

Expanded Criminalisation of Homosexuality in Uganda: A Flawed Narrative

Empirical evidence and strategic alternatives from
an African perspective



This report has been prepared by Sexual Minorities Uganda (SMUG) in response to the passing of the Anti-Homosexual Bill in the Ugandan Parliament.

About Sexual Minorities Uganda (SMUG)

SMUG is a non-profit network of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) human rights organisations. SMUG was born on 4 March 2004. It was created to work towards achieving full legal and social equality for LGBTI people in Uganda. This would be done through organising all LGBTI organisations in Uganda to create one strong LGBTI community. It would then work on behalf of its member organisations, enforcing their activities and representing them in a more organised manner by coordination of efforts through local, regional and international bodies or partners. SMUG has now developed into a network of 18 LGBTI member organisations in Uganda all working to advance the rights of LGBTI persons and improve their welfare.

It is advocacy that has made SMUG an integral part of the human rights struggle in Uganda.

SMUG Vision: A liberated LGBTI people of Uganda.

SMUG Mission: To monitor, coordinate, and support member organisations to achieve their objectives aimed at the liberation of LGBTI people.

Membership and Governance: SMUG's constituency is made of all LGBTI persons living in Uganda and belonging to the member organisations. Our constituency is as diverse as the Ugandan society itself. This implies that sexual and gender minorities in Uganda are of different tribes, cultures, sex, and gender and vary in educational backgrounds, economic classes and creed. While there is a great diversity in educational and economic status, and gender identity and expression, we do have a much more urban than rural constituency.

For more information, please visit the SMUG website at: <http://www.sexualminoritiesuganda.com> Follow us on Twitter: @SMUG2004 and Facebook: <https://www.facebook.com/smug2004>

ACKNOWLEDGMENTS

The production of this report was a collective effort from various persons who contributed in countless ways.

SMUG would like to extend its acknowledgment to Onyango & Co. Advocates, Kampala, for assisting in reviewing this report.

We also acknowledge all our members for validating and endorsing the production of this report.

We extend our gratitude to all generous supporters who made financial contributions to the production of this report.

DEDICATION

We would like to dedicate this report to the numerous lesbian gay bisexual transgender and intersex persons and those person suspected and labelled LGBTI, who have suffered or been victimised by the expanded criminalisation of homosexuality in Uganda.

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Executive summary

1. This report explores the various attempts to rationalise expanded criminalisation of homosexuality under the Anti-Homosexuality Bill that has been passed by Parliament. Although reports have indicated that the President of Uganda has sent it back to Parliament having rejected it in its current form, it has also been suggested he will present his own amended version of the legislation.¹ Given the seriousness of the consequences of this proposed law in terms of potential human rights violations and negative impacts on public health and governance if passed into law, it is important that the justifications behind it are subjected to the greatest scrutiny. These include **myths** that:
 - a. homosexuality is alien to Africa;
 - b. homosexuality is mutable and a mental disorder;
 - c. expanded criminalisation is necessary to protect the traditional African family unit;
 - d. expanded criminalisation is necessary to maintain strong religious convictions;
 - e. expanded criminalisation will help prevent the spread of HIV;
 - f. expanded criminalisation will help prevent child abuse; and
 - g. gay and lesbian persons are asking for special rights and privileges.
2. The report uses historical, anthropological and comparative social data from other sub-Saharan African states to subject these preconceptions to the necessary evidentiary scrutiny.
3. Each section of the report poses a question based on the most common misconceptions about homosexuality in a specifically Ugandan context. A brief summary of the findings follows.

I. Is homosexuality alien to Africa?

Historical and anthropological evidence shows that same sex relationships existed throughout Africa, including in the territories that now make up Uganda, long before colonisation by Western powers. There was no particular stigmatisation of this behaviour; indeed in many cultures it was part of accepted normal relationships between people. Current homophobic attitudes date from the colonial period and are strongest in those countries that were once part of the British Empire. Uganda's laws criminalising homosexuality stem entirely from laws introduced by the British colonial administration in 1902 and 1950 in an attempt to counter what was seen at the time as dangerous sexual tendencies among Ugandans. *Ubuntu* (or 'African humanism') extends tolerance towards and acceptance of other sexualities, including lesbian, gay, bisexual and transgendered people. Consequently, it is more correct to see homophobia as alien to Africa rather than homosexuality.

¹ 'President Museveni will Reject "Fascist" Anti-Gay Bill; Plans to Introduce New Legislation', Robert F. Kennedy Center for Justice and Human Rights, 18 January 2014. Available at: <http://rfkcenter.org/president-museveni-will-reject-fascist-anti-gay-bill-plans-to-introduce-new-legislation?lang=en>; 'Museveni Postpones Anti-Homosexuality Bill', *Wall Street Journal*, 17 January 2014. Available at: <http://online.wsj.com/news/articles/SB10001424052702304603704579326261995028546>.

