THE ANTI HOMOSEXUALITY BILL 2009 (UGANDA)

LEGISLATIVE PROVISIONS AND PROPOSALS

RELATING TO THE CRIMINALISATION OF HOMOSEXUALITY

OPINION FOR THE COMMONWEALTH LAWYERS ASSOCIATION

Introduction

1. In October 2009 a private member's bill (the Anti-Homosexuality Bill 2009 – "the AHB") was presented to the Parliament of Uganda. It is understood to be on its second reading (of three) and to have the support of the Government of Uganda.[1]

2. If enacted the AHB would establish a sentence of life imprisonment for any individuals convicted of "*homosexuality*", itself defined to include consensual penetrative sex in private between persons of the same gender or any touching of another person with the intention of such an act (s. 2). The AHB also creates an offence of "*aggravated homosexuality*" – defined to include repeated acts of homosexuality (as defined) – punishable by a mandatory death penalty (s. 3). The final substantive provision of the AHB (s. 18) purports to nullify any international or regional commitments that are deemed "*contradictory to the spirit and provisions enshrined*" in the AHB.

3. This opinion considers the compatibility of the AHB with international human rights law. As part of this analysis the broader issue of any form of criminalisation of consensual private homosexual acts also falls for consideration. In this respect the opinion is of potential relevance in a large number of Commonwealth jurisdictions.

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[1] See *SB (Uganda) v Secretary of State for the Home Department* [2010] EWHC 338 (Admin).

As a result of legislation owing its origin to colonial times, private consensual homosexual acts between adults constitute criminal offences under the Criminal Codes in 40 of 54 Commonwealth countries[2].

4. In our opinion the principal substantive provisions of the AHB are incompatible with Uganda's international treaty obligations and with customary international law. So far as legislation in other jurisdictions is concerned, while any definitive opinion would, of necessity, require detailed consideration of the individual pieces of legislation concerned, it is our view that any criminalisation of private homosexual conduct between consenting adults is incompatible with the rights to dignity, equal treatment and privacy enjoyed by all human beings. In reaching these conclusions we have drawn upon the case law of highly respected domestic, regional and international Courts and treaty bodies.

5. As the broader question of criminalisation provides the material background to our specific views on the AHB, we address this first. We turn then to the individual sections of the AHB which, in our view, most obviously run counter to international law and conclude by identifying the provisions of the Ugandan Constitution which would appear, in the light of the available comparative law, to conflict with the AHB. While we do not presume to put forward any view on how the Ugandan Courts would ultimately decide the constitutional questions arising from the AHB, we are clear that any decision holding its core provisions to be compatible with the rights to dignity, equality and development enshrined in the Constitution would be at odds with the approach adopted in other major jurisdictions in recent times.

Criminalisation of private homosexual conduct between consenting adults

Relevant provisions in international instruments

6. The compatibility with international law and constitutional propriety of legislation purporting to criminalise private homosexual conduct between consenting adults has

[2] Michael Kirby, 'Homosexual Law Reform: An ongoing blind spot of the Commonwealth Nations', presented at the 16th Commonwealth Law Conference, Hong Kong, 8th April 2009, published as 'Legal discrimination against homosexuals - a blind spot of the Commonwealth of Nations?' EHRLR 2009, 1, 21-36. On 3 March 2010 Fiji introduced a decree to decriminalise homosexuality.

been considered in a series of important judicial decisions over the last 30 years. Before addressing these in turn it is useful to consider the principal fundamental rights engaged by any analysis of this issue and common to all major human rights instruments, namely:

(a) The right to equal treatment (see African Charter on Human and Peoples' Rights ("ACHPR") Article 2[3]; International Covenant on Civil and Political Rights ("ICCPR") Articles 2, 3 & 26[4]; United Nations Declaration of Human Rights ("UNDHR") Articles 1 & 2[5]; European Convention on Human Rights and Fundamental Freedoms ("ECHR") Article 14 [6];

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[3] "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, political or any other opinion, national and social origin, fortune, birth or other status."

[4] Article 2:

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any 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."

[5] Article 1 : "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. "

(b) The right to human dignity and to be free from cruel, inhuman or degrading treatment or punishment (see ACHPR Article 5[7]; ICCPR Articles 7 & 17[8]; UNDHR Articles 1, 5 & 12[9]; ECHR Articles 3 & 8[10]);

(c) The right to privacy and to personal and social development (see ACHPR Articles 19 & 22[11]; ICCPR Article 1[12]; UNDHR Article 12[13]; ECHR Article 8[14]).

Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

[6] "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. "

[7] "Every individual shall have the right to the respect of the 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 or degrading punishment and treatment shall be prohibited. "

[8] Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 17:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

[9] Article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

[10] Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[11] Article 19: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

7. In the course of our analysis of these instruments we have not overlooked the fact that the ACHPR does not contain an express right to privacy in the same form as the other instruments identified or the provision at Article 18 relating to the status of the family as the "*natural unit and basis for society*". We do not, however, consider that either of these textual matters indicates that the substance of the protections afforded by the ACHPR is any less in this sphere. First, as we shall explain below, the principal issue arising as a result of legislation of this nature is, in our view, its impact on the inherent dignity and humanity of the individual, rather than technical notions of privacy. Secondly by Articles 2, 5, 19 and 22 the ACHPR contains ample equivalent protections for the core values of dignity and personal and social development engaged by the right to privacy in this regard. Thirdly Article 18 does not purport to be exhaustive in its effect and is itself identical in substance to Article 23 of the ICCPR and, again as we shall explain below, the existence of Article 23 of the ICCPR has not prevented successful challenges to criminal legislation in this area before the United Nations treaty bodies.

8. Of the instruments we have referred to above, Uganda is a signatory to both the ACHPR and the ICCPR[15]. Although it is, of course, not a signatory to the ECHR we nevertheless consider that analysis of the ECHR is of value given the high standing of

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Article 22:

"1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

[12] "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

[13] See footnote 9.

