 111, which provides that discrimination includes: ‘Any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation.’¹ Furthermore, discrimination is defined in the under Article 21(3) of the 1995 constitution of Uganda to mean giving of different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. On the other hand, a sexual minority is one whose sexual identity, orientation or practices differ from the majority of the surrounding society.²

In Uganda, various cases of discrimination against sexual minorities have been portrayed through different emancipations that is criminalizing same sex sexual activity,³ Mass arrests often take place, and lead to arbitrary detention, forced anal ‘examinations’, and other forms of ill treatment, though successful prosecutions under the law appear rare. There have been consistent reports of discrimination and violence being committed against LGBT people in recent years, including murder, assault, harassment, extortion, arrests⁴ and the denial of basic rights and services. This paper is aimed at assessing the enjoyment and realization of the right to non-discrimination by to sexual minorities in Uganda and show how this right has been violated as opposed to the 1995 constitution of Uganda as amended, as well as international and regional laws which Uganda is a signatory to.⁵ Uganda is also a signatory to Regional laws that

¹See The Human Rights Committee General Comment No. 18, Non discrimination.

²https://en.wikipedia.org/wiki/Sexual_minority accessed 27th February 2023, see also

<https://sociologydictionary.org/sexualminority/>,

https://www.researchgate.net/publication/318063077_Sexual_minorities_The_terminology accessed 27th February 2023.

³ Penal Code Act 1950, Section 145.

⁴ ‘Uganda Arrests 44 at Alleged Gay Wedding’

<<https://76crimes.com/2021/06/01/uganda-44-arrests-came-at-alleged-gay-wedding/>>. Accessed 27th February 2023.

⁵ UDHR, Article 2, ICCPR, Article 26, ICESCR, Article 2(2), CMW Article 7 and CRPD Article 5.

provide for non-discrimination.⁶

1.2 Statement of the problem

Uganda recognizes laws that call for non-discrimination. This is illustrated in the grand norm of the land where its provided under Article 21 that All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. Furthermore, subsection 2 states that a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

Additionally, Uganda is signatory to various International instruments that call for non-discrimination that is UDHR⁷, UN CHARTER⁸ which provides that charter states shall “promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Additionally, the Covenant on Civil and Political Rights (ICCPR, 1966), and the Covenant on Economic, Social, and Cultural Rights (ICESCR, 1966).⁹ The principal clause on non-discrimination is found in Article 26 of the ICCPR¹⁰, The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), promulgated in 1979. Article 2 and 3 of the African charter on Human and People’s Rights also call for equal enjoyment of rights, treatment and protection under the law. Uganda being a signatory to these instruments and having domesticated the right to non-discrimination as required under Article 1¹¹ of the African Charter on Human and People’s Rights. It is absurd that even when Uganda recognizes the right to non-discrimination, there are various discrimination cases

⁶ African Charter on Human and People’s Rights 1981, Article 28.

⁷ Articles 1,2,4 and 7.

⁸ Article 13(1).

⁹ See ICESCR Article 2 (3), 3.

¹⁰ All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹¹ The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedom enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

against sexual minorities in Uganda as noted below.

On Wednesday 3rd August 2022, the National Bureau for Non-Governmental Organizations (NGO Bureau) halted the operations of Sexual Minorities Uganda for non-registration with the NGO bureau.¹² It should be noted that in 2012, Frank Mugisha and others applied to the Uganda Registration Services Bureau (URSB) under section 18 of the Companies act 2012 for reservation of a name of the proposed company. In a letter dated 16th February 2016, the URSB rejected the application to reserve the name “Sexual Minorities Uganda” on ground that the name was undesirable and unregistrable that the proposed company to be incorporated to advocate for the rights and wellbeing of Lesbians, Gay, Bisexual, Transgender and Queer persons, which persons are engaged in activities labeled criminal acts under section 145 of the Penal Code Act. This decision was also upheld by the High court of Uganda. This is a clear manifestation of acts of discrimination on grounds of sexual orientation. According to Article 145 of the penal code Act, Sexual Minorities are “criminals” which limit their enjoyment and realization of the right not to be discriminated.

It was further reported in The Observer,¹³ that police raided gay-friendly “Ram bar” and arrested over one hundred and twenty members of the Sexual Minority groups in Uganda. In March 2020¹⁴, police and local residents raided the Children of the Sun Foundation, a shelter for homeless LGBTQ youth in Wakiso. They beat and arrested twenty-three people. Twenty residents of the shelter were detained by police for over six weeks and were denied access to lawyers. In May 2021¹⁵, police raided a private celebration at another youth shelter in Wakiso and arrested forty four people, initially accusing them of holding a same-sex wedding. Police subjected seventeen of the accused to forced anal examinations.

It is therefore on the above background that the basis of the study is drawn to assess

¹² <https://twitter.com/smug2004/status/1555556472020410368?lang=en>, accessed 28th February 2023.

¹³ <https://observer.ug/news/headlines/62595-police-raids-gay-friendly-ram-bar-arrests-120> accessed 28th February 2023.

¹⁴ <https://76crimes.com/2020/03/30/ugandan-fear-of-covid-19-leads-to-23-arrests-at-lgbt-shelter/> accessed 28th February 2023.

¹⁵ <https://www.hrw.org/world-report/2022/country-chapters/uganda> accessed 28th February 2023.

the enjoyment and realization of the right not to be discriminated by sexual minority groups in Uganda.

1.3 Research Methodology

The research methodology adopted is qualitative in order to critically assess the discrimination of sexual minorities as opposed to existing international, Regional and domestic laws that provide for non-discrimination in Uganda. This study, is going to be desk research due to limited time available and the high expenses that come alongside a field study.

1.4 Objectives of the study

1.4.1 General objective

To assess the enjoyment and realization of the right not to be discriminated by sexual minority groups in Uganda.

1.4.2 Specific objectives

1. To analyze Uganda's policy and legal framework on non-discrimination.
2. To assess the enjoyment and realization of the right to non-discrimination by sexual minority groups in Uganda.
3. To examine the extent to which Uganda's policy and legal framework on non-discrimination has protected sexual minority groups from being discriminated against.
4. To conclude and give recommendations on how Uganda's policy and legal framework on non-discrimination can be improved an implemented.
5. To draw general conclusions from the research study and make

recommendations.

1.5 Research Questions

1. What is Uganda's policy and legal framework on non-discrimination?
2. To what extent is the right to non-discrimination enjoyed and realized by sexual minority groups in Uganda.
3. To what extent has Uganda's policy and legal framework on non-discrimination protected sexual minority groups from being discriminated against?
4. What can be done to improve Uganda's policy and legal framework on non-discrimination of sexual minority groups in Uganda?
5. What general conclusions and recommendations can be drawn or be made from this study?

1.6 Significance of the study.

Uganda as illustrated above recognizes the right to non-discrimination which is however not realized by the sexual minority groups in Uganda which gives me the basis of the study.

This research is therefore of the significance that it is to impact policy makers to come up with a streamlined framework on how the problem of discrimination of sexual minority groups in Uganda can be curbed, this study will also carry recommendations such as establishment of punitive laws against any forms of discrimination on the basis of sexual orientation.

Furthermore, the research is enhanced and directed to government¹⁶ and Non-governmental organizations to rise up and create an environment where the right to non-discrimination of sexual minority groups in Uganda can be realized effectively giving life to the non-discriminatory laws in place.

The research most importantly is meant to educate the sexual minority groups in Uganda of their right to non-discrimination and encourage them to rise up against any violations of this right by anyone.

By the end of this study, this paper aims to impact equal opportunities and enjoyment of all rights especially the non-derogable human rights provided under Article 44 (a) of the 1995 constitution of Uganda. Sexual minority groups have been and continue to receive inhuman and degrading treatment as discussed under the statement of the problem above hence the significance of the study.

1.7 Scope of the study

1.7.1 Geographical scope

This research is solely going to focus on Uganda. Non-discrimination policies and legal frameworks of sexual minority groups from other countries shall be used for comparison and examples. Authorities from other jurisdictions shall be used to add value to this research on the topic and no more.

1.7.2 Thematic scope

The study will focus on the assessment of the enjoyment and realization of the right not to be discriminated by sexual minority groups in Uganda. The different laws in Uganda that provide for non-discrimination together with international law shall be discussed and also show how this right has not been realized by the sexual minority groups in Uganda.

1.7.3 Time scope

¹⁶ Uganda Human Rights Commission.

The research shall take a month and the periodic study of the topic is from the promulgation of the 1995 constitution of Uganda (as amended) to date.

1.8 Literature Review

There have been few scholars at the local level who have researched and published on the subject of homosexuality in Uganda. At the International level, there exists a vast and wide ranging body of literature on the subject of homosexuality, yet there is paucity on the same in the Ugandan perspective. A review of the current literature on the subject discloses the controversies that surround this phenomenon. The literature review covers sexual orientation and the law and is divided into two sub-sections to reflect the main debates and discussions related to this study. The first part discusses the theories that have been advanced that relate to homosexuality and the second examines arguments of various scholars on the issues of law, policy and human rights on the subject matter.

Monica A. Ghabrial¹⁷ focused on the stigma faced by Lesbian, Gay, Bisexual, Trans, and Queer people of color (LGBTQ-POC). Her objective was to find out and show how this stigma has been linked to stress and increased likelihood of mental and physical health problems. However, this research is solely based on the evaluation of the extent to which the right to non-discrimination is enjoyed and realized by sexual minority groups in Uganda.

Twinomugisha and Mubangizi¹⁸ focused on the protection of the right to freedom of sexual orientation and what Uganda can learn from South Africa on the realization of this right. The objective of their study was to see how Uganda can embrace homosexuality the same way South Africa did. They note that although Robert Mugabe of Zimbabwe and Sam Nujoma of Namibia are reported to have made the most

¹⁷ Monica A. Ghabrial "Trying to Figure Out Where We Belong": Narratives of Racialized Sexual Minorities on Community, Identity, Discrimination, and Health (May 2016).

<https://link.springer.com/article/10.1007/s13178-016-0229-x> accessed 3rd March 2023.

¹⁸ Twinomugisha K. Ben and John C. Mubangizi, –Protecting the Right to Freedom of Sexual Orientation: What can Uganda learn from South Africa? Stellenbosch Law Review Regstydskrif, vol 22, no 2, 2011.

outrageous remarks against homosexuality, many other African leaders including the former Tanzanian president Julius Nyerere and former Kenyan president Daniel Arap Moi are also known to have denounced homosexuality as a phenomenon alien to Africa and therefore morally unacceptable. It is no wonder then that homosexuality is illegal in thirty-eight of Africa's fifty-three sovereign states Uganda inclusive. This paper however is focused on the enjoyment and realization of the right not to be discriminated by sexual minority groups in Uganda.

Tamale¹⁹ concentrated on the fact that many Africans today believe that whites introduced homosexuality to the continent during colonialism, abusing their power and wealth to corrupt the traditional African way of life. The objective was to show that Africans knew of and practiced and even in some cases honored sexual relations between males or between females long before whites ever arrived. Tamale further states that homosexuality in Uganda predates colonialism and other forms of subjugation. This study however focuses on the realization of the right not to be discriminated by sexual minority groups in Uganda.

Makau²⁰ probes the cultural, social and legal bases for homophobia in Africa and argues for inclusivity of homosexuality in the understanding of sexual orientation. He acknowledges the deep-seated nature of homophobia in Africa, but contends that there is nothing inherently African about it. The object of his scholarly work was to find out whether the law should protect other forms of sexual orientation apart from heterosexuality. Even with the study about homophobia in Africa, Makau did not assess the realization of the right not to be discriminated by sexual minority groups in Uganda.

De vos²¹ argues strongly for legal protection of sexual minorities. He identifies law as a tool that can be employed in protecting gays and lesbians. His writing does not, however, assess the enjoyment and realization of the right not to be discriminated by sexual minority groups in Uganda. De Vos further argues that the importance of having

¹⁹ Tamale Sylvia, "Out of the Closet: Unveiling Sexuality discourses in Uganda," *Feminist Africa* 2 (2003): 42-49.

²⁰ Mutua, Makau, "It is nonsense to assert that being gay is unafican" *Sunday Nation*, October 31, 2009.

²¹ P De Vos "the legal construction of gay and lesbian identity and South Africa's transitional constitution" (1996) 12 *South African Journal on Human Rights* 265.

legal protection for gays and lesbians cannot be overemphasized. He points to the fact that the law is an important tool around which gays and lesbians can organize to attain legal equality. This however has not been effective in Uganda because various cases of discrimination against sexual minorities are portrayed even with the non-discriminatory laws in place hence the reason for this study.

Quansah²² focused on contrasting the attitude of the judiciary in Zimbabwe, Botswana and South Africa with regard to the protection of sexual minority rights and concludes that courts in South Africa are more prepared to protect those rights than in the other two countries. The objective of Quansah's research was to find out how and why courts in South Africa are very prepared to protect sexual minority rights. This study agrees with Quansah's position and extends the debate further, that judges must give effect to international human rights treaties as well. He postulates that this is because the South African Constitution expressly recognizes the rights of sexual minority rights while the other two do not. The paper however does not specifically discuss the right to non-discrimination hence the basis for this research paper which is going to assess the enjoyment and realization of the right not to be discriminated by sexual minority groups in Uganda.

Ako²³ has done a comparative study of the situation in Uganda, Malawi, South Africa and Botswana. While some of the issues under discussion may coincide with this study such as the non-discriminatory laws and attitudes towards LGBTQI individuals, the current specifically assesses the realization of the right to non-discrimination of sexual minority groups in Uganda.