II. Is homosexuality mutable and a mental disorder?

The overwhelming and considered opinion of the psychological and psychiatric professions in Africa and across the globe is that homosexuality is not a mental disorder, but a natural variant of human sexuality. Nor is it considered 'abnormal'. The application of the label of 'mental disorder' should be treated with deep suspicion, when such a label is supported neither by scientific fact nor by psychological and psychiatric communities worldwide, and is instead driven by personal feelings of hostility towards a particular group simply because they are different. Furthermore, the overwhelming medical opinion concerning conversion or reparative therapies, which claim to change the sexual orientation of homosexuals, is that, at best, they do not work, and at worst they are damaging to individuals. Therefore the notion that homosexuality can be consciously altered is completely without merit.

III. Is expanded criminalisation necessary to protect the traditional African family unit?

Empirical data demonstrate how fears that the traditional African family unit will be destroyed without expanded criminalisation of homosexuality are entirely unfounded. Furthermore, the underlying assumption that homosexuality is 'contagious', that children will somehow be recruited into the so-called 'homosexual lifestyle' unless tough criminal sanctions are in place, is also completely without merit. Countries such as Niger, Mali, Burkina Faso and Congo, which have never criminalised homosexuality, do not have ever-increasing populations of gay men and lesbian women, and the traditional African family unit which forms part of their respective societies is very much alive and well. Therefore expanded criminalisation can have no impact on the traditional family unit.

IV. Is expanded criminalisation necessary to maintain strong religious convictions?

Data across Africa indicate that there is no basis in the belief that expanded criminalisation is needed to maintain strong religious faith. Statements made by a number of religious leaders, including heads of the Southern African Anglican Communion, and Archbishop Desmond Tutu in particular, and the Vatican, reiterate that there is no religious requirement that sexual minorities be persecuted with expanded criminalisation through the coercive power of the state. Whatever one's religious or moral view about diverse sexualities, those views are separate and distinct from the domain of criminal law, which should only concern itself with the protection of members of society from harm as in the case of non-consensual sex, coercive sex, sex with minors, incest, sex trafficking, and the sexual exploitation of children.

V. Does expanded criminalisation help prevent the spread of HIV?

All indicators suggest that the criminalisation of same-sex sexual conduct actually increases the risk of HIV infection, not just among men who have sex with men (MSM) but in the wider society. One of the underlying principles of successful HIV programming is non-discriminatory access to sexual health services. Given the overwhelming medical and scientific evidence, promulgated by international organisations such as UNAIDS, which demonstrates criminalisation of homosexuality has severe negative consequences for HIV programmes – and therefore public

health in general – the expanded criminalisation in the proposed law can only further exacerbate the situation in Uganda.

VI. Will expanded criminalisation of homosexuality reduce instances of child abuse?

If the reason for promoting the proposed law is the protection of children and minors from sexual abuse and transactional sex, then it is misguided and inadequate for such an aim. Sex with minors, who are by definition under the age of consent, should be criminalised. Yet current legal provisions in Uganda are biased against the boy-child, and distinguish penal sanctions between victims based on their gender. Even with the legal safeguards in place to protect the girl-child from sexual abuse, it remains the second most common crime in Uganda. This is why prominent opponents to the proposed law from within Uganda agree in principle with its concerns – the protection of young and vulnerable Ugandans from sexual exploitation and abuse – but recognise that this must extend to all situations of abuse, whether the abuse is opposite-sex or same-sex in nature. The criminalisation of adult, consensual same-sex intimacy does nothing to address these concerns.

VII. Are homosexual persons asking for privileges/rights that other citizens do not have?

A commonly held perception is that a failure to expand criminalisation of homosexuality will lead in itself to an assertion of rights or privileges beyond those that are provided for in the Constitution of the Republic of Uganda. This misconception is as a result of a misunderstanding of the nature of rights that are provided for in the Constitution. Rights are inherent and are not granted by the state. All the rights provided in the 1995 Constitution inhere in human beings and one not need be of any sexual orientation to enjoy them. The decision not to expand criminalisation will not lead to the acquiring of any privileges by the gay and lesbian community.

4. To recap:

- a. same-sex practises were common place in pre-colonial Africa, as demonstrated by a wealth of anthropological and historical data;
- b. same-sex attraction is not alterable or a mental disorder, according to widespread consensus of psychiatric and psychological bodies;
- c. the level of criminalisation does not affect demographics, based on clear evidence such as the fact that the two countries with the highest fertility and birth rates in the world do not criminalise homosexuality;
- d. religious conviction is, in some instances, greater in countries which do not criminalise than countries which stringently enforce criminal provisions, as demonstrated by demographic data;
- e. the spread of HIV is aggravated, rather than halted or reversed, by criminalisation and expanded criminalisation, based on incontrovertible epidemiological data which has been acknowledged by various African and international figures;
- f. sexual abuse of children, particularly of girls but especially boys, is a serious problem in Uganda, and this is primarily driven by poverty rather than the sexual orientation of the perpetrators as demonstrated by crime statistics; and
- g. gay and lesbian people are not seeking special privileges or rights, they are simply seeking enforcement of the rights enjoyed by all Ugandans under the 1995 Constitution of Uganda.