[14] See footnote 10.

[15] Uganda acceded to the ICCPR on 21 June 1995 and ratified it on 21 September 1995. It deposited its instrument of ratification to the ACHPR on 27 May 1986, which came into force on 21 October 1986.

the jurisprudence of the European Commission and Court in international law, and the express obligation of the African Commission on Human and Peoples' Rights to draw inspiration from international law (as well as from the specialised agencies of the United Nations) in its approach to the Charter (see Article 60[16]).

Relevant international and regional case law

African Commission on Human Rights

9. We are not aware of any cases in which the African Commission has considered challenges to legislation purporting to criminalise homosexual conduct. We do, however, consider that some assistance may be derived from its jurisprudence in its clear and repeated statements as to the primacy to be afforded to international human rights standards.

10. In *Commission Nationale des Droits de l'Homme et des Libertés v Chad*[17] the Commission, considering the duty on Member States under Article 1 of the Charter[18], held that, aside from the duty to recognise the rights enshrined in the Charter, there was a positive duty on Member States to protect rights. A failure to do so (or neglecting the rights) would amount to a violation of the Charter (see paragraphs 18-20).

11. More generally, in the 1998 case of *Media Rights Agenda and Others v Nigeria*,[19] concerning legal restrictions on the press in Nigeria following a coup d'état, the

[16] "The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members."

[17] Comm. No. 74/92 (1995).

[18] "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."

[19] Comm. 105/93, 128/94, 130/94 and 152/96 (1998).

Commission recalled previous decisions concerning the approach that should be adopted by Member States to the rights enshrined in the Charter, namely:

"*The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.*"[20]

12. The Commission went on to say that this principle was of general application and not simply confined to the rights that were the subject of that decision:

"*With these words the Commission states a general principle that applies to all rights, not only freedom of expression. Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.*"

13. In an important passage, the Commission specifically stated that international law and international human rights standards must prevail over contradictory national laws which seek in effect to set aside the rights set out in the Charter. The Commission expresses the clear view that such restrictions must be proportionate, reasonable and evidence-based, and should not be such that they render the right illusory.[21] They also warned against the danger of using the law to target specific individuals or legal personalities stating that this could amount to discrimination and unequal treatment before the law:

"*To allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law.*" (Emphasis added.)

14. In *Legal Resources Foundation v Zambia*,[22] the Commission expressed similar views. It held that amendments to the Zambian constitution requiring presidential candidates to prove Zambian parentage were discriminatory and breached Article 2 as well as other provisions of the Charter. In reaching this conclusion, the Commission drew

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[20] The Commission recalling its decision in *Civil Liberties Organisation v Nigeria*, Comm. 101/93 (1995), paragraph 18; see paragraph 56 below.

[21] See also footnote 18.

[22] Comm. No. 211/98 (2001).

attention to Article 60 as requiring the interpretation of the Charter to *"draw inspiration from international law on human and peoples' rights"*.[23] While noting that the Zambian government did not seek to avoid its international obligations, the Commission commented that this was just as well because:

> "*international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations*".[24]

15. The Commission also emphasised:

> "*The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens*".[25]

<u>United Nations Human Rights Committee</u>

16. In *Toonen v Australia*[26] the United Nations Human Rights Committee ("UNHRC") considered the compatibility of a Tasmanian statute which criminalised various forms of sexual conduct between men, including all forms of sexual contact between consenting adult homosexual men in private. The Applicant contended that such legislation breached the rights to equal treatment and privacy under the ICCPR.

17. The Tasmanian authorities sought to justify the measures in question on public health and moral grounds asserting that they were intended to prevent the spread of HIV/AIDS. This argument was rejected by the UNHRC. It held that no link had been shown between criminalisation and effective control of the spread of the HIV/AIDS virus and that the Applicant's right to privacy under Article 17 of the ICCPR had been the subject of an arbitrary interference. In these circumstances the UNHRC did not need to resolve the complaint of unequal treatment but it did state that it considered that the prohibition of differential treatment on grounds of *"sex"* enshrined in Article 2 of the ICCPR encompassed differential treatment on grounds of *"sexual orientation"* (see paragraph 8.7). Notably the wording of Article 2 of the ICCPR is, in

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[23] Paragraph 58 of the decision. See also paragraph 56 above.

[24] Paragraph 59 of the decision, citing Article 27 of the Vienna Convention on the Law of Treaties.

[25] Paragraph 63 of the decision.

[26] Comm. No. 488/1992; 31 March 1994.

this respect, mirrored in Article 2 of the ACHPR and in the Constitution of Uganda (Section 21[27]).

European Court of Human Rights

18. In *Dudgeon v United Kingdom*[28] the European Court of Human Rights held that legislation then in force in Northern Ireland which criminalised certain homosexual acts between consenting adult males breached Article 8 of the ECHR. The Government sought to defend the legislation on the basis that it was intended to *"safeguard young persons from undesirable and harmful pressures and attentions"* and that there was a strong body of opinion in Northern Ireland which considered that any relaxation of the laws in relation to consensual acts would be "*seriously damaging to the moral fabric of society*". The Court rejected these arguments and said the following:

> "*Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved. ... The moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the*

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[27] Section 21: "Equality and freedom from discrimination.

(1) 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.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

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

(4) Nothing in this article shall prevent Parliament from enacting laws that are necessary for—

(a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or

(b) making such provision as is required or authorised to be made under this Constitution; or

(c) providing for any matter acceptable and demonstrably justified in a free and democratic society.

(5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution."

[28] [1981] ECHR 7525/76.

applicant's private life to such an extent. 'Decriminalisation' does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features" (paragraphs 60, 61).