Cameron²⁴ argued that sodomy should be decriminalized because it treats homosexuality as an insult. These views are pertinent in the application of salient constitutional provisions to anti-sodomy laws. Writing later,²⁵ he stated that the African

²² EK Quansah "Same-sex relationships in Botswana: Current perspectives and future prospects" (2002) 4 Africa Human Rights Law Journal 201.

²³ EY Ako "The debate on sexual minority rights in Africa" 2010.

²⁴ E Cameron "Un-apprehended felons: Gays and lesbians and the law in South Africa" in M Gessiver & E Cameron (Eds) Defiant desire: Gay and lesbian lives in South Africa 90.

²⁵ E Cameron "Constitutional protection of sexual orientation and African concepts of humanity" (2001)

concept of "Ubuntu" or oneness ought to galvanize people towards the protection of sexual minority rights. The objective of Cameron's study was to advocate for the extension of the principle of Ubuntu to the protection of the rights of sexual minority groups. This appears risky because much of the vitriol directed against homosexuality and "unconventional" gender identity arises from the characterization of these as un-African, alien and inimical to African cultural values.²⁶ This research paper however is aimed at identifying different forms of discrimination and assessing the enjoyment of the right not to be discriminated by sexual minority groups in Uganda.

Chilisa²⁷ makes the point that criminalization of homosexuality reinforces the societal prejudices and stigma against sexual minorities. His objective was to implore the judiciary in a constitutional democracy to 'vigorously protect constitutional rights without fear or favor'. The essence of Chilisa's contribution to the debate is that the judiciary in a constitutional democracy should not pander to 'popular subjective views' about legal issues before them and should interpret the bill of rights to protect the rights of sexual minorities. This study takes a similar position and adds that the judiciary must also be guided by the international human rights treaties that their countries are state party to. Furthermore, this paper goes ahead to assess the extent to which the right to no discrimination is realized in Uganda by sexual minority groups.

Ann C. McGinley discusses how workplace discrimination law applies to the different groups of individuals who do not fit within binary conceptions of gender or sex-lesbians, gays, bisexuals, transgender and intersex²⁸ individuals. The objective of the study was to analyze state anti-discrimination laws' treatment of these individuals at work, and uses masculinities and other gender research to provide a theoretical account that

118 South African Law Journal 642.

²⁶ L Keevy "Ubuntu versus the core values of the South African Constitution" (2009) 34(2) Journal for Juridical Science 44.

²⁷ MM Coilisa, "Two steps back for human rights: a critique of the Kananecas" (2007) 1 The Botswana Review of Ethics, Law and HIV/AIDS.

²⁸ Intersex individuals are persons born with indeterminate sex because their chromosomes do not match their genitalia or their genitalia is ambiguous, or they carry an extra chromosome or a mosaic chromosomal pattern. Catherine Harper, Intersex 9-12 (2007); ebook published 9 2020.

<https://www.taylorfrancis.com/books/mono/10.4324/9781003103554/intersex-catherine-harper> accessed 3/22/2023.

explains, at least in part, discrimination against members of these groups. However much this paper is partly in line with Ann's scholarly work, the study goes ahead to discuss any forms of discrimination that can happen to sexual minority groups in Uganda apart from the discrimination in work places which Ann focuses on.

Given all the above scholarly work on the subject matter of Minority groups not only in Uganda, but also all over Africa and other continents, the problem of non-realization of the right to non-discrimination by sexual minority groups in Uganda hasn't been well studied and hence the purpose of this research.

1.9 Limitation of the study

Sexuality is a very sensitive area of research especially in African societies like Uganda where a lot of people do not feel comfortable talking about their sexuality. To make matters worse, this research is targeted to the sexual minorities in Uganda who are facing a lot of Stigma, intimidation and therefore it is hard to gather information which would have been essential to this research paper.

The other limitation is the aspect of time period in which this research is to be gathered and submitted. A period of one month is not sufficient enough to come up with deeply researched work, which might lead to missing of certain aspects which would have been of essence to the research paper.

2.0 Chapterization

This study is divided into five chapters;

Chapter one gives the overview of the study, the general introduction, statement of the problem, objectives of the study, research methodology, and significance of the study and literature review.

Chapter Two shall analyze Uganda's policy and legal framework on non-discrimination.

Chapter Three shall assess the enjoyment and realization of the right to

non-discrimination by sexual minority groups in Uganda.

Chapter Four shall discuss the extent to which Uganda's legal framework has protected sexual minorities from discrimination

Chapter Five shall conclude the study that covers the recommendations on what can and should be done to improve the realization of the right to non-discrimination by sexual Minority groups in Uganda.

CHAPTER TWO

AN ASSESSMENT OF THE POLICY AND LEGAL FRAMEWORK FOR HUMAN RIGHTS IN UGANDA.

2.1 Introduction

Uganda under chapter 4 of the 1995 constitution of Uganda as amended recognizes various forms of human rights. The same constitution establishes the Uganda Human Rights commission under Article 51 and its functions stipulated under Article 52. The 1995 constitution further provides under Article 79 that parliament shall make laws on any matter for the peace, order, development and good governance of Uganda. It is therefore parliament's duty to make laws that promote human rights in Uganda other than those that limit the enjoyment of these rights. The constitution of Uganda under Article 50 provides for the enforcement of human rights by courts of law. It is therefore evident as will be discussed in this chapter that Uganda recognizes different human rights and freedoms.

2.2 Meaning of the term Human Rights

The apparent difficulty to identify human rights has reduced their definition to a subject of great controversy among scholars.²⁹ The Black's Law dictionary³⁰ defines Human rights as the freedoms, immunities, and benefits that, according to modern values all human beings should be able to claim as a matter of right in the society in which they live. It has further been suggested that Human rights are those entitlements individuals possess by virtue of being human.³¹ Human rights can also be defined to mean liberties,

²⁹ A Brendalyn, *Democratisation and the Protection of Human Rights in Africa* (1995).
<https://www.amazon.com/Democratization-Protection-Human-Rights-Africa/dp/027595143X> accessed 3/22/2023.

³⁰ Bryan A. Garner, 'Black's Law Dictionary' 11th Edition. Page 889.

³¹ Brendalyn (n 29).

immunities and benefits which by accepted contemporary values, all human beings are able to claim as of right of the society in which they live.³²

2.3 A brief background on the genesis and development of the concept of Human rights.

Every person has life and dignity. The norms and principles of human rights have been gradually developed by humanity as a way to confirm that the life and dignity of each human being, without any sort of distinction, is properly and equally revered and developed. In other words, it implies that men are free to develop and utilize human inherent qualities.³³

The belief that everyone, by virtue of her or his humanity, is entitled to certain human rights is fairly new and is something stemming from an evolution of the consideration of human dignity over the last centuries. Its roots lie in earlier tradition and documents of many cultures. Origins of Human Rights are ideally pinpointed to the year 539 BC. When the troops of Cyrus the Great conquered Babylon. Cyrus freed the slaves, declared that all people had the right to choose their own religion, and established racial equality. These and other principles were recorded on a baked-clay cylinder known as the Cyrus Cylinder, whose provisions served as inspiration for the first four Articles of the Universal Declaration of Human Rights.³⁴

Another cornerstone in Human Rights History is represented by the promulgation of the Magna Charta in 1215 which introduced a raw concept of “Rule of Law” and the basic idea of defined rights and liberties to all persons, which offers protection from arbitrary prosecution and incarceration. Before the Magna Charta, the rule of law, now considered as a key principle for good governance in any modern democratic society, was perceived as a divine justice, solely distributed by the monarch or the king or, in this

³² Morris Mbondenyei, *International Human Rights and Their Enforcement in Africa* (LawAfrica) 15.

³³ Dr Kaushik Mitra and Dr Anshu Daud, 'Human Rights: The Genesis' (2018) 4 Ijariie.

³⁴ Marco Sutto, 'Human Rights Evolution, a Brief History' (2019)

<<https://www.coespu.org/articles/human-rights-evolution-brief-history#:~:text=The%20origins%20of%20Human,religion%2C%20and%20established%20racial%20equality.>> accessed 19 February 2023.

case, King John of England.³⁵

2.3.1 Historical Development of Human Rights

The idea of human rights has its roots in Greece philosophy of 'Antiquity'. Already in ancient Greek philosophy more than 2000 years ago, it was developed by the idea 'equality of all people', which implies, the idea of natural law that belongs to every man. That tradition natural law experienced its further development in early Christianity and other religions - God created all people as equals and as a model of himself, and this initiated in forming the root of the idea of human rights.³⁶

It is in this historical period that the concept, mostly based on political concerns, of Civil and Political Rights was defined. These rights, also known as first generation rights, recognize the existence of certain things that the all-powerful rulers should not be able to do and that people should have some influence over the policies affecting them. The two central ideas were those of personal liberty, and of protecting the individuals against violations by the State. They serve negatively to protect the individual from excesses of the State.³⁷

Significant is the adoption of the first three Geneva Conventions and The Hague Conventions expressing the deep concern of the public opinion to promote a respect of a basic level of Human dignity of individuals even in wartime and posing the foundations of modern International Humanitarian Law. The concerns over the protection of certain minority groups, which were raised by the League of Nations at the end of the First World War, and the establishment of the International Labor Organization (ILO) to oversee treaties protecting workers with respect to their rights, including their health and safety, manifest the increased positive attitude toward the recognition of the importance of Human Rights as we know them today.

The time for a revolution and a deep progress in the protection and promotion of human

³⁵ *ibid.*

³⁶ Mitra and Daud (n 33).

³⁷ Sutto (n 34).

dignity was ripe. Eventually, it took the catalyst of World War II to propel human rights onto the global stage and into the global conscience. The unprecedented cruelties perpetrated during the conflict and outside it such as the extermination by Nazi Germany of over six million Jews, Sinti and Romani (gypsies), homosexuals, and persons with disabilities horrified the world. The idea of human rights thus emerged even stronger than ever after World War II. The Trials held in Nuremberg and Tokyo after World War II, introduced the rather new concepts of "crimes against peace," and "crimes against humanity."

Governments then committed themselves to establishing the United Nations, with the primary goal of bolstering international peace and preventing conflict. People wanted to ensure that never again would anyone be unjustly denied life, freedom, food, shelter, and nationality.³⁸

2.3.2 Historical Legal Documents of Human Rights

As early as 1215, the English nobility, through Magna Charta, took away certain rights from King John without extortion. The document of Petition of Rights (1628) guarantees the inviolability of the citizen, while the Habeas Corpus Act (1679) was a turning point for establishing the idea of human rights in specific state law. This act protected a citizen from arbitrary arrest and prosecution. These rights were also valid in the English colonies, and in the United States of America. During the struggle for independence in the USA, the Catalogue of Human Rights was formulated for the first time in history. This list of human rights directly referred to the ideas of the English philosopher and champion of individual rights, John Locke. The Virginia Bill of Rights (1776), along with the document on the American Declaration of Independence, in the same year, are most important documents in the history of human rights.³⁹

In the Virginia Bill of Rights, the following rights were declared Inalienable Human Rights and constituted the core of human rights:

³⁸ *ibid.*

³⁹ Mitra and Daud (n 33).

- right to life,
- freedom and privacy of ownership;
- freedom of assembly and freedom of the press;
- freedom of movement and the right to petition;
- the right to legal protection;
- voting right

Furthermore, the 1945 and the fifty founding members of the United Nations stated, in the preamble of the UN Charter, that they were determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained in order to promote social progress and better standards of life in larger freedom.

In the first Article of the same Charter, Member states pledged “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

A strong political commitment was set and to advance on these goals, a Commission on Human Rights was immediately established and charged with the task of drafting a document spelling out the meaning of the fundamental rights and freedoms proclaimed in the Charter. Three years later, The Commission, guided by Eleanor Roosevelt’s forceful leadership, captured the world’s attention, drafting the 30 Articles that now make up the Universal Declaration of Human Rights.

The Declaration was presented to the world, acting for the first time as a recognized



and internationally accepted charter, whose first Article states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

The UDHR, although not legally binding, introduces the concept that how a government treats its own citizens is now a matter of legitimate international concern, and not simply a domestic issue, and that the exercise of a person's rights and freedoms may be subject to certain limitations, which must be determined by law, solely for the purpose of securing due recognition of the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Its Preamble eloquently asserts that: recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. It restates the already identified civil and political rights and introduces the so-called second-generation rights, fundamentally economic, social, and cultural in nature, furthermore claiming that all rights are interdependent and indivisible.

The message was clear and powerful, the realization of one Right is linked to the realization of the others. All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Similarly, the deprivation of one right hampers the improvement and enjoyment of the others.

The influence of the UDHR has been substantial and together with the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights it constitutes the so defined “International Bill of Rights” that lays down the obligations of Governments to act in certain ways or to refrain from specific acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Its principles, by now, have been incorporated into the Constitutions of almost all the UN members and has achieved the status of customary international law regarded as a common standard of achievement for all people and all nations.

Human Rights have continued to evolve and, since its foundation, the United Nations has adopted more than 20 principal treaties including conventions to prevent and prohibit specific abuses like torture and genocide and to protect particularly vulnerable populations, such as refugees (Convention Relating to the Status of Refugees, 1951), women (Convention on the Elimination of All Forms of Discrimination against Women, 1979), and children (Convention on the Rights of the Child, 1989).

A multitude of other treaties and documents have clarified and further developed some of the basic concepts that were laid down in the original UDHR, thus envisaging new generations of rights. These additions have been a result of a number of factors, partly as a response to progressively modified ideas about human dignity, and partly as a result of new emerging threats and opportunities. As far as for the specific new category of rights, that have been proposed as third generation rights, these have been the consequence of a deeper understanding of the different types of obstacles that may stand in the way of realizing the first and second-generation rights. The idea at the base of the third generation of rights is that of solidarity and collective rights of society or peoples, such as the right to sustainable development, to peace or to a healthy environment.