5. Drawing on the empirical data, historical and anthropological evidence, as well as expert medical and legal opinion, this report makes four recommendations as political and legislative alternatives to the Anti-Homosexuality Bill:
 - a. Amend sexual offence laws to ensure offences and sentences are gender neutral.
 - b. Implement a system of mandatory reporting of suspected child abuse.
 - c. Address underlying risk factors associated with child sexual exploitation, including poverty and other economic factors.
 - d. Ensure non-discriminatory access to health services.

Purpose of this report

The purpose of this report is to analyse critically the underlying concerns that have informed the development of the Anti-Homosexuality Bill (the 'proposed law'). In doing so, it would be useful for the Policy makers in steering the debate away from a discourse of persecution towards one of human rights-compliant solutions to Uganda's real and pressing social concerns by providing practical and constitutionally valid alternatives to the proposed law. In addition it will help inform domestic and international pressure on Uganda.

Uganda already criminalises homosexual conduct by virtue of ss. 145, 146 and 147 of the *Penal Code Act 1950* (Chapter 120) (the 'Act').² The proposed law attempts to further entrench and expand such criminalisation by criminalising additional people and increasing penalties for certain conduct, going significantly beyond what is currently provided for under the Act. In this report, these effects of the proposed law are referred to as 'expanded criminalisation'.

The proposed law's memorandum states that one of its aims is:

[S]trengthening the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family. (emphasis added)

It goes on to state:

This legislation further recognizes the fact that same sex attraction is not an innate and immutable characteristic ...

The Bill further aims at providing comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda, legal, religious, and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda.

There is also need to protect the children and youths of Uganda who are made vulnerable to sexual abuse and deviation (emphasis added)

The supposed necessity of the proposed law mirrors common rationalisations of criminalisation as evidenced in public statements by senior political figures across certain, but by no means all, African states:

1. that homosexuality is fundamentally un-African and is a Western value of sexual promiscuity being imposed on African nations;
2. that homosexuality is 'mutable' and a mental disorder;
3. that understanding and tolerance of homosexuals will undermine and destroy the traditional African family unit;
4. that criminalisation is consistent with or required to maintain African religious values;
5. that criminalisation is required to limit the spread of HIV; and
6. that criminalisation is necessary to protect children from sexual exploitation.
7. that gay and lesbian persons are asking for extra rights or privileges which other citizens do not enjoy.

² Penal Code Act 1950 (Cap 120), sections 145 (unnatural acts which includes 'carnal knowledge of any person against the order of nature'), 146 (attempts to commit unnatural acts) and 147 ('any acts of gross indecency').

This report aims to address these seven common arguments in favour of expanded criminalisation in Uganda, by way of an evidence-based comparative analysis with other African states that either do not currently or have never criminalised homosexuality. Using a number of reliable social data sources, it will be demonstrated that each of the concerns has no evidentiary basis and, in some cases, criminalisation itself is responsible for the feared negative consequences. Furthermore, it will demonstrate that it is not homosexuality that is a foreign import, but criminalisation and intolerance, neither of which featured in pre-colonial African societies. Finally, alternatives to criminalisation of homosexuality will be suggested to target better the real and valid underlying concerns regarding sexual offences, child sexual exploitation and abuse, and public health.

I. Is homosexuality alien to Africa?

A commonly cited reason for maintaining - or expanding - criminalisation of homosexuality is that it is a foreign phenomenon; that it is fundamentally un-African. Such a position has been outlined by many leading figures in Africa, such as Canon Taiwo of Nigeria, who said:

*They dare not come to the open. They will be shot. I can assure you that they will be stoned to death. We don't do it in Africa. It is only in the West that they are doing rubbish.*³

Although the construction of homosexuality as 'against African norms and traditions'⁴ is one of the most enduring modern discourses surrounding same-sex practises within Africa, does historical and anthropological evidence support such a position? President Yoweri Museveni has in the recent past publicly acknowledged that there were incidences of homosexuality in African traditions. He has noted that, '[in our society, there were a few homosexuals. There was no persecution, no killings and no marginalization of these people.]' This acknowledgement is in line with the writings of anthropologists that have extensively researched the issue in the region. President Museveni also acknowledged that, '[sex among Africans including heterosexuals is confidential]'.⁵ It should be pointed out, however, that the President was in no way endorsing homosexuality.

Historical context

In their work anthropologists Stephen Murray and Will Roscoe provide wide-ranging evidence in support of the fact that throughout Africa's history, homosexuality has been a 'consistent and logical feature of African societies and belief systems'.⁶ Thabo Msibi of the University of Kwazulu-Natal documents many examples in Africa of same-sex desire being accommodated within pre-colonial rule'.⁷ Deborah P. Amory speaks of 'a long history of diverse African peoples engaging in same sex relations'.⁸ Drawing on anthropological studies of the pre-colonial and colonial eras, it is possible to document a vast array of same-sex practises and diverse understandings of gender across the entire continent. Examples include:

- One notably 'explicit'⁹ Bushmen painting, which depicts African men engaging in same-sex sexual activity.
- In the late 1640s, a Dutch military attaché documented Nzinga, a warrior woman in the Ndongo kingdom of the Mbundu, who ruled as 'king' rather than 'queen', dressed as a man and

³ Canon Taiwo in interview with Kaoma, K., *Globalizing the Culture Wars: U.S. Conservatives, African Churches and Homophobia* (2012). Available at: <http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/africa-full-report.pdf> [last accessed 2 December 2013].