19. The European Court's decision in *Dudgeon* has been consistently followed and applied thereafter in relation to similar challenges to legislation in other countries (see e.g. *Norris v Ireland* [1988] ECHR 10581/83; *Medinos v Cyprus* [1993] ECHR 15070/89). As part of its judgment in *Norris* the European Court identified the serious psychological harm which could result from discriminatory legislation citing the following passage from the domestic judgments with approval:

"*one of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow*" (paragraph 21).

20. In *Kozak v Poland*,[29] the European Court considered differential treatment on grounds of sexual orientation in the context of a right of succession to a tenancy. The Court found that such treatment breached the prohibition of discrimination under Article 14 of the ECHR taken in conjunction with Article 8. It held:

"when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances" (paragraph 92).

21. The Court recognised that: *"Striking a balance between the protection of the traditional family and the Convention rights of sexual minorities is, by the nature of things, a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition"*. It nevertheless concluded that the *"blanket"* nature of the

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[29] App. No. 13102/02, 2nd March 2010.

impugned measures could not be accepted as necessary for the protection of the family in its traditional sense (paragraph 99).[30]

Organisation of American States and Inter-American Court of Human Rights

22. The members of the Organisation of American States, under whose auspices the Inter-American Court of Human Rights operates, adopted a Resolution in 2009 on *Human Rights, Sexual Orientation, and Gender Identity.*[31] In adopting this Resolution, the States unanimously agreed:

> *"1. To condemn acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity.*
>
> *2. To urge states to ensure that acts of violence and human rights violations committed against individuals because of their sexual orientation and gender identity are investigated and that their perpetrators are brought to justice.*
>
> *3. To urge states to ensure adequate protection for human rights defenders who work on the issue of acts of violence and human rights violations committed against individuals because of their sexual orientation and gender identity."*

23. More generally, the Inter-American Court of Human Rights has repeatedly made it clear that it regards the principles of equality and non-discrimination not only as important, but as so central to the rule of law as to have become *jus cogens* – one of the peremptory norms, alongside the prohibitions on slavery, torture and genocide, that bind all States regardless of circumstances. It has summarised its view in the following terms:

> "*Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle*

[30] On a similar issue (discrimination on grounds of sexual orientation in relation to succession to tenancies), see also *Karner v Austria* (App. No. 40016/98).

[31] AG/RES. 2504 (XXXIX-O/09). Adopted at the fourth plenary session, June 4, 2009.

(equality and non-discrimination) forms part of general international law."[32] (Emphasis added.)

24. While it is arguable whether a prohibition against discrimination has yet attained the status of *jus cogens*, it is clear that the Inter-American Court would find the type of discrimination contemplated in the AHB entirely unacceptable (notwithstanding the fact that the Inter-American system of human rights protection operates in the context of a group of States that share a strong heritage of Christian values and respect for the traditional family).

Relevant comparative law

25. We turn now to recent cases in national courts. They provide further strong support for our opinion that the AHB breaches international human rights norms in a series of fundamental respects.

Vriend v Alberta – Canadian Supreme Court No. 25285, 2 April 1998

26. In this case the Canadian Supreme Court was concerned with a complaint of discrimination on grounds of sexual orientation in the employment field. Cory J made the following observations illustrative of the issues of human identity and dignity at stake in any instance of differential treatment in this realm:

> "*Even when these provisions are not enforced, they reduce gay men ... to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and others matters bearing on orientation ....*
>
> *Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals are not worthy of protection. ... The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination*" (paragraphs 69, 102).

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[32] Advisory Opinion OC-18/03 of September 17, 2003, requested by the United States, at para 101.

National Coalition for Gay and Lesbian Equality – South African Constitutional Court 1999 (1) SA 6

27. This case concerned the constitutional validity of South African legislation which prohibited sodomy and, as a necessary part of the reasoning in the case, the validity of the common law offence of sodomy. The constitutional provisions in play were the right to equality provided by ss. 8 and 9 of the Constitution (both of which expressly prohibit discrimination on grounds of sexual orientation) and s. 36 (which permits limitation on rights where reasonable and justifiable). The Constitutional Court found that the statutory provisions and common law offence were unconstitutional.

28. Ackerman J gave the leading judgment of the Court. He cited the *Vriend* decision referred to above and pointed out that such provisions also impinged on gay men in ways which went beyond the immediate impact on dignity and self-esteem in that their consequences legitimated or encouraged blackmail, police entrapment, violence and peripheral discrimination such as refusal of facilities, accommodation and opportunities. He expressed the view that this impact was rendered more serious because the minority status of homosexuals meant that they were unable to use political power to secure favourable legislation for themselves and so were almost exclusively reliant on the Constitution for protection. In explaining the impact of the measures under scrutiny on human dignity he said the following:

> "*Dignity is a difficult concept to express in precise terms. At its least it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of society. The common law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed any other circumstances whatsoever. In so doing it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution .... I would emphasise that in this judgment I find the*

offence of sodomy to be unconstitutional because it breaches the rights of equality, dignity and privacy" (paragraphs 28-32).

29. In considering the question of a constitutional justification under s. 36, Ackerman J acknowledged that the issues in the case touched upon deep conviction and evoked strong emotions and cautioned that "*it must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant role or purpose is held by crude bigots only*" but was "*sincerely held for considered and nuanced religious reasons*". He nevertheless held that no s. 36 justification could be made out and stated that he "*would have reached this conclusion if the right to equality alone had been breached. The fact that the constitutional rights of gay men to dignity and privacy have also been infringed places justification even further beyond the bounds of possibility.*"

30. Sachs J gave a concurring judgment. We draw particular attention to the following passages as providing further support for our views as expressed in this opinion:

"*[103] At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution. In expressing my concurrence with the comprehensive and forceful judgment of Ackermann J, I feel it necessary to add some complementary observations on the broader matters. I will present my remarks - in a preliminary manner as befits their sweep and complexity - in the context of responding to three issues which emerged in the course of argument. The first concerns the relationship between equality and privacy, the second the connection between equality and dignity, and the third the question of the meaning of the right to be different in the open and democratic society contemplated by the Constitution.*"

"*[108] It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalised. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony.*"

"*[132] The present case shows well that equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self,*

not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society."