In much of the world, conditions such as extreme poverty, war, ecological and natural disasters have meant that there has been only very limited progress in respect of human rights. For that reason, people have felt necessary the recognition of a new category of human rights.

Fortunately, it is nowadays clear that what human dignity means, how to protect and promote it, is a concept that, albeit rooted within the principles of the UDHR, is in constant evolution in accordance with the new necessities. There is a need for a comprehensive response and while the international community is still discussing about 4th generation rights it is the researchers' belief that there will be room, in the

future, for the fifth and, hopefully, for further generations of Human Rights.

2.3.3 Philosophical Legal thought

Ancient philosophical and legal thought portrays the concept of rights in the sense of justice and law, but they ignored the concept of rights in the sense of authorization. Many philosophers have dealt with the topic of human rights. The English philosopher John Locke (1632-1704) was one of such pioneers. For him, right to life, liberty and private property, are immovable and inalienable human rights. The purpose of every state is to protect the natural human rights. He with his political philosophy, obliges the state to protect human rights, makes a decisive move from the abstract idea of human rights to its concrete achievements, within the state in the form of rights guaranteed by it. Locke also defends the principle of constitutional limitation of state power and legal resistance.

John Locke states three natural law;

- The first and fundamental law of nature is sustaining humanity. God created all people for a specific purpose; a necessary condition that people achieve to continue living.
- The other natural law is the maintenance of society, from which follows the duty of man to maintain society.
- The third natural law expresses man's duty to worship and praise God. While the first two fall under natural law and is the basis for natural rights, it is the third natural law which forms the basis for Christian life of an individual, and has no direct role in determining human rights.

The preservation of every human being entails three natural rights:

- legal maintenance,

- The right to freedom of maintenance of oneself, and
- The right to material goods necessary for one's maintenance.

In the state of nature, according to Locke, these demands of life, liberty and property are shaped and regulated in a natural way. The legislator fulfils their duty to achieve the common good by maintaining life, liberty and possessions. These ideas of John Locke were accepted by the constitutionalists in England and the United States of America and thus incorporated them in its basic legal documents.⁴⁰

2.4 Categories/ generations of Human rights.

The development of subjective rights, in terms of number, content and completeness of their function is strongly connected to the disequilibrium of the relationships between the individual (the citizen) and the social group (state), and it can astonish the evolution, in terms of human history. In ancient times, the balance between the individual (citizen) and social group (state) was clearly in favor of the state. Individual rights were subordinated to the interest of the "fortress".⁴¹

In the medieval period, personal safety and private property were at the arbitrary disposal of the sovereign who had absolute rights without limits, the right to life and death over their subjects. This period generally is characterized by the existence of the right to force itself and not the force of law, subordinating rights of circumstance, to servitude towards the absolute monarch (monarchy by divine right).⁴²

2.4.1 First Generation of Subjective Rights

The first generation of subjective rights is the generation of civil and political rights acquired through the force of writing and of arms. Once time passed and ideas and

⁴⁰ *ibid.*

⁴¹ Vasile Cornescu Adrian, 'The Generations Of Human's Rights' [2009] Brno: Masaryk University 11. https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/tvorba_prava/Cornescu_Adrian_Vasil_e.pdf accessed 3/22/2023.

⁴² Silvia Castignone, *Introduzione Alla Filosofia Del Diritto* (Ed Laterza 2004).

concepts about state were developed, political power, and right and freedom (the works of philosophers John Locke, Ch. Montesquieu, Th. Hobbes, JJ Rousseau), appeared a fight against monarchical absolutism, struggle which will be successful, success expressed by documents with legal force as: Magna Charta in 1215, Petition of Rights in 1628, The Bill of Rights (Declaration of Rights) in 1689, England, The American Declaration of Independence in 1776 and The French Declaration of Human and Citizen Rights in 1789. Through these laws, early forms of limitation of absolute power of the state were portrayed and these included safeguards against the introduction of taxes by the king without the approval of Parliament, established safeguards against arrest of persons and confiscation of assets without observance of procedure of courts, they also supported and declared the freedom of speech, thought and the right to petition and lastly principles of individualism starting from the idea expressed by the French Declaration of Human and Citizen Rights in 1789.⁴³

The French Declaration of Human and Citizens Rights from 1789 contained two new ideas: 1. the idea that man as an individual, benefits of "natural rights, inalienable and sacred" including liberty and equality;

2. The second idea is that the "purpose of all political associations is the preservation of the natural and inalienable rights of man"⁴⁴. There are two categories of rights which the Declaration of Human and Citizens Rights from 1789 is referring to:

1. civil rights or human rights as: - Freedom of opinion (Article 10) - Freedom of expression and press (Article 11) - Personal ownership (Article 17) - The right to personal security in relation to justice and police (art. 7-9) - Equality before the law (Art. 6) 2. political rights, those that allow citizen participation at power, namely: - Equal access to public (Article 6) - Participation in elaboration of laws (Article 6) - Control of taxes (art. 13-14) - Citizen control over the administration (Art. 15) These rights represent the first generation of subjective rights, and more precisely those rights that refer to personal autonomy of the individual and the rights that enable citizen participation in power in a society where "the exercise of natural rights of each man has

⁴³ Adrian (n 41).

⁴⁴ UDHR, Article 2.

no limits, than those which ensure for the other members of society the same rights" (Article 4).

In the modern age, these rights have found their consecration in constitutions and in the laws of most countries, as well as in international documents. Among them we mention:

- The Universal Declaration of Human Rights U.N. The International Pact on Civil and Political Rights. At regional level in Europe, there were created legal mechanisms for protecting these rights: the system of the Council of Europe and of European Court of Human Rights, based on European Convention of human rights and The Additional Protocols of this Convention. In the system of protected rights which belong to the first generation protected by the European Convention on Human Rights and by The Additional Protocols to this Convention we mention:

1. The right to life, the Right to privacy; Prohibition of torture and inhuman or degrading punishments; Prohibition of slavery and forced labor.

2. Freedom and security of a person. - The Right to a fair trial, the right to property of the person or of a legal person, Freedom of mind, of thought and religion, Freedom of expression and information and Freedom to free elections. This is the first generation of human rights.⁴⁵

2.4.2 Second generation of subjective Human rights

The second generation of human rights are the socio-economic and cultural rights. These rights come from positive law, as well as from international law (International Covenant on Economic, social and cultural). This dedication has not the same coverage, as in the case of first-generation rights, as consecration requires significant effort from the State and so it is appropriate to everyone's prosperity. The second generation of rights, against the first generation of rights requires institutional support from the state, the first-generation rights can be exercised independently and singular. The state must

⁴⁵ Adrian (n 41).

intervene through legislation to create an institutional system that allows the exercise, for example, of the right to education or retirement.⁴⁶

These rights include the right to work; freedom of association; the right to education, learning; the right to insurance for sickness, old age and disability (Social insurance).

2.4.3 Third generation of Human rights

The rights in this category cannot be exerted individually, but only by groups or collectivities of people. The third generation rights require not only the need to create an institutional support by the State, but, as in the case of second generation rights, they need to restrict the first generation of rights, through a so called “positive discrimination”, in the sense that these rights, like the rights of any minority, require a limitation of rights of first generation.⁴⁷ These include: the right of people to self-determination; the right to peace; the right to development; the right to humanitarian assistance; environmental law; the right of sexual minorities, ethnic, religious, linguistic, among others. These rights have a positive consecration, generally in international law.

The environmental law allows social groups to live in a healthy environment, clean, without harmful agents to health but, in the same time, involves a number of limitations of rights of first or second generation, like owning a forest or the right to work.

2.4.4 Fourth generation of Human rights

In this category are included the so called “rights related to genetic engineering”, rights which are on the doctrinal debate in what regards their recognition or prohibition of certain activities. We could put in the same category the so-called rights of future generations, as well as rights that cannot belong to an individual nor to social groups, including nations, do they belong only to humanity as a whole. The rights of humanity

⁴⁶ *ibid.*

⁴⁷ *ibid.*

would treat the common assets of the whole humanity.⁴⁸

2.5 The policy and legal framework for the enjoyment and realization of the right not to be discriminated in Uganda.

Uganda under the 1995 constitution as amended recognizes the right to non-discrimination under Article 21 which provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

It is further stated under clause 2⁴⁹ that a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

Article 21(3)⁵⁰ defines discrimination to mean giving different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

In the case of *Kasha Jacqueline*⁵¹, Hon. Justice V. F. Musket Kabuki made it clear that the rights in the constitution apply equally to everyone regardless of sexual orientation. He stated inter alia that, "With regard to the right to privacy of the person and home, under Article 27, of the Constitution, court has no doubt, again using the objective test, that the exposure, of the identities of the persons and homes of the applicants for the purposes of fighting gays and the activities of gays, as can easily be seen from the general outlook of the impugned publication, threaten the rights of the applicants to privacy of the person and their homes. They are entitled to that right." From the above case it is ascertained that all rights provided for under the constitution apply to everyone and are not selective of one's sexual orientation.

⁴⁸ *ibid.*

⁴⁹ The Constitution of Uganda 1995.

⁵⁰ *ibid.*

⁵¹ *Kasha Jacqueline, Pepe Onziema & David Kato v Giles Muhame and the Rolling Stone Publication Ltd* (High Court Miscellaneous Cause No 163 of 2010).

Furthermore, Uganda is a signatory to International and regional instruments that call for non-discrimination which include, the Universal Declaration of Human Rights 1948 under Article 1, the International Covenant on Civil and Political Rights (ICCPR) Article 14(1), and the African Charter on Human and Peoples Rights under Articles 2, 3, 5 and 6. The same are set out here below: -

Article 2(1) of the International Convention on Civil and Political Rights to which Uganda is a state party also recognizes the right to all persons to enjoy the rights recognized in the Covenant without distinction of any kind, such as race, color, sex or religion. Article 26 of the Covenant provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Article 1 UDHR states that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 14(1) ICCPR stipulates that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligation in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Articles of the African Charter:

Article 2 states that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, or any other opinion, national or social origin, fortune, birth or other status.

Article 3 provides that every individual shall be equal before the law and shall be entitled to equal protection of the law.

Article 5 goes ahead to stipulate that every individual shall have the right to the respect of dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman and degrading punishment and treatment is prohibited.

Article 6 states that every individual shall have the right to liberty and to the security of his person.

We note that all the above international and regional instruments have as one of their core principles respects for human rights and fundamental freedoms without discrimination.

The UDHR stipulates that all human beings are born free and equal in dignity and rights. The ICCPR and the African Charter provide for equality before the law and equal protection of the law and non-discrimination.

The Vienna Declaration and Program of Action 1993 captured it aptly when it declared that “all human rights are universal, indivisible, interdependent, and interrelated.” Indeed, the above principles are enshrined in the various Articles of the 1995 Constitution quoted throughout this study.

In *Toonen v Australia*⁵², the UN Human Rights Committee, which monitors state compliance with ICCPR, confirmed that sexual orientation is a prohibited ground of discrimination under the above-mentioned Articles. The UN Human Rights Committee has since urged states to enshrine the prohibition of discrimination based on sexual orientation into their constitution or other fundamental laws.

From the above, I note that Uganda heard the call of the UN in the *Toonen* case⁵³ and enshrined Article 21⁵⁴ which calls for the right to non-discrimination and this has been reincarnated in the courts decisions as illustrated in below.

2.6 A discussion of case law in Uganda that entrenches the right not to be discriminated in Uganda.

First reference is made to *Bwegye v Bishop Stuart University*⁵⁵ where the

⁵² *Toonen v Australia* (UN Human Rights Committee, Communication No488/1992).

⁵³ *ibid.*

⁵⁴ The Constitution of Uganda.

⁵⁵ *Bwegye v Bishop Stuart University* (Equal opportunities Commission Tribunal) 2018.
<https://ulii.org/ug/judgment/equal-opportunities-commission/2018/1> accessed 3/22/2023.

Complainant's case was that some provisions of the Respondent University's Guild Constitution are discriminatory because they ring-fence certain positions on the Guild Executive exclusively for students who belong to the Anglican faith. The complainant therefore contended that the provisions and requirements referred to herein were discriminatory and amounted to nullification of equal opportunities as they seek to exclude students who do not belong to or profess the Anglican faith from contesting for the listed Guild positions. The Complainant prayed that the Commission declares the impugned provisions discriminatory and accordingly nullifies them. It was held by the tribunal that the impugned provisions of the Respondent's Guild Constitution are discriminatory and amount to impairment of equal opportunities contrary to Article 21 of the Constitution of Uganda, Sections 1 and 14 (1) and 23 of the Equal Opportunities Act, 2007; Articles 2 and 3 of the African Charter on Human and Peoples Rights, Articles 2 (1) and 26 of the International Covenant on Civil and Political Rights, 1966, and Article 2 of the Declaration on the Elimination of all Forms of Discrimination Based on Religion or Belief, 1981. This is a clear indication of the viability of the right to non-discrimination in Uganda.