⁴ Former President of Kenya Daniel arap Moi, quoted in Mwaura, P. 'Homosexuality Un-African? It's a Big Lie' in *Daily Nation*, 5 June 2006.

⁵ See "Museveni Speaks out on Homosexuality" *The New Vision*, March 19 2013. Available at: <http://www.newvision.co.ug/news/640814-museveni-speaks-out-on-homosexuality.html>. In his statement President Museveni referred to attitudes in the past as also considering homosexuals 'deviants'.

⁶ Murray, S. and Roscoe, W., *Boy-Wives and Female Husbands: Studies of African Homosexualities* (1998), p. XV

⁷ Msibi, T., 'The Lies We Have Been Told: On (Homo) Sexuality in Africa' in *Africa Today*, Vol. 58, No. 1 (2011), p. 99

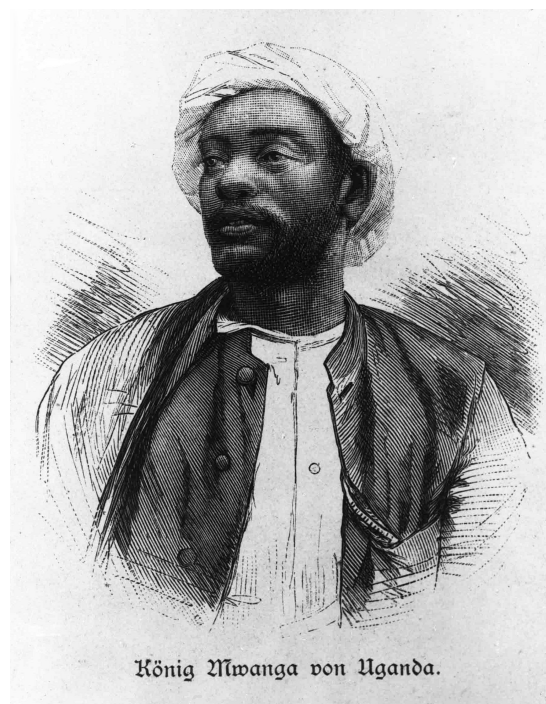
⁸ Amory, D. P., "'Homosexuality" in Africa: issues and debates' in *Journal of Opinion XXV*, No. 1, Commentaries

⁹ Epprecht, M., 'The 'Unsayings' of Indigenous Homosexualities in Zimbabwe: Mapping a Blindspot in an African Masculinity' in *Journal of Southern African Studies*, Vol. 24, No. 4, Special Issue on Masculinities in Southern Africa (1998), p. 631.

surrounded herself with a harem of young men who dressed as women and who were her 'wives'.¹⁰

- Eighteenth century anthropologist, Father J-B. Labat, documented the Ganga-Ya-Chibanda, presiding priest of the Giagues, a group within the Congo kingdom, who routinely cross-dressed and was referred to as 'grandmother'.¹¹
- In traditional, monarchical Zande culture, anthropological records described homosexuality as 'indigenous'.¹² The Azande of the Northern Congo 'routinely married'¹³ younger men who functioned as temporary wives – a practise that was institutionalised to such an extent that warriors would pay 'brideprice' to the young man's parents.
- Amongst Bantu-speaking Pouhain farmers (Bene, Bulu, Fang, Jaunde, Mokuk, Mwele, Ntum and Pangwe) in present-day Gabon and Cameroon, homosexual intercourse was known as *bian nkû'ma*¹⁴ – a medicine for wealth which was transmitted through sexual activity between men.
- Similarly in Uganda, amongst the Nilotico Lango, men who assumed 'alternative gender status'¹⁵ were known as *mukodo dako*. They were treated as women and were permitted to marry other men. Same-sex relationships were reported amongst other groups in Uganda, including the Bahima,¹⁶ the Banyoro and the Baganda. King Mwanga II, the Baganda monarch, was widely reported to have engaged in sexual relations with his male subjects.

Fig. 1 King Mwanga II of Buganda



¹⁰ Murray and Roscoe (1998) at n. 4, p. 1.

¹¹ Ibid, pp. 9-10.

¹² Evans-Pritchard, E. E., *The Azande: History and Political Institutions*. Oxford: Clarendon Press (1971), p183.

¹³ Murray and Roscoe (1998), p. XII.

¹⁴ Murray, S. (undated), 'Homosexuality in "Traditional" Sub-Saharan Africa and Contemporary South Africa', p. 9. Available at: http://semgai.free.fr/doc_et_pdf/africa_A4.pdf [last accessed 25 November 2013]

¹⁵ Msibi, (2011), at n 5 p. 99.

¹⁶ Mushanga, M., 'The Nkole of Southwestern Uganda' in Molnos, A. (ed.), *Cultural Sources Materials for Population Planning in East Africa: Briefs and Practices* (1973).