Lawrence v Texas – United States Supreme Court 539 US 558 (2003)

31. This case required the United States Supreme Court to consider the constitutional compatibility of a Texas statute forbidding two persons of the same sex from engaging in certain intimate sexual conduct. Following a reported weapons disturbance police had entered Mr Lawrence's home and observed him engaging in a private, consensual sexual act with another man. Both men were arrested and convicted of deviate sexual intercourse. The Supreme Court, overturning the State Court of Appeals, held that the statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process clause of the Fourteenth Amendment to the US Constitution.

32. By a majority decision the Court held that the sodomy law in Texas was unconstitutional. The court had previously addressed the same issue in 1986 in *Bowers v Hardwick*, where it had upheld a similar Georgia statute, finding that the constitutional protection of privacy did not extend to bar such legislation. In *Lawrence* the Court explicitly overruled *Bowers*, holding that it had viewed the liberty interest too narrowly. The Court held that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment. Kennedy J, delivering the opinion of the majority, said the following:

"*The Court began its substantive discussion in Bowers as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homsexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." Id., at 190. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.*

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain *__their dignity__* *as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.*" (Emphasis added.)

33. In overturning the decision in *Bowers,* Justice Kennedy also emphasised that whilst all may live through their own moral codes, these should not be foisted on the whole of society by criminalising that which did not fit well with the majority:

"*It must be acknowledged, of course, that the Court in Bowers was making the broad point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." Planned Parenthood of Southeastern Pa. v. Casey, [1992] USSC 112."*

34. The Court concluded that "*__Bowers__* *was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.* *__Bowers v. Hardwick__* *should be and now is overruled.*"[33]

35. Justice O'Connor, in her concurring opinion, also examined the inability of moral justification to allow discriminatory criminal laws to stand, stating:

"*A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law...*

A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgement that Texas' sodomy law banning

[33] Page 17.

"deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional."

Naz Foundation v Government of NCT of Delhi - Delhi High Court No. 7455/2001

36. Judgment in this case was given by the Delhi High Court on 2nd July 2009. The judgment is extensive and detailed in its consideration of domestic and international materials – including case law, consensus-documents and binding treaties – relating to the issues of the criminalisation of same-sex acts. The case concerned the compatibility of Section 377 of the Indian Penal Code, 1860 (IPC) which criminally penalizes what are described as *"unnatural offences"* with Articles 14 (equality), 15 (non-discrimination), 19 (freedom of speech and expression) and 21 (life, personal liberty and dignity) of the Constitution of India. The petitioners limited their plea to submitting that Section 377 [at paragraph 1]: "*should apply only to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.*" Whilst this was a very detailed judgment, the Court's ultimate decision was succintly stated (at paragraphs 130 -132):

"*If there is one constitutional tenet that can be said to be [the] underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that [the] Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as "deviants" or 'different' are not on that score excluded or ostracised.*

Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution; of which Nehru spoke so passionately. In our view, Indian constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is anti-thesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private is violative of Articles 21, 14 and 15 of the Constitution[34]. *The*

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[34] Article 21: "Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 14: "Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 15: "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality."

37. The Federal Court's judgment provides a valuable and compendious summary of relevant international material and we draw particular attention to the following:

(a) The recitation of the Yogyakarta Principles set out at paragraphs 43 to 44. These principles were produced by human rights experts from 25 countries representing all geographical regions in 2007. The experts included one former UN High Commissioner for Human Rights, 13 current or former UN Human Rights Special Mechanism Office Holders or Treaty Body members, serving judges and a number of academics and activists. Most importantly the principles recognised that "*human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights.*";

(b) A series of academic studies which trace the colonial origins of much legislation criminalising homosexuality and which evidence the severe detrimental impact of such legislation on the inherent self-worth and self-esteem of homosexual individuals (paragraphs 49 to 52);

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(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

(c) The almost complete unanimity within medical and psychiatric opinion to the effect that homosexuality should not be treated as either a disease or disorder and should, instead, simply be treated as another expression of human sexuality and that, furthermore, there is no evidence capable of justifying criminalisation on public health grounds (paragraphs 67 to 73);

(d) The consistent rejection of arguments in different jurisdictions to the effect that de-criminalisation would in some way be damaging to the *"moral fabric of society"* as lacking any substantial evidential foundation and the identification, instead, of a concept of *"constitutional morality"* based on the fundamental principle that all citizens are to be equally free from coercion and restriction by the state or by society privately (paragraphs 75 to 87).

McCosker v State [2005] FJHC 500

38. The High Court of Fiji in 2005 held that Fijiian sodomy laws were unconstitutional.[35] Its reasons for doing so mirrored those in the *Lawrence* case: it held that criminal laws should not be used to discriminate against private same-sex acts, that the protection of vulnerable individuals could be achieved by recourse to other conventional criminal offences and that the existence of consent should be a determinative factor precluding criminalisation in this field. It went on to conclude that whilst a provision may not be discriminatory prima facie, if it operates or is used in such a way that a certain group is targeted, then the application of the law is not equal. The key passages, in Judge Winter's judgment, are as follows:

"*The technical description of the law may read as equal. The application of the law is not. State's counsel was unable to provide me with statistics to demonstrate that a*

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[35] Impugned sections:

Section 175: "Any person who – (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years with or without corporal punishment."

Section 177: "Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment."

prosecution had been brought in Fiji against a heterosexual couple for consensual private acts against the order of nature. I accept the Human Rights Commission's submission that while these Section 175 offences are not exclusively anti-homosexual they are selectively enforced primarily against homosexuals ...