*Adrian Jjuuko v Attorney General*⁵⁶, the case was field on 5th January 2009 in the Constitutional Court of Uganda. Section 15(6)(d) of the Equal opportunities commission Act was argued as being inconsistent with Article 20(1) of the Constitution of the Republic of Uganda 1995 which recognizes the inherent nature of human rights, Article 21(1) which guarantees equality of all persons before and under the law, Article 21(2) which prohibits discrimination that negates equal protection of the law, Article 28(1) which guarantees the right to a fair hearing before an impartial tribunal and Article 36 which protects the rights of minorities. This section blocked the Equal Opportunities Commission from investigating matters involving behavior that is regarded as 'immoral or socially unacceptable' by the majority of cultural groupings in Uganda. This simply defeats the whole purpose of the commission which is to 'eliminate discrimination and inequalities against any individual and take affirmative action in favor of groups marginalized on the basis of sex, gender, age, disability or any other reason created by

⁵⁶*Adrian Jjuuko v Attorney General* Constitutional Court Petition No.1 of 2009.



history, tradition or custom for the purpose of redressing imbalances which exist against them'. The Constitutional Court in 2016, found that the provision was against the right to a fair trial and the freedom from discrimination as it excluded groups from accessing the Commission. It is therefore evident the Ugandan courts of law have continued to uphold the right to non-discrimination as being discussed in this study

Furthermore, in the case of Hon. Justice (Rtd) Bamwine v Attorney General⁵⁷, the Petitioner brought this petition under Article 2 (2), Article 137(3)(a)(b) of the Constitution of the Republic of Uganda 1995 (herein after referred to as the "Constitution") and Rules 3(l), (2) of the Constitutional Court (Petitions and References) Rules, in which he alleged that sections 22 and 25 and Schedules 2 and 5 of the Administration of the Judiciary Act, 2020 are inconsistent with and contravene Articles 21(1), 2 (f) 40 (1) (b) and 128 (7) of the Constitution for being discriminatory in nature. Justice Kibeedi noted that "Article 21 of the Constitution of the Republic of Uganda, by guaranteeing equality and freedom from discrimination, was not intended to mean equal treatment to all persons in all the different aspects of lives.

In a society which is heterogeneous, same treatment of "unequal" persons inevitably leads to different unintended consequences for the different persons. It is a recipe for creation of "unintended inequality" and greater injustice in the name of equality. This could not have been the intention of the framers of the Constitution when enacting Article 21." Furthermore, Justice Madrama, noted that the differential treatment which is prohibited by Article 21 is that which relates to personal attributes of "sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic stand in opinion or disability".

Therefore, this paper aims at discrimination on the basis of sex which is within the scope of categories of discrimination that are covered under Article 21⁵⁸ as stated by Justice Madrama⁵⁹.

⁵⁷ *Hon Justice (Rtd) Dr Yorokamu Bamwine v Attorney General* [2022] Constitutional Court of Uganda constitutional petition number 15 of 2021.

⁵⁸ The Constitution of Uganda.

⁵⁹ *Hon Justice (Rtd) Dr. Yorokamu Bamwine v Attorney General* (n 57).

2.7 Conclusion.

In conclusion of this chapter, the legal and policy frameworks of Uganda have been discussed and from the above discussion it is evident enough to conclude that Uganda recognizes the right to non-discrimination on the basis of sex which is the gist of this research paper because even with the existence of these laws, Sexual minority groups still face the problem of discrimination as it is illustrated in the following chapter.



CHAPTER THREE

AN EXAMINATION OF THE CURRENT STATUS OF THE RIGHT NOT TO BE DISCRIMINATED BY SEXUAL MINORITY GROUPS.

3.1 Introduction

This chapter shall cover the meaning of the term sexual minority and the different categories of sexual minorities. It shall further illustrate the different reported cases of discrimination of sexual minorities and challenges faced by these minority groups when realizing the right not to be discriminated in Uganda. Lastly, this chapter shall be concluded by discussing the best practices of protecting rights of sexual minorities from other jurisdictions.

3.2 Meaning of the term sexual minority groups.

The term “sexual minority” has no legal definition but it is drawn from various scholarly sources for the better understanding of the study. Wikipedia⁶⁰ defines a sexual minority as a group whose sexual identity, orientation or practices differ from the majority of the surrounding society. Another definition thought closely related to the first is that Sexual minorities are groups of people whose sexual orientation, gender identity, or sexual characteristics are different from the presumed majority of the population, which are heterosexual, cisgender, and non-intersex individuals.⁶¹

3.3 Types of sexual minority groups.

The concept of sexual and gender minorities includes considerable diversity as well as

⁶⁰ Wikipedia, 'Sexual Minority' <https://en.wikipedia.org/wiki/Sexual_minority>accessed 5 February 2023.

⁶¹ Elizabeth Hartney, 'Sexual Identity' <<https://www.verywellmind.com/what-are-sexual-minorities-21876>>.



a multiplicity of identities and behaviors, including lesbians, gay men, bisexuals and transgender people (LGBT); intersex people (people whose bodies do not have typically male or female sex characteristics due to variations in chromosomes, gonads, sex hormones and/or genitals); gender non-conforming people who may not see themselves as transgender; and people involved in same-sex relations who may not see themselves as lesbian, gay or bisexual, possibly preferring another word to self-identify or possibly preferring no label at all.⁶² Some authors use a more expansive definition of sexual and gender minorities, including for example asexual people (those without sexual feelings or associations) and sex workers. This research paper however, does not cover asexual persons and sex workers even when asexual people suffer from social exclusion due to cultural pressure to marry and have children, while people involved in sex work often suffer multiple forms of exclusion.

3.4 Reported cases of discrimination of sexual minorities in Uganda.

Given the legal and policy frameworks in Uganda against discrimination of persons on grounds of sex, various forms of discrimination have continuously been attributed to the sexual minority groups in Uganda. Some of these reported cases are going to be illustrated here under. It is however noted that, most cases are not reported because of the criminalization of carnal knowledge against the order of nature (section 145)⁶³ which therefore prevents such persons from seeking for justice or help from bodies like the Police which continuously harasses minorities⁶⁴ and therefore the members of the LGBTQI+ community have to deal with these injustices internally which affects their mental health.⁶⁵

⁶² Jeffrey O'Malley and Andreas Holzinger, 'Sexual and Gender Minorities and the Sustainable Development Goals'.
https://www.undp.org/sites/g/files/zskgke326/files/publications/SDGs_SexualAndGenderMinorities.pdf
accessed 3/22/2023.

⁶³ Penal Code Act of Uganda.

⁶⁴ 'Uganda Arrests 44 at Alleged Gay Wedding' (n 4).

⁶⁵ *Victor Mukasa & Yvonne Oyo v Attorney General* (High Court of Uganda (Civil Division) Misc Cause No247/06). Police arbitrarily arrested and detained Oyo Yvonne and took her to LC1 Chairman's office where she

3.4.1 Discrimination from Religious Institutions

Discrimination within religious institutions which is a contravention of the freedom of religion (Article 29).⁶⁶ It is no lie that homosexuality has been denounced in Uganda on grounds of religion. The Christians base their denunciation on the bible. They claim that the cities of Sodom and Gomorrah in the bible were destroyed because of homosexuality.⁶⁷ In the book of Leviticus 18:22-23 and Romans 1:26-27 homosexuality is an abomination. The Ugandan Christian churches cannot bless a marriage between two people of the "same sex". The Church of England's national assembly on Thursday 9th February 2023, voted to let priests bless same sex marriages⁶⁸. However, following this, Uganda's Archbishop Samuel Stephen Kaziimba Mugalu denounced the Church of England over homosexuality.⁶⁹ He is quoted to have said "And, if they refuse to repent, then we call on them to have the integrity to form their own Canterbury Communion because what they believe is not Anglicanism and it is not the faith once delivered to the saints. If they want to take their whole church into the belly of a whale, they are free to do that; we are, after all, autonomous Anglican provinces. They are not free to drag the whole Anglican Communion with them. The Anglican Communion is not an extension of the Church of England, the Church of England has departed from the Anglican faith and are now false teachers," Kaziimba said. This criticism has focused

was subjected to humiliating and degrading treatment by denying her access to the toilet before taking her to the Police where she was forced to undress in the gaze of the public in order "to prove that she was a woman.

⁶⁶ The Constitution of Uganda.

⁶⁷ *Bible Gateway* <<https://www.biblegateway.com/passage/?search=Genesis%2019&version=NIV>> accessed 13 March 2023. Genesis 19.

⁶⁸ Danika Karka, 'Church of England Allows Blessings for Same-Sex Couples' <<https://apnews.com/article/anglicanism-england-london-lgbtq-people-marriage-382f4f61ed3f38cbf9df1c773164cb0f>> accessed 9 February 2023.

⁶⁹ 'Church of Uganda Denounces Church of England over Homosexuality' (The observer 2023) <<https://observer.ug/news/headlines/76901-church-of-uganda-denounce-canterbury-over-homosexuality>> accessed 7 March 2023.

particularly on same-sex marriage and related LGBT rights. Such stigma from religious institutions keeps sexual minorities in the closet hence discrimination on grounds of their sexual identity.

The Moslem community also terms homosexuality as unnatural, despicable and detested since it is with a person of the same sex. The Quran refers to homosexuality as a fahishah which is more than just a sin. And 'remember' when Lot scolded 'the men of' his people, 'saying, ' "Do you commit a shameful deed that no man has ever done before? You lust after men instead of women! You are certainly transgressors."⁷⁰ The Uganda Muslim Supreme Council (UMSC) issued a directive calling upon Muslims across the country to come out in large numbers to demonstrate against homosexuality. Mufti Mubaje noted that "We ask the government to keenly monitor some of the organizations. We cannot be better than God who created and eliminated the entire generation because of homosexuality (This was the generation of prophet Lot in Islam) because this is a very shameful act. Death sentence must be upheld,"⁷¹ Such homophobic statements from Religious leaders in Uganda limit the enjoyment of rights of sexual minorities hence discrimination on the basis of sex Orientation.

3.4.2 Arrests

Police officers in Uganda are responsible for the widespread application of public order laws (including charges such as "rogue and vagabond") in a discriminatory and selective fashion against LGBTI individuals. When faced with threatening situations, many LGBTI persons opt to relocate in order avoid confrontation with the police and others in their communities. The fear of being ousted has led to members of the LGBTI community to distrust the police and refuse to report to them when their rights are

⁷⁰ Quran Surah A 'araaf 7:80-81.

⁷¹ Muhamadi Matovu, 'Mufti Mubaje Calls for Closure of NGOs That Promote LGBTQ Rights in Uganda' <<https://nilepost.co.ug/2023/02/26/mufti-mubaje-calls-for-closure-of-ngos-that-promote-lgbtq-rights-in-uganda/>> accessed 2nd March 2023..

violated. This puts many LGBTI people at risk and denies them access to justice.⁷²

In one example, five men who were visiting a friend's home in Kampala on April 19, 2013 were surrounded by unknown individuals who threatened to burn the men the death in the house for supposedly promoting homosexuality. The incident was reported to the police, who failed to investigate the matter.⁷³

Furthermore, when a LGBTI organization's offices were broken into on December 26, 2012 and a number of items were stolen, including computers, Uganda Police Force officers visited the crime scene and took statements from three individuals associated with the organization.⁷⁴

In August 2012, police in the Ntinda neighborhood of Kampala arrested one of three men accused of the corrective rape of a lesbian woman. The woman's brother, having seen her in a bar with women he suspected to be lesbians, organized three men to gang rape her in the bathroom of the bar. The suspect was released after the victim decided to drop the case.⁷⁵

In all the above illustrated cases, the Police of Uganda has failed investigate and resolve any matter relating to human rights violations occurring to sexual minorities which illustrates the discrimination of sexual minority groups by the police of Uganda.

The Police has also been responsible for committing direct abuses against members of the LGBTI community.

On December 6th 2013, a gay man was summoned to a Kampala police station where he was arrested without being informed of the reasons for the arrest in violation of his constitutional right to be informed of the reasons for his detention.⁷⁶ Police officers then placed the man in handcuffs and drove him to his home, which they searched

⁷² 'Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation' (2014) <<https://www.kuchutimes.com/2019/11/ram125-67-remanded-to-luzira-prison/>> accessed 27th February 2023.

⁷³ CSCHRCL & HRAPF-Uganda, 'Protecting "Morals" by Dehumanising Suspected LGBTI Persons?' (2013). Case number: 2013-021.

⁷⁴ *ibid.* Case Number: 2012-021.

⁷⁵ *ibid.* Case Number: 2012-018.

⁷⁶ The Constitution of Uganda. Article 23(3).

without a warrant in breach of international protections against arbitrary interference with the home and the rights to privacy.⁷⁷ At the man's house, police arrested three men whom they found at the home on allegations of being involved in carnal knowledge against the order of nature –arrests that are considered arbitrary under international law. When the man and his companions were brought back to the police station, he was medically examined and given an HIV test without his consent in contravention of international and national prohibitions on non-consensual medical experimentation.⁷⁸ While in detention, all four men were paraded before the media an infringement of both privacy rights and the right to be presumed innocent until proven guilty.⁷⁹ Article 17 of the ICCPR along with the 1994 decision of the UN Human Rights Committee, *Toonen v. Australia*, which held that Articles 17 and 26 of the ICCPR prohibit discrimination on the grounds of sexual orientation. The Working Group on Arbitrary Detention found detention on the basis of sexual orientation to be in breach of Article 9 of the ICCPR protections against arbitrary arrest. From the above, it is evident that the actions of the police and the way the matter at hand was handled were discriminatory of grounds of

⁷⁷ As a component of privacy rights, Article 17 of the ICCPR proscribe arbitrary or unlawful interference with the home. ICCPR, Article. 17(1); Though the Constitution of the Republic of Uganda, Article. 27(1) (a) provides that: "No person shall be subjected to – (a) unlawful search of the person, home or other property of that person", Section 69 of the Magistrates Courts Act Cap 16 allows any police officer to conduct searches of the home of a person who has been arrested without a warrant if the police officer "has reason to believe that material evidence can be obtained in connection with an offence for which an arrest has been made or authorized." This power may be too broad and may not be in line with the international standards and even it may be unconstitutional in light of Article 27 of the Constitution.