- A Jesuit working in Southern Africa in 1606 described finding ‘*Chibadi*, which are Men attired like Women, and behave themselves womanly, ashamed to be called men’.¹⁷
- In the early 17th century in present-day Angola, Portuguese priests Gaspar Azevedo and Antonius Sequerius encountered *chibados*, men who spoke, sat and dressed like women, and who entered into marriage with men. Such marriages were ‘honored and even prized’.¹⁸
- In the Iteso communities, based in northwest Kenya and Uganda, same-sex relations existed amongst men who behaved as and were socially accepted as women.¹⁹ Same-sex practises were also recorded among the Banyoro²⁰ and the Langi.²¹
- In pre-colonial Benin, homosexuality was seen as a phase that boys passed through and grew out of.²²
- There were practises of female-female marriages amongst the Nandi and Kisii of Kenya, the Igbo of Nigeria, the Nuer of Sudan and the Kuria of Tanzania.²³
- Among Cape Bantu, lesbianism was ascribed to women who were in the process of becoming chief diviners, known as *isanuses*.²⁴

This is by no means an exhaustive list. Given the overwhelming evidence of pre-colonial same-sex relations which continued into the colonial and post-colonial eras, as well as historical evidence of diverse understandings of gender identity, it is clear that homosexuality is no more ‘alien’ to Africa than it is to any other part of the world. As stated by Murray and Roscoe:

*Numerous reports also indicate that in the highly sex-segregated societies of Africa, homosexual behaviour and relationships were not uncommon among peers, both male and female, especially in the years before heterosexual marriage... These kinds of relations were identified with specific terms and were to varying degrees institutionalized.*²⁵

What the colonisers imposed on Africa was not homosexuality ‘but rather intolerance of it – and systems of surveillance and regulation for suppressing it’.²⁶

The history of anti-homosexual laws

The laws governing same-sex sexual conduct in Uganda are derived from legislation enacted in the United Kingdom and adopted in its colonies – the so-called ‘sodomy’ laws, which concerned ‘buggery’, although this was never actually defined, and ‘gross indecency’ laws, which were so vaguely worded as to give police ample ‘opportunities to arrest people on the basis of suspicion or appearance’ and could include simple intimacies between two men.²⁷

¹⁷ Murray (undated), at n. 12, p. 13.

¹⁸ Ibid.

¹⁹ Lawrance, J., *The Iteso: Fifty Years of Change in a Nilo-Hamitic Tribe of Uganda* (1957)

²⁰ Needham, R., ‘Right and left in Nyoro symbolic classification’ in Needham, R. (ed.), *Right and Left: Essays on Dual Classification* (1973)

²¹ Driberg, J., *The Lango*, (1923).

²² Tendi, B M, ‘African myths about homosexuality’, *The Guardian* (UK), 23 March 2010, available at: <http://www.theguardian.com/commentisfree/2010/mar/23/homophobia-africa-gay-rights> [last accessed 9 January 2014]

²³ Tamale, S., ‘A Human Rights Impact Assessment of the Ugandan Anti-Gay Bill’ in *Equal Rights Review*, Vol. 4 (2009), p. 50. Available at: <http://www.equalrightstrust.org/ertdocumentbank/Sylvia.pdf> [last accessed 25 September 2013].

²⁴ Murray (undated), at n. 12, p. 47.

²⁵ Murray and Roscoe (1998), at n. 4, p. 9.

²⁶ Ibid., p. XVI.

²⁷ Gupta, A., *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, Human Rights Watch (2008), p. 11. Available at: http://www.hrw.org/sites/default/files/reports/lgbt1208_web.pdf [last accessed 8 October 2013]

So the origin of anti-homosexuality laws in Uganda and other countries around the world that were once British colonies is British law itself.²⁸

British laws governing sexual conduct between men (sexual relations between women were never criminalised) were rolled out across the Empire during the nineteenth and early twentieth centuries, beginning with India and over the following decades extending into Africa as more and more territory was annexed. The purpose was to instil British morality 'into resistant masses'.²⁹ This was not only an attempt to modify what the colonialists saw as unacceptable behaviour in the 'native' populations, but to stop 'moral infection' of colonialists themselves from the 'native' environment. British Imperialist apologists saw homosexuality as widespread amongst the people of the territories colonised by Britain. The explorer, Richard Burton, for example, wrote of a zone straddling the equatorial and tropical regions where 'the Vice [sodomy] is popular and endemic'.³⁰

British colonial anxiety about indigenous sexual practices and their potentially corrupting influence can be seen at work in an African context from early on in the colonial period. Marc Epprecht of the University of Zimbabwe analysed court records from the late nineteenth and early twentieth centuries dealing with same-sex 'crimes' among African men in what is now Zimbabwe at a time when it is too early to dismiss these activities as the result of Western decadent influence. Some of those convicted described stable, affectionate relationships.³¹

A high-profile figure like Mwanga II, the last independent king or Kabaka of Buganda, was subjected to systemic vilification by Christian missionaries and later British administrators, on the grounds of his reported homosexuality.³² His life has been reassessed recently by Samwiri Lwanga Lunyiigo of the Makerere Institute of Social Research, dispelling many of the colonial myths.³³ It is ironic that the rhetoric used today to condemn homosexuality as a Western import was used a century ago by colonisers to warn against indigenous Ugandan same-sex sexual practices.