The legitimate public interest in allowing prosecution for such crimes of male rape or predatory gross male indecency can be served by the specific preservations of that interest whilst severing from these penal provisions provisions any offence for consensual adult male or female sex acts.

I find this right to privacy so important in an open and democratic society that <u>the morals argument cannot be allowed to trump the Constitutional invalidity</u>. Criminalizing private consensual adult sex acts against the course of nature and sexual intimacy between consenting adult males is not a proportionate or necessary limitation ...

.. "[D]ifference should not be the basis for exclusion, marginalization, stigma and punishment ... I find that while technically the provisions of Section 175 are not anti homosexual nonetheless they proscribe criminal conduct essential to the sexual expression of the homosexual relationship and are perceived as such ...

What the Constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law.

<u>A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator</u>." (Emphasis added.)

Banana v Zimbabwe [2000] 4 LRC 621

39. In this case the impugned offence was the common law crime of sodomy: *"unlawful, intentional sexual relations per anum between two human males."* Anal sex between a man and a woman is not an offence and neither is a consensual sexual act between women. The Supreme Court of Zimbabwe had to decide inter alia whether "*the common law crime of sodomy was in conformity with s.23 of the Constitution of Zimbabwe which guaranteed protection against discrimination on the ground of gender.*"

40. Section 23 of the Constitution of Zimbabwe provides as follows:

"(*1) Subject to the provisions of this section—*

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability are prejudiced—

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability of the persons concerned".

41. The Court held, by a majority of 3 to 2, that the term *"gender"* could not be construed to include sexual orientation and on that basis the crime of sodomy could not be held to be unconstitutional.

42. We do not consider that this decision alters the analysis we have set out above, for a number of reasons. First the decision of the majority did not purport to address Zimbabwe's obligations in international law and was expressly focused on the domestic constitutional question before it. Secondly and more significantly its analysis proceeded on the basis that the decision of the United States Supreme Court in *Bowers* (supra) was good law. McNally JA went so far as to refer to the United States Supreme Court as "*perhaps the senior Court in the western world*". As the more recent decision in *Lawrence v Texas* (supra) has now held, the *Bowers* decision is not good law and was wrongly decided.

43. In our view it is, in these circumstances, the judgment of Gubbay CJ (joined by Ebrahim JA) which reflected the correct position in international law and which

provides the most useful guidance. We draw particular attention to the following passage in his judgment:

> "*I am thus not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable.*
>
> *The courts cannot be dictated to by public opinion. It cannot replace in them the duty to interpret the Constitution and to enforce its mandates. Otherwise there would be no need for constitutional adjudication. Those who are entitled to claim the protection of rights include social activists and the marginalised members of society...*
>
> *It is irrational in my view to criminalise anal sexual intercourse between consenting male adults yet to recognise that it is not an offence for a woman to permit a man to engage with her in anal sexual intercource. It is not rational to criminalise the one sexual activity but not the other. If both forms of sexual deviation are to be regarded as immoral and against the order of nature, by what logic is the discrimination against the male gender justified? Why should the female gender alone be given the protection of the Constitution."*[36]

The compatibility of the Anti-Homosexuality Bill with international law

44. In this section of our advice we address the principal provisions of the AHB which are, in our view, incompatible with international law as informed by the analysis we have set out above. We focus only on what appear to us to be the most significant of the provisions which raise discrete issues over and above those already addressed. All the provisions in the AHB which purport to criminalise private consensual homosexual conduct between adults are, however, in our view contrary to international law for the reasons set out above.[37]

Section 2 – The offence of homosexuality and mandatory life imprisonment

45. There are, in our view, at least four respects in which this section of the AHB breaches international law.

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[36] [2000] 4 LRC 621 at 646.

[37] We also note e.g. the mandatory testing provision proposed in Clause 3(3) of the AHB and the "informer" provision in Clause 14. These too raise very significant human rights concerns but are beyond the primary scope of this opinion.

(a) First, it imposes criminality on all forms of sexual intercourse per anum between persons of the same sex regardless of age, privacy or any other circumstances. For all the reasons identified by the United Nations Human Rights Committee, the European Court, the Canadian Supreme Court, the South African Constitutional Court, the United States Supreme Court, the High Court of Fiji and the Delhi High Court and set out above such a measure breaches the individual's right to equality, dignity and privacy;

(b) Secondly, there is a growing body of case law which indicates that the imposition of a mandatory life term of imprisonment offends the principles of a fair hearing. This is particularly so where a sentencing hearing gives the court no scope to mitigate a life term regardless of an individual's personal circumstances and the circumstances of the offence for which they fall to be sentenced.[38] Further, In the *State v Vries* [1997] 4 LRC, the High Court of Namibia held that a mandatory minimum sentence was unconstitutional as it infringed the protection against cruel, inhuman or degrading treatment guaranteed by article 8 (2) (b) of the Constitution. This was followed in *State v Likuwa* [2000] 1 LRC 600, where mandatory minimum sentences were struck out for all purposes;

(c) Thirdly, any mandatory sentence, particularly when not for the most serious crime of murder can be seen as arbitrary and therefore, potentially, disproportionate, as per Lord Bingham in the *De Boucherville* case heard in the Privy Council in 2008 at [13]:

> "*The sentence of life imprisonment is now the most severe penalty for which the law provides. There is ground for concern if the sentence is imposed on those who, despite the seriousness of their crime, could be adequately punished by a determinate sentence. Indeed, any mandatory or minimum mandatory sentence arouses concern that it may operate in a disproportionate manner in some cases. It was considerations of this kind which led the Supreme Court of Canada to conclude that a mandatory 7 year minimum sentence for importing drugs incompatible with section 12 of Canadian Charter of Rights and Freedoms, which guaranteed that no one should be subjected to cruel and unusual treatment or punishment: R v Smith (Edward Dewey)* [1987] 1 SCR 1045."