⁷⁸ Involuntary HIV tests constitute a violation of the rights to bodily integrity and privacy, protected under articles 7 and 17 of the International Covenant on Civil and Political Rights, and Article 24 and 27 of the Constitution of the Republic of Uganda. This prohibition has been found to include the subjection of men suspected of homosexual conduct to non-consensual anal examinations to prove their homosexuality by the UN Committee against Torture and the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See OHCHR, Report on Sexual Orientation and Gender Identity, para. 37. Article 23(1) of the Constitution protects liberty of the person and prohibits its deprivation except under the exceptions listed there one of which is "For the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda."

⁷⁹ The police practice of allowing detainees to be photographed by journalists prior to being brought to court violates the right to be presumed innocent and the right to a fair trial, as well as the UN Standard Minimum Rules for the Treatment of Prisoners requirement that prisoners be protected from insult, curiosity and publicity in any form. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, Rule 45(1)

sex orientation contrary to Article 21 of the constitution of Uganda.⁸⁰

Another instance is where A man was beaten by a mob in Mbale in September 2009⁸¹ was arrested and detained at the local police station on charges of taking part in homosexual sex. The man was not provided medical treatment for his injuries while in detention, and he died a few days after being released on bond. A post-mortem was not carried out to establish the cause of death, and the case was never disposed of by the court in Mbale. This is a clear indication of the discrimination of the sexual minority groups in Uganda.

Furthermore, a 31-year-old lesbian woman who was arrested in June 2010 at the insistence of her mother, who accused her of recruiting young girls into homosexuality, was held for a week without charge at Mukono Police Station, where she reported that she had been denied food, beaten, and sexually assaulted by police officers.⁸² This violates the right to fair hearing where the accused must be produced to court within 48 hours.⁸³

In May 2022, 44 people were arrested under the guise of violating COVID-19 regulations for attending a gathering in a shelter, which the police claimed was a same-sex marriage. Forty-two people were charged under section 171 of the Penal Code, which criminalizes acts “likely to spread infection of disease”. At least 17 of the accused were subjected to forced anal examinations despite the fact that there were no charges under anti-LGBT laws, and were transferred to a prison where they were held in unsafe conditions. On 4 June the detainees were granted bail and were later released.⁸⁴

In 2019, On 21 October, 16 LGBT activists were arrested on suspicion of engaging in same-sex sexual activity in what fellow activists called an escalating campaign against sexual minorities. The 16 men, believed to be aged between 22 and 35, were arrested at the office of a sexual health charity (Let’s Walk Uganda) where they all worked and lived.

⁸¹ CSCHRCL & HRAPF-Uganda (n 73). Case Number: 2009-005.

⁸² *ibid.* Case Number: 2011-003.

⁸³ The Constitution of Uganda. Article 28.

⁸⁴ ‘Uganda Arrests 44 at Alleged Gay Wedding’ (n 4).

On 24 October, police spokesperson Patrick Onyango indicated that officers had found lubricants, condoms and antiretroviral drugs at the charity, and had conducted medical examinations on all 16 people. “Based on the medical examination report, it was established that the suspects were involved in sexual acts punishable under the penal code,” he said.⁸⁵

Uganda activist Frank Mugisha noted that mass arrests were a new phenomenon in Uganda, reporting that the 16 individuals were held by police for over 48 hours and forced to undergo anal ‘examinations.’⁸⁶ All 16 activists were initially taken into “protective custody” after a crowd yelling homophobic slurs surrounded their office, rights groups said. Police said the group was detained after they were alerted to “illegal activities” by the community. They were reportedly released on bail until 5th November.

On 10 November, police raided LGBT-friendly ‘RAM Bar’ in Kampala, arresting 127 people⁸⁷. Local media reported⁸⁸ that they were dragged out of the venue and thrown into police vehicles. One of those detained by the police was able to call her brother, who works for the police and indicated that the raid had been to target LGBT people, despite police claims that it related to their use of shisha. Local LGBT rights organizations similarly suggested that this raid was targeting the LGBT community. Of those arrested, 67 were reportedly charged⁸⁹ with nuisance offences. In 2017, The US Department of State report⁹⁰ stated that the authorities enforced the law during the year. The report further noted that the Human Rights Awareness and Promotion Forum

⁸⁵ ‘Uganda Arrests 16 LGBT Activists on Suspicion of Gay Sex’ (24 October 2019)

<<https://www.theguardian.com/world/2019/oct/24/sixteen-lgbt-activists-arrested-in-uganda-as-hate-crimes-soar>> accessed 27 February 2023.

⁸⁶ Samuel Okiror, ‘Ugandan Doctor under Investigation over Claims He Assaulted LGBT Patient’

<<https://www.theguardian.com/global-development/2019/oct/30/ugandan-doctor-under-investigation-over-claims-he-assaulted-lgbt-patient>> accessed 27 February 2023.

⁸⁷ ‘Uganda: Stop Police Harassment of LGBT People’

<<https://www.hrw.org/news/2019/11/17/uganda-stop-police-harassment-lgbt-people>> accessed 27 February 2023.

⁸⁸ ‘67 Remanded To Luzira Prison’ (*Kuchu times*)

<<https://www.kuchutimes.com/2019/11/ram125-67-remanded-to-luzira-prison/>> accessed 27 February 2023.

⁸⁹ *ibid.*

⁹⁰ ‘2017 Country Reports on Human Rights Practices: Uganda’ (2017)

<<https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/uganda/>> accessed 27 February 2023.

(HRAPF) reported 14 cases of police arresting persons on suspicion of being LGBT. All the above forms of treatment by the police above amount to discrimination of sexual minority groups in Uganda.

As is in the definition of discrimination under Article 21 of the constitution that different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, or social or economic standing. This treatment from police to sexual minority groups as discussed in the essay above is discriminative in nature hence the basis of this research.

3.4.3 Forced Evictions

Discrimination of sexual minority groups extends to personal lives where people do not want to associate with members of the LGBTQI+ community hence evictions. In six verified cases, members of sexual minority groups were evicted from their homes in Kampala explicitly due to their sexual orientation or gender identify. In the cases that follow, landlords have worked in concert with Local Council officials to execute eviction orders based on a person's sexual orientation:

On May 15, 2013 a refugee suspected of homosexuality was served an eviction letter signed by the Local Council 1 in 2012.⁹¹ On February 9, 2013, a gay man in Mbarara was called to the office of his Local Council 1 and informed that members of his church accused him of promoting homosexuality in the district. The LC1 delivered a letter of village banishment to the man, ordering him to leave the village with immediate effect.⁹² Local Council 1 officials of Zone 12acted in similar fashion on July 11, 2012, when they gave a Congolese refugee two days to move out of her house due to her sexual orientation.⁹³ On October 10th 2022⁹⁴, a one Kagimu Frank Fabian was evicted on short notice (7 days) after his landlord noted that his lease was terminated due to the

⁹¹ CSCHRCL & HRAPF-Uganda (n 73).Case Number: 2013-024.

⁹² ibid. Case Number: 2013-011.

⁹³ ibid. Case Number: 2012-016.

⁹⁴ <https://twitter.com/boldtypeug/status/1577338999634640898?t=1Jcuzjwj40pm0Pyc-lhdyA&s=19>, accessed 27 February 2023.

unacceptable activities on the premises with colleagues. The landlord further noted that Kagimu allegedly hosted a big number of visitors and offered unknown services to different gangs of boys which created inconveniences and threatened morality. Such evictions illustrated above clearly show the discrimination of sexual minority groups in Uganda.

In order to register as a legal entity with the National Board for Nongovernmental Organizations, non-governmental organizations (NGOs) in Uganda must navigate a bureaucratic labyrinth involving numerous government agencies.⁹⁵

On Wednesday 3rd August 2022, the National Bureau for Non-Governmental Organizations (NGO Bureau) halted the operations of Sexual Minorities Uganda for non-registration with the NGO bureau.⁹⁶ It should be noted that in 2012, Frank Mugisha and others applied to the Uganda Registration Services Bureau (URSB) under section 18 of the Companies act 2012 for reservation of a name of the proposed company. In a letter dated 16th February 2016, the URSB rejected the application to reserve the name “Sexual Minorities Uganda” on ground that the name was undesirable and unregistrable that the proposed company to be incorporated to advocate for the rights and wellbeing of Lesbians, Gay, Bisexual, Transgender and Queer persons, which persons are engaged in activities labeled criminal acts under section 145 of the Penal Code Act. This decision was also upheld by the High court of Uganda. This is a clear manifestation of acts of discrimination on grounds of sexual orientation and violates the right of freedom of association.

On February 14, 2012, Lokodo, along with a police escort, personally shut down a workshop organized by LGBTI activists in Entebbe that he characterized as a gathering of homosexuals.⁹⁷ On June 26, 2012, more than two dozen police officers operating on

⁹⁵ 'Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation' (n 72).

⁹⁶ 'Statement of Shutdown of SMUG's Sexual Minorities Uganda Operations'

<<https://twitter.com/smug2004/status/1555556472020410368?lang=en>> accessed 3/22/2023.

⁹⁷ 'Uganda: Minister Shuts Down Rights Workshop' (*Human Rights watch*)

<<https://www.hrw.org/news/2012/02/16/uganda-minister-shuts-down-rights-workshop>> accessed 1

Lokodo's orders shut down another workshop organized for LGBTI human rights defenders, this one in Kampala. Police officers detained two organizational staff members along with two workshop participants in a police bus and ordered workshop organizers to deliver a copy of their registration and incorporation documents to the Criminal Investigations Department to seek approval from the police before staging future gatherings.⁹⁸ These violations to the right of freedom of speech, assembly and association of the sexual minority groups in Uganda amount to discrimination which is a basis of this study.

3.4.4 Discrimination from Family and community

Concerning the reactions of family members towards ousted LGBT persons, Pepe Julian Onziema, Programs Director, and Richard Lusimbo, Research and Documentation Manager and Assistant to the Executive Director, SMUG, confirmed that LGBT persons who have been ousted would most likely be disowned by their family and forced to leave the area. Families would do so because they are either homophobic themselves or because of societal pressure and fear of loss of status, being isolated as well as feeling ashamed etc. (or a combination of these).⁹⁹

While Ugandan families and communities in some cases provide an important source of support for members of sexual minority groups, they may also take it upon themselves to enforce gender norms and punish transgressions. As a result, many LGBTI individuals find themselves excluded from family homes, obligated to relinquish custody of their children, and subjected to both physical and reputational attacks. It is an unfortunate reflection of the virulence of homophobia, Trans phobia, and intersex phobia that exists in Uganda that many of the reported abuses against LGBTI

March 2023.

⁹⁸ 'Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation' (n 72).

⁹⁹ 'Situation of LGBT Persons in Uganda' (2013)

<<https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/09/SituationofLGBTpersonsUgandaFinal.pdf>> accessed 1 March 2023.

individuals were carried out by members of their immediate family.¹⁰⁰

On the evening of January 10, 2012 in Kampala, a gay man was detained and assaulted by his parents, who believed him to be a homosexual. The house assistant helped the man's parents tie him to a bed, whereupon the mother and father beat him with shoes and a length of rope. The man's brother was locked in a separate room so that he could not intervene to release him until 6 am the next morning.¹⁰¹

3.5 Challenges faced by sexual minority groups in realizing their right not to be discriminated.

3.5.1 Laws prohibiting homosexual acts

Referring to the legislative framework, OHCHR in Uganda stated that art. 21 (1) of the Constitution of Uganda 1995 provides for equality and non-discrimination, but that art. 31 (3) establishes that "marriage shall be entered into with the free consent of the man and woman intending to marry". Furthermore, homosexuality [homosexual acts] is criminalized in Section 145 (a) of the Penal Code Act, Cap 120. It was added that the Penal Code Act stems from colonial times and has never been revised since.

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

Section 146 of the Penal Code provides that: 'Any person who attempts to commit any of the offences specified in Section 145 commits a felony and is liable to seven years' imprisonment.'

¹⁰⁰ *ibid.*

¹⁰¹ 'Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation' (n 72).

Section 148 of the Penal Code Act provides that: 'Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years.' Ugandan law does not define what constitutes acts of 'Gross indecency'. These acts are punishable whether committed in public or in private. It is an easier offence to prove because it does not require proof of penetration.¹⁰²

Furthermore, the CSCHRCL & HRAPF¹⁰³ study states: "Other offences usually invoked against LGBT person are: Being idle and disorderly; The whole of Section 167 is about the offence of being 'idle and disorderly'.⁸ However, Section 167(e) stands out for it concerns an 'indecent act'. It provides that; any person who without lawful excuse publicly does any indecent act. Section 167(f) concerns 'immoral purposes'. It provides that any person who in any public place solicits or loiters for immoral purposes; "Section 167 says that such person shall be deemed an idle and disorderly person, and is liable to conviction to imprisonment for three months or to a fine not exceeding three thousand shillings or to both such fine and imprisonment, but in the case of an offence contrary to paragraph (a), (e) or (f) that person is liable to imprisonment for seven years. This section of the Penal code is very vague. It has a very wide range, and that is perhaps why the police prefer it. Rogues and vagabonds: Under Section 168(1) (a), every person convicted of an offence under Section 167, after having been previously convicted as an idle and disorderly person, shall be deemed to be Roque and vagabond. Having earned that title, the person affected has committed a misdemeanor. The person is liable for the first offence to imprisonment for six months; for every subsequent offence the penalty jumps to imprisonment for one year."

The CSCHRCL & HRAPF study concludes: "The above are the key offences that are often used to charge persons suspected of engaging in same-sex conduct. Since it is difficult to prove carnal knowledge against the order of nature, charges of attempts to

¹⁰² 'Situation of LGBT Persons in Uganda' (n 99).