Uganda was declared a British protectorate in 1894, and eight years later, by virtue of Section 15(2) of the *Order in Council 1902*, the laws of the United Kingdom became applicable in Uganda. These included the various provisions governing same-sex sexual conduct. Finally the Ugandan *Penal Code 1950*, imposed by the colonial administration, replaced earlier provisions and is the source for the current so-called 'unnatural offences' laws.³⁴

The leaders of Uganda – and many other parts of modern-day Africa – find themselves, therefore, in the position of defending British colonialism if they defend colonial laws that, as a result of racist attitudes, effectively outlawed African values of diversity and tolerance.

This is in stark contrast to those African nations that were colonised by other European powers. Whereas the British imposed extended criminal codes which prohibited same-sex sexual conduct, the French incorporated into a penal code of 1810 provisions which had already previously abolished the offence of 'sodomy' in 1791.³⁵ The influence of the French Penal Code was promulgated through its adoption by

²⁸ Specifically, *The Offences Against the Person Act 1861*, which provided for criminal sanctions for 'buggery' from ten years hard labour to life, and the *Criminal Law Amendment Act 1885*, which introduced the additional crime of 'gross indecency'.

²⁹ Gupta (2008), at n. 25, p. 5.

³⁰ Quoted in Aldrich, R., *Colonialism and Homosexuality*, London: Routledge (2003), p. 31.

³¹ Amory (1997), at n. 6, pp. 6-7.

³² *Bulletin of the American Geographical Society*, vol. 41, No. 1 (1909), p. 58, review of Grington Berry, W., *Bishop Hannington and the Story of the Uganda Mission*

³³ Lwanga-Lunyiigo, S., *Mwanga II: Resistance to Imposition of British Colonial Rule in Buganda, 1884-1889*, Wavah Books (2011)

³⁴ Gupta (2008), at n. 25, p. 20.

³⁵ Merrick, J. and Ragan, B. T. (eds.), *Homosexuality in Modern France*, Oxford (1996), p. 82.

countries such as The Netherlands, Belgium, Spain, Portugal and Italy – as well as their respective colonies and dependencies. This meant that:

*... comparatively few of the countries of the European empires, other than the British, ever imposed criminal sanctions specifically on same-sex consensual activity in private. The existence of such offences has been a peculiar inheritance of British rule...*³⁶

This is especially evident when one examines the list of African states which currently do not criminalise homosexuality, as – with the exception of South Africa - none is a former British colony:

- Burkina Faso (France)
- Benin (France)
- Cape Verde (Portugal)
- Central African Republic (France)
- Chad (France)
- Congo (Belgium)
- Democratic Republic of Congo (Belgium)
- Djibouti (France)
- Equatorial Guinea (Spain)
- Gabon (France)
- Guinea-Bissau (Portugal)
- Ivory Coast (France)
- Madagascar (France)
- Mali (France)
- Niger (France)
- Rwanda (Germany/Belgium)
- South Africa (Britain/The Netherlands)

Like many African countries which inherited criminalisation of homosexuality, this is yet further evidence that Uganda did so through the legacy of British colonial laws.

Ubuntu

Ubuntu, commonly referred to as ‘African humanism’, is a Bantu term, originating from as early as the mid-nineteenth century. It is a ‘pervasive African philosophy’,³⁷ a ‘cosmology’ that defines the ‘harmonic intelligence’ underpinning local cultures in Africa;³⁸ it is a ‘gift that Africa will give the world’³⁹ and ‘the backbone of many African societies’.⁴⁰ *Ubuntu* is a complex and ‘multidimensional concept’,⁴¹ which many believe is difficult to translate into western language.

Archbishop Desmond Tutu, however, has attempted to offer just such a definition of *Ubuntu*. He calls it:

³⁶ Kirby, M., ‘The Sodomy Offence: Britain’s Least Lovely Criminal Law Export?’ in Lennox, C. and Waites, M. (eds.), *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change*. London: School of Advanced Study, University of London (2013), p. 64.

³⁷ Swartz, S., quoted in Hailey, J., *Ubuntu: A Literature Review: A Paper Prepared for the Tutu Foundation* (2007), p. 4. Available at: http://www.tutufoundationuk.org/documents/UbuntuLiteratureReview_JH_Dec08.pdf [last accessed 26 November 2013]

³⁸ Dandala, H., quoted in Hailey, (2007), at n. 32, p. 4.

³⁹ Tutu, Archbishop D., quoted in Hailey (2007), at n. 32, p. 2.

⁴⁰ Nyathu, N., quoted in Hailey (2007), at n. 32, p. 3.

⁴¹ Hailey (2007), at n. 32, p. 5.