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[38] *De Boucherville v The State of Mauritius* [2008] UKPC 37.

(d) Fourthly, the Rome Statute of the International Criminal Court provides for a maximum of 30 years imprisonment. A term of life imprisonment can only be justified by the "*extreme gravity of the crime and the individual circumstances of the convicted person.*" Even at the International Criminal Court there is no provision for the imposition of a mandatory life sentence. Uganda is a State Party to the Rome Statute of the International Criminal Court.[39] The Rules of Procedure and Evidence of the International Criminal Court provide detailed guidance of what the court must taken into account when passing sentence (r.145 (1)); and the (non-exhaustive list of) mitigating and aggravating factors they are to have regard to when determining sentence (r.145 (2) and (3)). An arbitrary imposition of a sentence of *"life meaning life"* prevents individual factors being taken into account at any stage during the sentencing process or during the decades of punitive incarceration that inevitably follow. Life should only mean life if consideration has been given to the specific circumstances of an offence and an offender and can be justified by the same.

Section 3 – Aggravated homosexuality and mandatory death penalty

46. It is this provision – imposing the mandatory death penalty for "*aggravated homosexuality*" – which has attracted the widest public comment. If enacted it would, of all the provisions in the AHB, represent the most flagrant breach of international law. It would place Uganda in direct breach of its treaty obligations and it would also contravene customary international law. In imposing a mandatory death penalty the legislation would also fly in the face of the very recent case law of Uganda's own highest courts.

Treaty obligations

47. Article 6 of the ICCPR provides that:

> "*(1) Every human has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

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[39] Uganda signed the Rome Statute on 17 March 1999 and deposited its instrument of ratification on 14 June 2002.

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant ... This penalty can only be carried out pursuant to a final judgement rendered by a competent court"[40].

48. We are of the view that it is impossible rationally to characterise the proposed offence of "*aggravated homosexuality*" as "*the most serious of crimes*" and on this basis alone Section 3 would breach the ICCPR. Consistent with this view the UNHRC has expressly confirmed that it considers that the imposition of the death penalty for homosexual acts is incompatible with Article 6 of the ICCPR[41]. Similarly, the Special Rapporteur on extrajudicial, summary or arbitrary executions, reporting to the Commission on Human Rights, has stated:

"*The Special Rapporteur ... believes that the death penalty should under no circumstances be mandatory by law, regardless of the charges involved. Paragraph 1 of the Safeguards guaranteeing protection of the rights of those facing the death penalty states that the scope of crimes subject to the death penalty should not go beyond intentional crimes with lethal or other extremely grave consequences. The Special Rapporteur is strongly of the opinion that these restrictions exclude the possibility of imposing death sentences for ... actions primarily related to prevailing moral values, such as ... matters of sexual orientation*"[42].

49. Likewise, the Safeguards to which the Special Rapporteur referred[43] stipulate that the most serious crimes should not extend beyond intentional crimes with lethal or other extremely grave consequences.

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[40] Article 6.

[41] Human Rights Committee, Concluding Observations of the Human Rights Committee: Sudan, UN Doc CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, paragraph 19: "*The imposition in the State party of the death penalty for offences which cannot be characterized as the most serious … as well as practices which should not be criminalised such as committing a third homosexual act and illicit sex, is incompatible with article 6 of the Covenant … The State party should ensure that the death penalty, if used at all, should be applicable only to the most serious crimes … and should be repealed for all other crimes*."

[42] Commission on Human Rights, *Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Asma Jahangir*, UN Doc E/CN.4/2000/3, 25 January 2000, paragraph 70.

[43] Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, published in 1984 by the Economic and Social Council (the "Safeguards"). The Safeguards are not legally binding but were endorsed by the United Nations General Assembly without a vote.

Customary international law

50. Article 38 of the Statute of the International Court of Justice is generally regarded as providing a complete statement of the sources of international law and includes the provision that the Court is to apply "*international custom as evidence of a general practice accepted by law*". International custom has itself been said to have three main criteria: general (though not absolute) uniformity and consistency, generality (though not universality) of practice, and some basis for finding that was has occurred has gone beyond mere usage and taken on the form of an obligation. Each of these criteria is satisfied in the present context so as to render a mandatory death penalty for homosexual acts contrary to customary international law:

(a) There are only 8 countries anywhere in the world which purport to be able to impose the death penalty for offences related to homosexuality. So far as we are aware only Iran, Mauritania, Nigeria, Saudi Arabia, Somalia, Sudan, the United Arab Emirates and Yemen retain the death penalty for offences related to homosexuality. Were Uganda to join this group it would place itself at odds with the remaining 193 member States of the United Nations;

(b) Of these 8 countries we are not aware of any other than Iran having purported to implement the death penalty for such offences in recent times;

(c) The treaty obligations already referred to, and the domestic case law to which we shall turn next, indicates that imposition of a mandatory death penalty in the manner proposed would breach a clearly acknowledged obligation on the part of Uganda.

Domestic case law

51. In a majority judgment in the *Susan Kigula* case in 2005 (Constitutional Petition No. 6 of 2003), the Constitutional Court of Uganda ruled that the automatic nature of the death penalty in Uganda for murder and other offences was unconstitutional as it did not provide the individuals concerned with an opportunity to mitigate their death sentences. This decision was then upheld by the Supreme Court of Uganda in January 2009 (Constitutional Appeal No. 3 of 2006). In circumstances where the mandatory death penalty has been held to be impermissible for murder it is, in our view,

inconceivable that it could be said to be legitimate for a lesser offence such as homosexuality even if, contrary to our firm conclusions as expressed above, any form of criminalisation could be appropriate.