¹⁰³ CSCHRCL & HRAPF-Uganda (n 73).

commit carnal knowledge, gross indecency, idle and disorderly and rogue and vagabond are more frequent.”¹⁰⁴

3.5.2 Family and Community Discrimination and Abuse

LGBTI individuals find themselves excluded from family homes, obligated to relinquish custody of their children, and subjected to both physical and reputational attacks. It is an unfortunate reflection of the virulence of homophobia, Tran’s phobia, and intersex phobia that exists in Uganda that many of the reported abuses against LGBTI individuals were carried out by members of their immediate family.¹⁰⁵ Families dis own sexual minorities in Uganda therefore this is a challenge together with others identified in this study.

3.5.6 Uganda’s Homophobic Media

The portrayal of sexual minorities in Uganda’s newspaper, radio, television and online media outlets routinely perpetuates repellent stereotypes, is typically sensational, and at times appears to be utterly devoid of facts. At the same time, there are numerous instances where Ugandan periodicals have published the names, photographs, and contact details for individuals who are reported to be LGBTI with dangerous consequences for the persons named: In one example of the impact such lurid and irresponsible journalism has on people’s lives, The Kamunye newspaper published the name of a gay man, as well as his contact information, on May 29, 2012, alleging that he had been recruiting university students into homosexuality. The man was subsequently threatened by his neighbors and evicted by his landlord.¹⁰⁶ This homophobic press promotes hate hence limitations to the rights of sexual minority groups in Uganda.

¹⁰⁴ *ibid.*

¹⁰⁵ ‘Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation’ (n 72).

¹⁰⁶ *ibid.*

3.6 Best practices from other jurisdictions of protecting rights of sexual minority groups.

The best practices from other jurisdictions that shall be referred to here under are majorly going to be derived from South Africa which has done really well in recognizing the rights of sexual minorities hence eliminating discrimination. South Africa was chosen as the best practice model since it has experienced the most rapid transformation on the issue of sexual minority rights. However, other Jurisdictions are also going to be referred to for the purposes of this study. These practices adopted by other jurisdictions are going to be discussed below;

As Twinomugisha and Mubangizi noted, one of the most philosophical achievements that has been hailed by many commentators was the inclusion of sexual orientation among the listed grounds on which unfair discrimination is prohibited.¹⁰⁷ Noteworthy is the fact that South Africa became the first country to include the prohibition in its national constitution. By implication, a host of rights commonly sought by gays and lesbians in other countries were seen to be incorporated by the inclusion. This meant that these rights could now be enforced under the South Africa Constitution.

South Africa's constitution like Uganda's constitution contains a prohibition against discrimination based on sexual orientation. However, while Uganda is still struggling with archaic penal laws that criminalize consensual sexual conduct in private, the South African constitutional court made a landmark decision in the case of National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others CCT11/98 (1998). In this case, the Constitutional Court was called upon to decide whether the common law offence of sodomy and several statutory provisions dealing with the criminalization of homosexual activity were inconsistent with section 9 (3) of the South African Constitution. The court unanimously overturned as unconstitutional the law

¹⁰⁷ K Mubangizi, Ben Twinomugisha and John C, *Protecting the Right to Freedom of Sexual Orientation: What Can Uganda Learn from South Africa?* vol 22 (Stellenbosch Law Review 2011).



prohibiting homosexual conduct between two consenting adults in private.¹⁰⁸ While South Africa takes a stage of progress with regard to the protection of homosexuals, Uganda retrogresses with the introduction of the Anti-Homosexuality bill, 2023 which if enacted, would broaden the criminalization of homosexuality and further violate several fundamental human rights.

The case of South Africa totally paints a different picture on the perception and treatment of same-sex relations from other African countries. Important to note is that South Africa has undergone a great transition on the issue of lesbian, gay, bisexual and transsexual equality (LGBT). The LGBT in South Africa had no legal protection until the decade of 1994-2004 when 35 items of legislation changed. Prior to this, sexual acts between two consenting adult men in private were criminalized.¹⁰⁹ One profound change is seen in the constitution which now guarantees the right to be free from discrimination by the State or Legal and Natural persons, on the ground of sexual orientation. The constitution now places sexual orientation on a par with gender and race as protected categories.¹¹⁰ South Africa's constitutional position on sexual orientation is seen as a benchmark in Africa.¹¹¹ Important to note is the fact that the legalization of same-sex marriages in South Africa was premised on that very foundation.¹¹²

In South Africa, prominent religious leaders have voiced their support for the South African homosexuals. Archbishop Desmond Tutu and Dr. Allan Boesak are vocal supporters of homosexual rights in South Africa. Even the conservative Dutch reformed church ruled that gay members should not be discriminated against and could hold positions within the church.¹¹³ Such practices by South African religious leaders should

¹⁰⁸ 'South African Court Ends Sodomy Laws' *New York Times* (8 May 1998) <<http://www.nytimes.com/1998/10/10/south-africa-strikes-down-laws-on-gay-sex.html>> accessed 2 March 2023.

¹⁰⁹ Robinson and BA, "End of the World Predictions", Ontario Consultants on Religious Tolerance.' <http://www.religioustolerance.org/end_wrlld.htm> accessed 2 March 2023.

¹¹⁰ The Constitution of South Africa. Article 9.

¹¹¹ Mubangizi, Twinomugisha and C (n 107).

¹¹² *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others CCT11/98 (1998)* [1998].

¹¹³ Jack Rogers, 'Review of Jesus, the Bible and Homosexuality, by David, G. Myers, A Journal of Reformed Thought' [2010] *Perspectives magazine* <<http://www.drjackrogers.com.html>> accessed 2

be adopted in Uganda as well so as to enable the realization of the right to freedom of religion.¹¹⁴

South Africa has also curbed the problem of discrimination of sexual minority groups in employment. In 1998 the South African parliament passed the Employment Equity Act which protects the South Africans from labour discrimination based on sexual orientation among other categories. Homosexuals are allowed to serve openly in the South African National Defense force (SANDF). In 1996 the government adopted the White Paper on National Defense which was to the effect that in accordance with the constitution, the SANDF shall not discriminate against any of its members on the grounds of sexual orientation.¹¹⁵ In 1998 the Department of Defense adopted a Policy on Equal Opportunity and Affirmative Action under which recruits may not be questioned about sexual orientation and the Defense Force officially takes no interest in the lawful sexual behavior of its members.¹¹⁶

Courts have also pronounced themselves on the issue of labour discrimination based on sexual orientation. In *Satchwell v President of the Republic of South Africa*¹¹⁷ the court held that same sex partners should not be denied pension and other benefits given to spouses of judges. In the case of *Langemaat v Minister of Safety and Security*¹¹⁸ the court found that the regulations and rules of the Police Medical Aid Scheme which did not include same sex couples unfairly discriminated against lesbian and gay people and on that basis declared the rules and regulations to be unconstitutional. Such practices need to be adopted by Uganda so that to enable the full realization of rights of sexual minority groups in Uganda.

The Promotion of Equality and Prevention of Unfair Discrimination Act also prohibits

March 2023.

¹¹⁴ The Constitution of Uganda. Article 29.

¹¹⁵ –White Paper on National Defence for the Republic of South Africa: Defense in a Democracy'. <https://www.gov.za/documents/national-defence-white-paper> accessed 3 March 2023.

¹¹⁶ Aaron Belkin and Margot Canaday, 'Assessing the Integration of Gays and Lesbians into the South African National Defence Force.' (12 January 2011) <http://www.palmcenter.org/assessing_integration_gays_and_lesbians_south_african_national_defence_force.htm> accessed 2 March 2023.

¹¹⁷ 2001 12 BCLR 1284 (T).

¹¹⁸ 1984 4 BCLR44 (T).

hate speech and harassment based on any of the prohibited grounds of discrimination. The South African Constitution outlaws hate speech.¹¹⁹ In Uganda, hate speech is very common in Uganda. Mufti Mubaje as earlier noted stated that, homosexuals should be sentenced to death.¹²⁰ We should therefore adopt such practices in the move to realize sexual minority rights in Uganda.

In November 14, 2006 South Africa passed a bill legalizing same-sex marriage.¹²¹ The Civil Unions Act 17 Of 2006 establishes the South African legal position on same sex marriages. In the case of *Minister of Home Affairs v. Fourie*¹²² the Constitutional Court of South Africa declared a constitutional right to same-sex marriage. The Court 's holding is based on Section 9 of the Constitution of South Africa which guarantees equal rights and equal protection for all and the explicit prohibition of discrimination on the basis of sexual orientation.¹²³ The court held that South Africa has a multitude of family formations that are evolving rapidly as society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one. After this decision by the Constitutional Court, the promulgation and adoption of the Civil Unions Act by the South African Parliament in 2006 was inevitable. Uganda needs to adopt this as well.

Despite a hostile political climate, members of Zimbabwe's Constitutional Commission considered the voices of gay and lesbian citizens.¹²⁴ This process gave human rights advocates the opportunity to air their concerns in an official forum. Furthermore, it introduced the idea to many officials that sexual minorities are entitled to the same protections as other citizens. This decision by Zimbabwe's constitutional commission upholds sexual minority rights of speech and expression in Zimbabwe.

Elsewhere in Africa, existing rights protections have served as the basis for legal arguments, despite the lack of explicit constitutional protection in those countries. In

¹¹⁹ Constitution of South Africa. S.16.

¹²⁰ *Matovu* (n 71).

¹²¹ *BA* (n 109).

¹²² *Minister of Home Affairs v Fourie* [2005] ZACC 19.

¹²³ The Constitution of South Africa, S. 9(1) (3).

¹²⁴ BBC News, Africa, Zimbabwe Gay Rights Face Dim Future (Nov. 17, 1999), at <http://news.bbc.co.uk/2/hi/africa/523162.stm>. accessed 3/22/2023.

Botswana for example, activists have initiated challenges to discriminatory laws in addition to establishing LGBT organizations in the region.¹²⁵ Such organizations uphold and advocate for the rights of sexual minorities effectively.

Furthermore, in Kenya, the supreme court held that the LGBTQI+ community have the right to Freedom of Association, which includes the right to form an association of any kind¹²⁶. Three of the five judges held that it would be unconstitutional to limit the right to form association purely on the basis of sexual orientation of the applicants. Such practices can be borrowed by Uganda which still cannot register NGOs that advocate for the rights of the sexual minority groups since it is criminalized by the Anti Homosexuality bill 2023 which was passed by parliament on 21st March 2023 and is yet to be assented by President.

Outside Africa, India is yet another jurisdiction that Ugandan courts can refer to and uphold the rights of the sexual minorities. India's supreme court in the case of Navtej Singh Johar v Union of India¹²⁷ declared section 377 of the Penal Code of India unconstitutional insofar it criminalized gay sex between two consenting adults. Such decisions of declaring provisions of the laws that criminalize carnal knowledge against the order of nature protect the rights of sexual minorities in India.

3.7 Conclusion

In view of the foregoing findings and discussion, it is submitted that sexual minority groups have faced discrimination in different areas with far reaching effects in their lives. As regards the protection of these sexual minorities in Uganda, given the legal and policy framework in place against discrimination on grounds set up in Article 21 of the constitution. Cultural prejudices against LGBTQI+ remain strong. This explains why sexual minority groups still face discrimination and are often victims of violence and crimes as discussed above.

¹²⁵ Southern African organizations outside of South Africa include Gays and Lesbians of Zimbabwe (GALZ); The Rainbow Project in Namibia; and Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo).

¹²⁶ NGOs Coordination Board v Eric Gitari, Petition No.16 of 2019. Decided 21/02/2023.

¹²⁷ (2018) 10 SCC1

CHAPTER FOUR

THE IMPACT OF UGANDA'S LEGAL FRAMEWORK IN THE REALIZATION OF THE RIGHT NOT TO BE DISCRIMINATED AGAINST BY SEXUAL MINORITY GROUPS

4.1 Introduction

As noted in the previous chapters, Uganda has laws that call for non-discrimination of all persons however, various forms of discrimination continue surfacing to the sexual minority groups in Uganda. This has mainly been attributed to the Ugandan cultures, criticisms for political and religious leaders and lastly from laws which are discriminative in nature when it come to the right of sexual minority groups. This chapter shall evaluate the extent to which Uganda's legal framework has curbed the problem of discrimination of sexual minority groups in Uganda.

4.2 Extent to which Uganda's legal framework has curbed the problem of



discrimination of sexual minority groups in Uganda.

The findings in chapter two of this study about Uganda's legal framework on discrimination are reiterated in this chapter. It is clear from my discussion in chapter two that Uganda recognizes the right to freedom from discrimination under Article 21 of the constitution which is the supreme law of the land as per Article 2(2).¹²⁸ However, given this recognition of the right to freedom from discrimination, various laws are discriminatory which makes Uganda's legal framework oppressive to the sexual minority groups in Uganda and hence this legal framework escalates the level of discrimination other than eliminating it as discussed below;

4.2.1 Criminal statutes

The main criminal statute in Uganda is the Penal Code Act, Cap 120 and it has a number of provisions on same sex conduct:

Provisions criminalizing same sex conduct are: Carnal knowledge against the order of nature (Article 145 of the Penal Code Act Cap 120). It provides that Any person who (a) Has carnal knowledge of any person against the order of nature (b) ... or (c) Permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.

These sections do not expressly mention homosexuality or criminalize homosexuality per se, but prohibit engagement in certain acts that have been almost exclusively attributed to homosexuality. The term 'carnal knowledge against the order of nature' is not defined in the Act and this section has not been substantially prosecuted on.¹²⁹ The

¹²⁸ The Constitution of Uganda.

¹²⁹ CSCHRCL & HRAPF-Uganda (n 73).

High Court in the Rolling stone case¹³⁰ held that this offence only covers particular acts and does not extend to homosexuality as a sexual orientation.