[T]he essence of being a person. It means that we are people through other people. We cannot be fully human alone. We are made for interdependence, we are made for family. When you have ubuntu, you embrace others. You are generous, compassionate.... A person with ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.⁴²

According to Michael Onyebuchi Eze of Augsburg University the notion that '[a] person is a person through other people strikes an affirmation of one's humanity through recognition of an "other" in his or her uniqueness and difference'.⁴³ *Ubuntu*, therefore, stresses the interconnectedness of human beings, beyond differences such as race, ethnicity, gender, religion or sexual orientation – yet 'it also acknowledges the importance of their individuality and independent identity'.⁴⁴

Such a tolerant and inclusive philosophy appears to sit ill at ease with the existence of laws, inherited from the colonial era, which criminalise private consensual conduct between adults. Yet its potential role in countering the lingering influence of colonial intolerance and restoring the much older African tradition of diversity and openness should not be underestimated. As Prof. Sylvia Tamale has indicated, rather than using a contested rights discourse or other politically charged language, activists and theorists ought to employ the concept of *ubuntu* as a solid base for the realisation of universal human rights, including the human rights of LGBT people, in sub-Saharan Africa.⁴⁵

Given the anthropological and historical evidence of the preponderance of same-sex practices in pre-colonial Africa and the undisputed source of laws criminalising homosexuality in British colonial rule, the assertion that homosexuality is un-African cannot be sustained. It is the intolerance of homosexuality and the persecution of homosexuals which is un-African.

⁴² Tutu Foundation UK, *Ubuntu*. Available at: <http://www.tutufoundationuk.org/ubuntu.php> [last accessed 26 November 2013]

⁴³ Eze, M. O., *Intellectual History in Contemporary South Africa*, Macmillan (2010), p. 190

⁴⁴ Hailey (2007), at n. 38, p. 7.

⁴⁵ In a lecture to the College of Liberal Arts' Human Rights Program, University of Minnesota. Available at: <http://blog.lib.umn.edu/hrp/main/2012/10/sylvia-tamale-proposes-an-ubun.html>

II. Is homosexuality mutable and a mental disorder?

A second commonly cited reason for maintaining or enhancing criminalisation of homosexuality is that gay and lesbian individuals are either mentally disordered or consciously choose the gay 'lifestyle', and hence, they are able to (and should) simply change their sexual orientation. While the proposed law limits its claims to stating that 'same sex attraction is not ... immutable', constructing homosexuality as a mental disorder or psychological problem is a common justification for expanding criminalisation. Linked to the notion that homosexuality is a 'condition' is the commonly cited fear that children are vulnerable to recruitment or 'deviation'. Do such claims have any evidentiary basis, however?

Homosexuality is not a mental disorder

Although homosexuality is often posited as a mental disorder by those who favour expanded criminalisation, it is worthwhile recalling examples of previously stated 'mental disorders' that were nothing more than a pseudo-scientific imposition of prejudice and intolerance. For example, in the mid-19th century in the United States, attempts made by African slaves to escape the appalling conditions to which they were subjected were classified as *drapetomania* – a supposed mental disorder which caused slaves to flee captivity.⁴⁶ It is therefore important to treat with deep suspicion the application of the label of 'mental disorder' to any behaviour, when such a label is unsupported by psychological research and psychiatric communities worldwide and is instead driven by personal feelings of hostility towards a particular group, simply because they are different.

What, then, is the psychological and psychiatric consensus on homosexuality?

- In 1973 the American Psychiatric Association removed the classification of homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).⁴⁷ The American Psychological Association said it 'supports the action taken on December 15, 1973, by the American Psychiatric Association, removing homosexuality from that Association's official list of mental disorders'.⁴⁸
- The World Health Organisation followed suit in 1992 when it removed homosexuality from the International Classification of Diseases (ICD-10).⁴⁹
- In 2001, the Chinese Psychiatric Association removed homosexuality from its list of mental disorders, in the third version of the Chinese Psychiatric Disorder and Classification Standards. Declassification has been endorsed by numerous professional organisations.
- The Psychological Society of South Africa in 2009 emphasised that '[t]he scientific fields devoted to mental health and well-being, including psychiatry, psychology and sociology, do not consider homosexual orientation to be a disorder, but rather view it as a naturally occurring variation of normal human sexuality' and therefore not abnormal.⁵⁰

⁴⁶ White, K., *An Introduction to the Sociology of Health and Illness*, London: Sage Publications Ltd (2002), p. 42.

⁴⁷ American Psychiatric Association, *Position Statement on Homosexuality and Civil Rights* (1973).

⁴⁸ Conger, J.J. (1975). "Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the annual meeting of the Council of Representatives" in *American Psychologist*, 30 (1975) pp. 620-651. Available at: <http://www.apa.org/about/policy/discrimination.aspx> [last accessed 9 December 2013]

⁴⁹ World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines* (1992). Available at: <http://www.who.int/classifications/icd/en/bluebook.pdf> [last accessed 19 November 2013].