Section 13 – Promotion of homosexuality

52. Section 13 of the AHB makes it a criminal offence to "*promote*" homosexuality. The offence is punishable by a fine, by a prison sentence or by both. The term of imprisonment is a minimum of five years and a maximum of seven years. The conviction of a corporate body, a business, an "*association*" or a NGO will render certain personnel liable to seven years imprisonment. The broad and sweeping provisions of Section 13 are in our opinion contrary to international human rights law.

53. We consider that these provisions contravene a number of provisions of the ACHPR:

(a) Article 9: the right to receive information and to express and disseminate one's opinions within the law;

(b) Article 10: the right to free association;

(c) Article 11: the right to assemble freely with others.

54. The rights contained in Article 9 are reflected in Article 19 of the ICCPR, Article 13 of the Convention of the Rights of the Child and Article 10 of the European Convention on Human Rights.[44] In a case concerning politically motivated deportations, the African Commission held in *Amnesty International v Zambia* that Article 9 of the Charter "*reflects the fact that freedom of expression is a fundamental*

[44] The First Amendment to the US Constitution protects freedom of speech. The US District Court (Northern District of Florida, Panama City Division) has held that the prohibition in a public high school on t-shirts, armbands and other messages or symbols advocating fair treatment for homosexuals violated a student's right to free speech: *Gillman v School Board for Holmes County, Florida*, Case No. 5:08cv34-RS-MD, 24th July 2008. The Court relied on a number of US Supreme Court decisions including *Texas v Johnson*, 491 US 397, 414, 109 S. Ct. 2533, 105 L Ed 2d 342 (1989) on the lawfulness of flag burning: "*If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds that idea itself offensive or disagreeable*".

human right, essential to an individual [sic] personal development, political consciousness and participation in the public affairs of his country".[45]

55. In *Article 19 v State of Eritrea*,[46] concerning press freedom and the detention of journalists, the Commission considered (inter alia) the effect of the restriction under Article 9(2) of the Charter that individuals have the right to express and disseminate opinions "*within the law*". The Commission reiterated that domestic laws must be in accordance with the Charter:

> "*To allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.*"

56. The right to free association in Article 10 of the Charter is reflected in Article 22 of the ICCPR and Article 11 of the ECHR.[47] In *Civil Liberties Organization v Nigeria*,[48] the Commission considered whether the composition and powers of a new governing body for the Nigerian Bar Association violated (inter alia) Nigerian lawyers' right to freedom of association under Article 10 of the Charter. It concluded:

> "*15…Freedom of association is enunciated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends.*
>
> *16. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.*"

57. Whilst Article 27 of the Charter permits limitations of rights in certain instances, Section 13 of the AHB contains a general and severe restriction of freedoms which cannot on proper analysis fall within the scope of the permitted limitations.

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[45] Comm. No. 212/98 (1999) at paragraph 54.

[46] Comm. No. 275/2003 (2007).

[47] Article 11 is cited below.

[48] Comm. No. 101/93 (1995).

58. The European Court of Human Rights in *Bączkowski v Poland*[49] held that the refusal of the civil authorities in Warsaw to permit public assemblies by a group seeking to draw attention to discrimination against sexual minorities breached the right to freedom of peaceful assembly under Article 11 of the ECHR.[50] In reaching its conclusion, the Court concluded as follows:

"*62 While in the context of art.11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.*

63 Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

64 In Informationsverein Lentia v Austria the Court described the state as the ultimate guarantor of the principle of pluralism. A genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the state not to interfere; a purely negative conception would not be compatible with the purpose of art.11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation...

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[49] App. No. 1543/06; (2009) 48 EHRR 19.

[50] Article 11:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

See also Article 21 of the ICCPR.

67 The Court acknowledges that the assemblies were eventually held on the planned dates. However, the applicants took a risk in holding them given the official ban in force at that time. The assemblies were held without a presumption of legality, such a presumption constituting a vital aspect of effective and unhindered exercise of the freedom of assembly and freedom of expression. The Court observes that the refusals to give authorisation could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in the assemblies on the ground that they did not have official authorisation and that, therefore, no official protection against possible hostile counter-demonstrators would be ensured by the authorities".

The European Court also found a breach of Article 14 in conjunction with Article 11.[51]

59. As its provisions would criminalise human rights defenders, Section 13 also breaches Article 7 of the Declaration on Human Rights Defenders[52] which states:

"*Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance*".

Whilst the Declaration is not binding, the rights in Article 7 are aspects of the rights, binding in international law, of freedom of expression, association and assembly as detailed above.

Section 18 – Nullification of inconsistent international treaties, protocols, declarations and conventions

60. Section 18(1) of the AHB is titled "*Nullification of inconsistent international treaties, protocols, declarations and conventions*". It provides:

"*Any International legal instrument whose provisions are contradictory to the spirit and provisions enshrined in this Act, are null and void to the extent of their inconsistency*".

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[51] Article 14 does not bestow freestanding rights but has effect in relation to other Convention rights. It reads:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[52] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; adopted by the UN General Assembly (A/RES/53/144) 8 March 1999.

61. As a matter of law, this provision is in our view ineffective in nullifying Uganda's obligations in international law. It cannot on any view render inoperative binding obligations arising under customary international law as these do not depend on express consent for their existence and so cannot be negatived by the withdrawal of consent. The binding status of customary international law regardless of consent has been summarised in this way:

> "*once there is sufficient practice together with opinio juris, a new rule of custom will emerge. Subject only to what is known as the "persistent objector" principle, the new rule binds all States. The persistent objector principle allows a State which has persistently rejected a new rule even before it emerged as such to avoid its application*".[53]

There is no material of which we are aware which could allow Uganda to claim "*persistent objector*" status in order to legitimise the AHB in this regard.

62. Furthermore, in circumstances where relevant treaties provide for formal mechanisms for withdrawal or derogation it is not open to a State simply to legislate in a manner which is incompatible with those treaty obligations without recourse to such formal mechanisms or, in the absence of such mechanisms, to the default provisions of Article 56 of the Vienna Convention on the Law of Treaties, 1969[54].