LGBTI Persons have also been regularly arrested and charged with offences under the following sections of the Penal Code Act;

a) Attempted carnal knowledge against the order of nature;

Section 146 provides that any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years. This provision is about attempting to commit 'carnal knowledge against the order of nature.' This provision has not yet been subjected to judicial interpretation in regard to sexual minority persons.

b) Indecent practices

Section 148 provides that any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years. The section criminalizes what it calls gross indecency with another person whether done in public or private. It also covers attempts to commit gross indecency. However gross indecency is not defined. In the case of Uganda v Simon Nyombi & Anor, Criminal case No. 654 of 2014, where the accused persons had allegedly been found naked in a bar, the accused was charged under this offence.

Besides the provisions directly criminalizing consensual same sex relations, there are others that are used to prosecute LGBTI persons. In terms of scope, these provisions have some of the widest provisions in any penal law with far reaching catch phrases. This way of drafting has made the sections gain the notoriety for being used to arrest and charge LGBTI persons at the slightest suspicion of a moral wrongdoing. These are:

¹³⁰ *Kasha Jacqueline, Pepe Onziema & David Kato v Giles Muhame and the Rolling Stone Publication Ltd* (n 51).

c) **Common nuisance**

Section 160 of the penal code Act provides that;

(1) Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanor termed a common nuisance and is liable to imprisonment for one year.

(2) It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any part of the public.

This provision, although not commonly used against LGBTI persons, is one of the vagrancy offences that are used to justify arrests of LGBTI persons. In 2014, HRAPF handled a case in which a transgender woman was arrested and charged with the offence of being a 'common nuisance' because 'his behavior of pretending to be a woman caused an inconvenience to the public in the exercise of their rights.'¹³¹

d) **Being idle and disorderly**

Section 167 provides for any person who (a) Being a prostitute, behaves in a disorderly or indecent manner in any public place; (d) Publicly conducts himself or herself in a manner likely to cause a breach of the peace; (e) Without lawful excuse, publicly does any indecent act; (f) In any public place solicits or loiters for immoral purposes; shall be an idle and disorderly person, and is liable on conviction to imprisonment for three months or to a fine not exceeding three thousand shillings or to both such fine and imprisonment, but in the case of an offence contrary to paragraph (a), (e) or (f) that person is liable to imprisonment for seven years. This provision's reference to 'prostitutes' could cover many LGBTI sex workers, and its reference to indecency would certainly cover acts associated with same sex conduct.

e) **Being rogue and vagabond**

¹³¹ CSCHRCL & HRAPF-Uganda (n 73).

Section 168 provides; (1) Every (a) Person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person; (c) Suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself; and such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed to be a rogue and vagabond, and commits a misdemeanor and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year.

Being 'rogue and vagabond' is a colonial provision that was used to control people and to wantonly arrest people on the flimsiest of grounds. It subsisted after independence for the same reasons. It is a provision that is very broad and that can be used to cover all persons and any persons at any time. For this reason, it is preferred by the Police as they do not have to prove much. It is thus a very dangerous provision for LGBTI persons because many of them do not have a sustained means of subsistence due to the systematic discrimination and are likely to be found in places which are reputed to harbor 'rogues and vagabonds' since such places are cheaper and affordable to people who are unemployed. Since it is broad sweeping provision, even when someone is arrested on allegations of 'sodomy', the Police would charge them with being 'rogue and vagabond'. But again, in most cases, the cases are dismissed for want of prosecution.¹³²

f) Personation

Section 381 of the penal code act provides for states that; (1) Any person, who, with intent to defraud any person, falsely represents himself or herself to be some other person, living or dead, commits a misdemeanor;

(2) If the representation is that the offender is a person entitled by will or operation of law to any specific property, and he or she commits the offence to obtain that property or possession of it, he or she is liable to imprisonment for seven years.

¹³² HRAPF, 'Compilation on LGBTQI Rights'2022. <https://hrapf.org/?mdocs-file=9813> accessed 3/22/2023.

This section has been used to charge many Trans genders.¹³³ From the definition of 'personation' under the law, it is odd for a transgender person to be charged under it. Personation is about representing oneself to be 'some other person' and with an intention to defraud. Transgender people are not trying to be anyone else but themselves, and also, they do not intend to defraud anyone. However, for the Police and most members of the public, the way they dress or act is seen as fraudulent and intended to misrepresent themselves as some other people. Transgender women are more vulnerable to this provision.

4.2.2 Laws on Legal recognition and Registration of individuals and companies

a) The Births and Deaths Registration Act Cap 309

This is the law that governs recognition of persons in Uganda. It governs registration of Births and Deaths in Uganda. It has provisions that affect the enjoyment of rights of LGBTI persons that include provisions on change of name and change of sex. The most relevant provisions are:

Section 12 (1) which provides that any person, being over the age of twenty-one years or a widower, widow, divorced person or a married person, who wishes to change his or her name shall cause to be published in the Gazette a notice in the prescribed form of his or her intention to do so.

(2) Not less than seven days after the publication of the notice, the person intending to change his or her name may apply in the prescribed form to the registrar of the births and deaths registration district in which his or her birth is registered.

(3) The registrar shall, upon being satisfied that the requirements of this section have been carried out and upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.

Furthermore, Section 13 (1) provides that the parents or guardian of any child under the

¹³³ Uganda v Boaz Kalyeija, Criminal Case No 18 of 2015.

age of twenty-one years who is not married, divorced, a widower or a widow may apply in the prescribed form to the registrar of the births and deaths registration district in which the birth of the child is registered to change the name of the child.

(2) The registrar shall, upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.

These provisions govern the change of name for adults above the age of 21 and those below the age of 21. They are important to LGBTI persons especially to transgender and intersex persons who may wish to change their names to reflect their preferred sex or gender. However, the problem is that the provisions consider 21 years of age as the age of majority and yet the Constitution and Section 2 of the Children's Act Cap 59 put it at 18 years. Therefore, a person who has made 18 years but who has not yet made 21 cannot change their name except through the parents. Considering that most transgender persons always get into trouble with their parents and many are usually disowned or alienated by their families, requiring them to change their names through their parents is something that would be difficult for them. The provisions are also unconstitutional since the age of majority under the Constitution is 18 years.¹³⁴

This provision concerns change of sex for children, and it is thus particularly important for transgender and intersex children who wish to undergo a sex change. It recognizes that such children can change the particulars as regards sex provided they have had 'an operation or otherwise' changed their sex and provided that their parents or guardians have applied to have the particulars of the register changed. This is a positive provision and indeed, its recognition of other modes of sex change besides surgery is commendable.

However, the downside with the provision is that it only covers children, and yet there is no other provision in the Act that covers adults. So, in essence adults cannot change the particulars in the Births register to reflect a change in sex. This affects the ability of transgender persons to get the necessary legal recognition.¹³⁵ It mostly protects

¹³⁴ HRAPF (n 128).

¹³⁵ Human Rights Awareness & Promotion Forum Submission on the Issues Paper for the Review of the

intersex persons who are presumed to undergo such operations as a matter of necessity unlike transgendered persons who are presumed to undergo such surgeries as a matter of choice. Even then, it remains difficult to understand whether an exception can be created in cases where a person above the age of 18 years requires a sex change surgery as a matter of necessity. It should also be noted that the Act only recognizes change of sex and not change of gender.

b) The Non-Governmental Organizations Registration Act Cap 113

The Non-Governmental Organizations Registration Act Cap 113 as amended in 2006 (NGO Act) is the law that governs registration and incorporation of entities as nongovernmental organizations in Uganda. It has provisions that restrict the operation of NGOs working on LGBTI issues as follows:

Section 2 provides that no organization shall operate in Uganda unless it has been duly registered with the Board established under Section 3 of this Act and has a valid permit issued by the Board.¹³⁶

This means that all organizations, including LGBTI organizations that intend to operate in Uganda as NGOs have to be registered with the board. The Act however also provides that an organization shall not be registered with the board if its objectives are in contravention of the law.¹³⁷ Considering the fact that same sex conduct is criminalized in Uganda,¹³⁸ this section could easily be interpreted to include prohibition of registration of LGBTI organizations by the board. As a result, LGBTI organizations may not easily register as NGOs and may thus have to operate without formal registration. This means that they will lack legal recognition as also registration with the board turns an organization into a body corporate with perpetual succession with power to sue and be sued in its corporate name.¹³⁹

Births and Deaths Registration Act'

<http://www.hrapf.org/sites/default/files/publications/14_04_15_hrapf_submission_on_the_births_and_deaths_registration_act.pdf> accessed 3 March 2023.

¹³⁶ Section 2(1) Of the NGO Registration Act Cap 113.

¹³⁷ Section 2(4) of the NGO Registration Act as amended.

¹³⁸ Section 145 and 146 of the Penal Code Act Cap 120.

¹³⁹ Section 2(3) of the NGO Registration Act as amended.

This has led to closure of various organizations like Sexual minorities Uganda on ground that they were not registered yet the URSB rejected its name that it was undesirable as earlier discussed.

c) The Companies Act, 2012

Section 4 provides that Companies limited by Guarantee

(1) Any one or more persons may for a lawful purpose, form a company, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability. (2) The company may be— (a)... (b) a company having the liability of its members limited by the memorandum to the amount that the members undertake in the memorandum to contribute to the assets of the company if it is being wound up, in this Act referred to as “a company limited by guarantee”

This section is to the effect that any one or more persons can form a company, and companies limited by guarantee are among such companies that can be formed. For an entity to be registered as a company limited by guarantee, they just have to fulfil the requirements set out in the Act like having Articles and Memorandum of association. It does not exclude any organizations and many LGBTI organizations have been able to register with broad objectives. The catch is however on reservation of name as discussed in the next section.¹⁴⁰

d) Reservation of name and prohibition of undesirable names

Section 36 provides; (1) The registrar may, on written application, reserve a name pending registration of company or a change of name by an existing company, any such reservation shall remain in force for thirty days or such longer period, not exceeding sixty days as the registrar may, for special reasons, allow and during that period no other company is entitled to be registered with that name.

(2) No name shall be reserved and no company shall be registered by a name, which in the opinion of the registrar is undesirable. As part of the registration process for a

¹⁴⁰ HRAPF (n 128).

company limited by guarantee, the organization has to apply for reservation of name under Section 36 of the Act. The same section grants the Registrar of companies' powers to refuse to reserve of a name if in the opinion of the registrar, such name is 'undesirable.' What is undesirable has not been defined by the Act. The Registrar is thus given a wide discretion. Indeed, in perhaps the first case under the new Act, the Registrar refused to reserve the name, Sexual Minorities Uganda (SMUG) stating that it was undesirable for Section 145 of the Penal Code criminalizes same sex relations. Therefore, as the law currently stands, an LGBTI organization cannot reserve a name that has a reference to sexual minorities and as a result it cannot register as a company limited by guarantee and also as an NGO since the Companies Registry also in practice reserves names of NGOs.¹⁴¹

4.2.3 Laws on Marriage

All the marriage laws in the country provide for marriage between a man and a woman. Article 31 of the Constitution not only restricts the right to marry to men and women of 18 years and above but also specifically prohibits marriage between same sex persons. The legislations governing marriage in Uganda are: The Marriage Act Cap 251; the Customary Marriages Registrations Act Cap 248; the Marriage and Divorce of Mohammedans Act Cap 252; the Hindu Divorce and Marriage Act Cap 250; and the Marriage of Africans Act Cap 253. They do not contain specific prohibitions against same sex marriages, but in light of Article 32A of the Constitution, no same sex marriage can be celebrated under these laws.¹⁴²

In the case of transgender persons who have undergone sex change surgeries, it is unlikely that they would enjoy the same rights as other individuals in marriage. This is because as discussed above, the law in Uganda does not recognize sex change for adults or change of gender. Therefore, if someone undergoes a sex change surgery before getting married, the marriage, the marriage would be likely to be void ab initio as a marriage celebrated between persons of the same sex. This would be the same thing

¹⁴¹ CSCHRCL & HRAPF-Uganda (n 73).

¹⁴² HRAPF (n 128).

if the person changed their sex in course of a marriage.¹⁴³

4.2.4 Laws on Divorce

The Divorce Act Cap 249 is the principle law that governs divorce in Uganda. Section 4 of the Divorce Act lists sodomy among the grounds for divorce. Use of this ground to seek divorce has not been regular but it remains on the law books. According to a study on the grounds of divorce in commonwealth jurisdictions derived from English Law, the inclusion of sodomy, as the other grounds such as adultery, cruelty, bestiality, among grounds for divorce is based on the fact that they are all criminal offences under the Penal Codes in the different countries.¹⁴⁴ In fact it is opined that so interlinked were the corresponding provisions in the criminal and the matrimonial legislations in English and Indian law that the requirement for corroboration and the high burden of proof usually applicable to criminal trials were also applied in matrimonial causes.

Thus, sodomy as mentioned in section 4 of the Divorce Act is derived directly from section 145 of the Penal Code and was intended to target one and the same people. It is an extension of the discriminatory arm of penal law into the sphere of domestic affairs.

4.2.5 Employment laws

Discrimination in employment is always a major issue for LGBTI persons.

The main law is the Employment Act 2006 and its provisions on discrimination are to be examined: Section 6 (1) In the interpretation and application of this Act it shall be the duty of all parties, including the Minister, labor officers and the Industrial Court to seek to promote equality of opportunity, with a view to eliminating any discrimination in employment. (2) ... (3) Discrimination in employment shall be unlawful and for the purposes of this Act, discrimination includes any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, the HIV status or disability which has the effect of nullifying or impairing

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

the treatment of a person in employment or occupation, or of preventing an employee from obtaining any benefit under a contract of service. Section 6(3) outlaws' discrimination in employment on the following grounds: race, color, sex, religion, political opinion, national extraction, social origin, HIV status or disability. These grounds appear to be closed and therefore grounds like sexual orientation and gender identity may not be include. However, the inclusion of sex as a protected ground may allow the inclusion of sexual orientation and even gender identity. There has been no authoritative court pronouncement on this provision in respect of sexual orientation and gender identity. In terms of practical realities, denial of employment and dismissals of LGBTI persons from employment still persist. The 2015 Consortium report recorded three such violations in respect of which the victims were not accorded any remedies.¹⁴⁵ Therefore more, protection is needed in this respect.