63. In these circumstances section 18 of the AHB would not, as a matter of international law, be capable of achieving its intended effect in respect of any of the relevant treaty obligations identified above.

64. So far as the ICCPR is concerned, there is strong evidence, both in the *travaux preparatoires* surrounding the formation of the ICCPR and in its overall design, that its drafters did not intend States to be able to denounce or withdraw from it. The Optional Protocol to the ICCPR, which allows individuals to bring complaints to the Human Rights Committee, and which was drafted and adopted at the same time as the ICCPR, makes express provision for denunciation, specifying the period of notice and the effect of denunciation on pending matters. Similarly, Article 41 of the ICCPR,

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[53] Professor Christopher Greenwood CMG QC, *Sources of International Law: An Introduction* (2008).

[54] Although Uganda is not a party to the Vienna Convention and it post-dates the ICCPR, the Convention is generally recognised as reflecting customary international law.

which provides for States to declare that the Human Rights Committee may examine complaints against them by other States, also provides that States may withdraw such declarations. By contrast, however, there is no provision allowing States to withdraw from the ICCPR as a whole. This suggests that the States party to the ICCPR did not intend that there should be any possibility of denunciation or withdrawal but even if the contrary view is taken there is no indication that Uganda has had recourse to the withdrawal provisions of the Vienna Convention.[55]

65. Nor is it possible to sustain an argument that States have a general, implied right to withdraw from human rights treaties. Several such treaties provide expressly for withdrawal or denunciation, including the Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture, the Convention on the Rights of the Child, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. If there were a general, implied right to withdraw, then the express and specific withdrawal mechanisms in these treaties would be rendered redundant.

66. Finally, the ICCPR contains a specific mechanism for States to derogate from certain obligations under certain circumstances. Article 4 provides that:

> "*1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
>
> *2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*
>
> *3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*"

[55] See further Elizabeth Evatt, "Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence", Australian Journal of Human Rights [1999] AJHR 8.

67. The detailed nature of this express provision, which prescribes limits on derogation in terms of the requisite surrounding circumstances, maximum extent and associated procedure, would be rendered meaningless if it were the case that States may withdraw or qualify their obligations under the ICCPR simply by means of a short provision in a domestic statute. The only conclusion is that no such right exists.

68. Like the ICCPR, the African Charter contains no provision for States to denounce or withdraw from it. The interpretive arguments set out above in relation to the ICCPR also apply, therefore, to the African Charter, and suggest that the absence of a provision for denunciation or withdrawal means that no such denunciation or withdrawal is possible.

69. A further consideration applies to the African Charter, however, since (in contrast to the ICCPR) that instrument does not contain any provision for derogation. This suggests strongly that the intention of the States party to the African Charter is that its obligations are of such fundamental importance as to mean that they can never be the subject of unilateral abandonment or suspension, by any State, under any circumstances.

70. In any event, even if an implied right to denounce or withdraw from the ICCPR and/or the African Charter could be established (which, for the reasons set out above, is considered unlikely), a *"catch-all"* provision in a domestic statute, such as Section 18(b) of the AHB, is clearly insufficient in order to constitute an effective exercise of this right on the international plane.

71. It has long been established that domestic legal provisions cannot excuse a State from compliance with its international obligations.[56] Any purported withdrawal or qualification of Uganda's obligations in international law would have to be made on an international level, under the mechanisms provided for in the relevant treaties, or at least by formal notice to the relevant international secretariat. Section 18 of the AHB would be insufficient in this regard. For this and the other reasons set out above, it

[56] See, for example, Article 27 of the Vienna Convention: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

would not achieve its purported aim, and would in fact be meaningless in terms of affecting Uganda's obligations in international law.[57]

Compatibility of AHB with Ugandan Constitution

72. This is, by definition, a matter upon which the views of a Ugandan legal expert are required. If, however, it is assumed that the Ugandan Courts would take a similar approach to that adopted by the leading domestic and international courts and treaty bodies identified above then the AHB would appear to run counter to each of the following provisions of the Ugandan Constitution:

(a) Section 21(1)-(3) – Equality and freedom from discrimination on grounds of, inter alia, sex (cf. paragraphs 13, 15, 23, 28, 36 and 38 above);

(b) Section 24 – Respect for human dignity and protection from inhuman treatment or punishment (cf. paragraphs 26, 28-30, 32, 36 and 38 above);

(c) Section 27 – Right to privacy of person, home and other property (cf. paragraphs 17, 18, 20, 28-30, 32 and 38 above);

(d) Section 29 – Protection of freedom of conscience, expression, movement, religion, assembly and association (cf. paragraphs 52 - 59 above);

(e) Section 44 – Prohibition from derogation from particular human rights and freedoms (including freedom from cruel, inhuman or degrading treatment or punishment), (cf. paragraphs 60 - 71 above).

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[57] We also draw attention in this regard to Sylvia Tamale 'A Human Rights Impact Assessment of the Ugandan Anti-homosexuality Bill 2009', The Equal Rights Review, Vol. Four (2009) 49-57. Dr Tamale concludes that provisions of the Bill violate Uganda's Constitution. In considering Section 18, she concludes that it is unconstitutional for the AHB to contain a clause requiring Uganda to treat as null and void those international treaty obligations that are contrary to the spirit of the AHB. In her view, Section 18 amounts to the usurpation by Parliament of the presidential treaty-making powers granted by Article 123 of the Constitution.

Conclusion

73. We are of the clear view that the enactment of the AHB would place Uganda in flagrant breach of its international obligations. Furthermore, if the Ugandan Courts were to take the same approach to issues of this nature as has been taken by a series of other domestic and international courts, then they would be likely to treat the AHB as being contrary to the Constitution of Uganda in a series of respects.

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