4.2.6 The right of children to stay with parents and adoption of Children

Under the Children's Act Cap 59, there are two important issues concerning LGBTI persons, the rights of children to stay with their parents and the ability of LGBTI persons to adopt children. The Act does not expressly talk about LGBTI persons but has sections that would imply their exclusion from exercising certain rights regarding adoption, parentage and custody of children. These are;

a) The child's right to live with their parents

Section 4 provides that a child is entitled to live with his or her parents or guardians.

(2) Subject to subsection (1), where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate him or her from his or her parents or parent, the best substitute care available shall be provided for the child. Although section 4(1) gives every child the right to stay with his/her parents, section 4(2) would make it difficult for openly LGBTI parents to stay with their children. As already discussed, same sex relations are criminalized and so there is societal bias against LGBTI persons. If it comes to the knowledge of the

¹⁴⁵ 'Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation' (n 72).

relevant authorities that the parent or parents of a child are LGBTI, it is probable that this provision can be invoked to take such a child away from its parent or parents because it can easily be said that living with an LGBTI parent is not in the best interests of the child.

b) Adoption of children

Section 45 of the Children's lays down conditions and restrictions:

Section 45 states; (1) An adoption order may be granted to a sole applicant or jointly to spouses where— (a) ... (b) in the case of an application by one of the spouses, the other has consented to the adoption.

(3) An adoption order shall not be made in favor of a sole male applicant in respect of a female child, or in favor of a sole female applicant in respect of a male child, unless the court is satisfied that there are special circumstances that justify, as an exceptional measure, the making of an adoption order. Section 45(1) allows married couples to adopt a child jointly, and the provision seems to make no distinction between spouses in different sex marriages and persons in same sex marriages.

It should be noted that Article 32 A, it is implied that the type of marriages recognized in Uganda are marriages between persons of the opposite sex and therefore same sex couples would not qualify. This provision has not been tested before, but is almost certain that a same sex couple would not be allowed to adopt a child. As regards single person adoptions, section 45(3) restricts adoption orders for applicants of a different sex from that of the child. This would prima facie imply that persons of the same sex as the child would be eligible. However, the intention of the drafters of the law was to ensure that adoptive parents do not sexually exploit their adopted children. Therefore, for LGBTI persons, persons of the same sex as the child would certainly be denied.

4.2.7 Conclusion

The protection of the rights of sexual minority persons is still at the very basic level in

Uganda. Whereas there is no specific exclusion of sexual minority persons from the enjoyment of human rights except in relation to marriage, there are also no express guarantees of protection such as those that exist in many other jurisdictions.¹⁴⁶

Despite of the recognition of the right to nondiscrimination under the constitution, a wider legal frame work as illustrated above limits sexual minority groups from the enjoyment of their fundamental human rights which amounts to discrimination which this study highly condemns.

¹⁴⁶ CSCHRCL & HRAPF-Uganda (n 73).



CHAPTER FIVE

GENERAL CONCLUSIONS AND RECOMMENDATIONS OF THE STUDY

5.1 INTRODUCTION

From this study, we can ascertain that Uganda recognizes the right to non-discrimination which is provided for under Article 21 of the constitution and international legal instruments that Uganda is a signatory to. However, given such laws sexual minority groups in Uganda face various forms of discrimination as reported in this study. In this chapter, the study is concluded and recommendations on how the rights of sexual minority groups can be realized without discrimination are given.

5.2 General Conclusions of the Study

From this study, it comes out clearly that homosexuals in Uganda do not generally enjoy the legal and constitutional liberties enjoyed by other citizens. As much as Uganda is a party to the International and Regional human rights mechanisms and has got a Bill of Rights in its Constitution and a legal framework for the protection of sexual minorities, a contradiction exists between Uganda's human rights commitments and its treatment of homosexuals. The 1995 Constitution guarantees equality and freedom from non-discrimination but this is not a reality for sexual minority groups who have suffered human rights abuses.

The Penal Code Act criminalizes carnal knowledge against the order of nature and the Anti-Homosexuality Bill 2023 tabled by Hon. Basalirwa proposes to maintain homosexuality as a crime. The prohibition of homosexual practices has impinged upon the personal liberties of some Ugandans. As discussed in this study, both the current law and the bill constitute prima facie violations of a number of human rights. The rights violated according to the findings are the right to privacy, freedom of association and expression, right to health, right to liberty and freedom from non-discrimination. It

should be noted that the Penal Laws are archaic, and outdated in such a democratic society. By keeping such archaic laws, persecuting and even seeking to recriminalize them, Uganda is not committed to its international obligations of upholding human rights and fundamental freedoms but rather violating such human rights contrary to the constitution and the international laws that Uganda is a signatory to.

This study finds that the criminalization of same sex conduct is discriminatory. Discrimination against sexual minority groups was revealed within religious institutions, from family and friends, in employment and other areas and from different state actors like the police. The effects of such discrimination are far reaching ranging from under achievement, school dropout, low self-esteem, mental ill-health, high suicide rates, rejection and expulsion from families, harassment, abuse, and blackmail to firing of employees because of their sexual orientation. Although this apparent persecution has attracted loud cries both nationally and internationally, the government has done nothing to alleviate the problem but rather a bill is being tabled to strengthen the criminalization of being part of the LGBTQI+ community. The Anti-homosexuality bill 2023 proposes that identifying as LGBTQI+, proposes offences of homosexuality, aggravated homosexuality, aiding and abetting homosexuality. Such offences will not only target sexual minorities but also human rights activists that advocate for the rights of sexual minorities in Uganda.

Homophobia still rides high in Uganda. Living in a homophobic environment has forced many homosexuals to remain in the closet and conceal their sexuality for fear of harsh criminal penalties, arbitrary harsh raids and societal disapproval.

Arguments against homosexuality have a religious connotation. Most Ugandans look to the biblical teachings to condemn homosexuality. Jesus Christ constantly preached about love and understanding of the wounded, marginalized and despised. Religious leaders should be accommodative and preach a message of love and not condemnation. Homosexuality has been attacked on grounds of culture. Culture changes differs from one society to the other. Homosexuality has been accused of being a western vice. The reality is that even our culture has been compromised and so

there should be no reason as to why homosexuality should be prohibited on cultural grounds.

It is on the above observations and conclusions that this study proposes some recommendations on what can be done to curb the problem of discrimination of sexual minority groups in Uganda.

5.3 Recommendations from the Study

To the Attorney General, the study recommends that, as the legal advisor of the government on the constitutionality and legality of various laws, the Attorney General should advise the executive and the legislature on the dangers of passing the Anti-Homosexuality Bill 2013 as it is unconstitutional since it encroached the bill of rights provided for under the constitution, advise the Executive, Parliament and the Judiciary as to the illegality and non-constitutionality of the actions being undertaken in the name of implementing laws that criminalize consensual same-sex conduct among adults; advise Parliament on its duty to protect the Constitution and its responsibility to desist from passing laws that violate the Constitution; advise government on the likely outcomes of cases taken before courts of law seeking compensation for unlawful arrest, restriction or detention. Awards made by courts will have a direct impact on the Consolidated Fund which money would have been used to do other constructive work.

To the Uganda Police Force, it is recommended that as the body responsible for arresting suspects and as the first point of contact with the community, the police should arrest people on allegations that can be proven in courts of law. The effect of doing otherwise violates basic constitutional rights of the persons affected.

As the constitutional officer charged with having regard to the public interest, to the administration of justice, and to the need to prevent abuse of the legal process, the DPP should Not sanction charges involving consensual adult same-sex relations, especially where the complainant is not one of the persons involved in the act, ensure that the rights of LGBTI persons are respected and that charges are not arbitrarily sanctioned and develop a prosecutorial policy on cases involving consensual adult same-sex

relations, which will guide State Attorneys on how to handle such cases.

To the judiciary, it is recommended that courts should declare laws criminalizing same sex activities unconstitutional and be more responsive to the constitutional violations involved in bringing a suspect to court based on charges too flimsy to sustain and without any evidence.

The government should include homosexuals in all programs especially the health programs. Since they are not recognized in Uganda as minorities, they are not at all addressed in the country's health programs including responses to the HIV/AIDS pandemic. AIDS and STDs have become rampant in LGBT communities. In some cases, the medical personnel do not attend to them insisting that they should first bring their partners. The law¹⁴⁷ provides for affirmative action in favor of –groups marginalized on the basis of any reason created by history, tradition or custom for the purpose of redressing imbalances which exist amongst them. Homosexuals definitely fall within this category and should be given attention in HIV/AIDS programs. The government should put in place facilities that enhance the position of homosexuals. These facilities include provision of safe and anal sex lubricants and shelters for counseling and sensitization.¹⁴⁸

As seen in Zimbabwe, Uganda's constitutional court should consider the voices of the sexual minority groups. Zimbabwe's Constitutional Commission considered the voices of gay and lesbian citizens.¹⁴⁹ This process gave human rights advocates the opportunity to air their concerns in an official forum. This should be adopted in Uganda so as to improve the enjoyment of the rights of sexual minorities without discrimination.

Furthermore, in Botswana, activists have initiated challenges to discriminatory laws in addition to establishing LGBT organizations in the region.¹⁵⁰ Such organizations uphold

¹⁴⁷ Constitution of Uganda. Article 39.

¹⁴⁸ CSCHRCL & HRAPF-Uganda (n 73).

¹⁴⁹ BBC News, Africa, Zimbabwe Gay Rights Face Dim Future (Nov. 17, 1999), at <http://news.bbc.co.uk/2/hi/africa/523162.stm>. accessed 3/22/2023.

¹⁵⁰ Southern African organizations outside of South Africa include Gays and Lesbians of Zimbabwe

and advocate for the rights of sexual minorities effectively. The LGBTQI+ community therefore in Uganda is recommended to form associations and organizations for better advocacy, promotion and protection of their rights.

Ugandan courts should also learn from the Kenyan supreme court held that the LGBTQI+ community have the right to Freedom of Association, which includes the right to form an association of any kind¹⁵¹. This will promote the formation of organizations and there shall not be closure of organizations or denial of licences for registration of NGOs that advocate for sexual minority rights.

Government should put a framework in place to implement International Human Rights provisions in order to protect and support sexual minorities in Uganda. Lack of a supportive framework to implement the inspirations of International Conventions and declarations for the protection of LGBTs in Uganda, hampers the task of harmonizing constitutional rights of sexual minorities with international standards, and makes the enforcement and monitoring of those rights more difficult.

The state should preserve the identity of sexual minorities by abstaining from policies that negatively impact on LGBT people and embarking on those that shall protect them against activities of the society which tantamount to human rights violations. There is, therefore, a need to strengthen the political commitment to LGBT rights in Uganda. The state should put an end to the defamatory and harassing campaigns against homosexuals and reconfirm its commitment to protecting the rights of all persons regardless of their sexual orientation or gender identity in anti-discrimination and equal opportunity legislation and bodies.

Religious inspired homophobia should be discouraged by pastors/priest/bishops/pope. Religion may be considered as the thread that runs through the whole breadth of culture. Most people depend on religion to denounce homosexuality as deviant and unholy behavior. Rather than condemning and passing judgment on homosexuals, religious leaders should preach a message of love, tolerance and reconciliation. Jesus Christ

(GALZ); The Rainbow Project in Namibia; and Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo).

¹⁵¹ NGOs Coordination Board v Eric Gitari, Petition No.16 of 2019. Decided 21/02/2023.

preached love and he welcomed even the so-called sinners to dine with him. He called upon people to have unity even in diversity. Since Christ is the head of the church and we follow into his footsteps, we must emulate his example by loving everyone unconditionally.

Culture should not be used as a yardstick to condemn homosexuality. The African culture has been presented as the basis of homophobia in Uganda. Culture is not static. It changes with time. What we cherish and hold so dearly today are western concepts. Some people have argued that homosexuality is a western vice. Which in the researcher's view is the same as Christianity or Islam. Same as education and the dressing. Our culture has been compromised and so we should be tolerant with homosexuals. Study also shows that homosexuality has been in Africa way before the coming of colonialists.¹⁵²

This paper finally recommends that Uganda does the way India did in the case of Navtej Singh Johar v Union of India¹⁵³ where the supreme court declared section 377 of the Penal Code of India unconstitutional because it criminalized gay sex between two consenting adults. Uganda courts should also declare sections of the law that criminalize gay sex unconstitutional including the anti-Homosexuality bill 2023 may it be assented by the president to become a law. This shall uphold the enjoyment of the rights of sexual minority groups without discrimination.

¹⁵² Ann C McGinley, 'Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination.' (2010) 43 University of Michigan Journal of Law Reform 713.

¹⁵³ (2018) 10 SCC1

RECOMMENDED AREAS FOR FURTHER RESEARCH

Introduction

This research paper is limited to the assessment of the realization of the right not to be discriminated by sexual minorities in Uganda. However further areas of study that are not tackled by this paper but need be researched for the better understanding of the rights of sexual minority groups in Uganda are proposed below;

- **The Legal Recognition of Trans-gender persons' identification in Uganda.**
- **The Legal consequences of the Anti-Homosexuality bill 2023 to both homosexual and heterosexual Ugandans.**

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