⁵⁰ Psychological Society of South Africa, *An Open Statement from the Psychological Society of South Africa to the People and Leaders of Uganda Concerning The Anti-Homosexuality Bill 2009* (2009). Available at:

- The British Psychological Society in 2012 confirmed that '[a]s set out in the ICD-10 and DSM-IV, homosexuality per se is not a diagnosable mental disorder'.⁵¹
- The Australian Psychological Society said in 2012 that 'claiming homosexuality is a mental disorder stems from efforts to discredit the growing social acceptance of homosexuality as a normal variant of human sexuality'.⁵²
- The Psychological Association of the Philippines issued a statement in 2012 reaffirming that:
*[D]ecades of scientific research have led mental health professional organizations worldwide to conclude that lesbian, gay and bisexual orientations are normal variants of human sexuality The Psychological Association of the Philippines (PAP) aligns itself with the global initiatives to remove the stigma of mental illness that has long been associated with diverse sexualities and to promote the wellbeing of LGBT people.*⁵³
- In 2013, the Lebanese Psychiatric Society categorically stated that 'homosexuality is not a mental disorder'.⁵⁴

Given the overwhelming and considered opinion of the psychological and psychiatric professions across the globe, including in Africa, it is clear that homosexuality is no more a mental disorder than the aforementioned *drapetomania*. The characterisation of both 'conditions' as mental disorders is driven not by objective medical evidence or scientific fact, but by subjective, personal prejudice and hostility towards certain groups based on their personal characteristics.

If, however, homosexuality is not a mental disorder, can it still be said that homosexuality is not innate and immutable?

The immutability of homosexuality

One way to measure whether sexual orientation is mutable is to examine the opinion of medical experts on the merits of Sexual Orientation Change Efforts ('SOCE'), also known as 'conversion' or 'reparative' therapies, which claim to be able to alter the sexual orientation of gay and lesbian individuals. The scientific and medical community worldwide has also denounced such therapies:

- The Pan American Health Organisation (regional office of the World Health Organisation) has said '[b]esides the lack of medical indication, there is no scientific evidence for the effectiveness of sexual re-orientation efforts'.⁵⁵

<http://www.pyssa.com/documents/Open%20Statement%20from%20PsySSA%2023-02-10.pdf> [last accessed 19 November 2013]

⁵¹ British Psychological Society, *Position Statement: Therapies Attempting to Change Sexual Orientation* (2012). Available at:

http://www.bps.org.uk/system/files/images/therapies_attempting_to_change_sexual_orientation.pdf [last accessed 25 November 2013]

⁵² Australian Psychological Society, *APS Position Statement on the Use of Therapies that Attempt to Change Sexual Orientation* (2012). Available at: http://www.psychology.org.au/Assets/Files/reparative_therapy.pdf [last accessed 9 December]

⁵³ Psychological Association of the Philippines, *Statement of the Psychological Association of the Philippines on Non-Discrimination Based on Sexual Orientation, Gender Identity and Expression* (2012). Available at: <http://www.pap.org.ph/?ctr=page&action=resources> [last accessed 19 November 2013]

⁵⁴ Sandels, A., 'Lebanese medical group says being gay is not a disease' in *Los Angeles Times*, 12 July 2013. Available at: <http://articles.latimes.com/2013/jul/12/world/la-fg-wn-lebanon-homosexuality-20130712> [last accessed 2 December 2013]

- The Royal College of Psychiatrists in the United Kingdom stated that there is ‘no sound scientific evidence that sexual orientation can be changed’.⁵⁶
- The Royal New Zealand and Australian College of Psychiatrists similarly indicated that it ‘does not support the use of sexual orientation change efforts of any kind’ and warned that ‘[m]ental health workers should avoid misrepresenting the efficacy of sexual orientation change efforts when providing assistance to people distressed by their own or others’ sexual orientation’.⁵⁷
- The Hong Kong Psychological Society confirmed that ‘[p]sychologists understand that efforts to change sexual orientation are not proven to be effective or harmless’.⁵⁸
- The Psychological Society of South Africa published an open letter to President Museveni in response to the proposed law in 2009. It concluded that ‘[w]hile “causes” for any of these sexual orientations remain unclear, they are highly resistant to change’, and that ‘[r]esearch and clinical experience further concludes that for most people sexual orientation is not “a choice” or “voluntary”’.⁵⁹
- The Indian Journal of Psychiatry also concluded in an editorial that ‘[t]here is no evidence for the effectiveness of sexual conversion therapies. Such treatments also raise ethical questions. In fact, there is evidence that such attempts may cause more harm than good’.⁶⁰
- The Lebanese Psychiatric Society announced its strong opposition to Sexual Orientation Change Efforts declaring that:

*Homosexuality ... does not need to be treated.... The assumption that homosexuality is a result of disturbances in the family dynamic or unbalanced psychological development is based on wrong information.*⁶¹

- In June 2013, Exodus International – the largest and oldest ‘gay-cure’ group – shut down its operations permanently and issued a public apology for the ‘pain and hurt’ it caused to LGBT persons worldwide.⁶²

⁵⁵ Pan American Health Organisation, ‘“Cures” for an illness that does not exist’ (2010). Available at: http://new.paho.org/hq/index.php?option=com_docman&task=doc_view&gid=17703&Itemid [last accessed 19 November 2013].

⁵⁶ Royal College of Psychiatrists, *Position Statement on Sexual Orientation*, PS01/2010 (2010). Available at: http://www.rcpsych.ac.uk/pdf/PS01_2010x.pdf [last accessed 19 November 2013]

⁵⁷ Royal New Zealand and Australian College of Psychiatrists, *Position statement 60 – Sexual reorientation therapies* (2010). Available at: http://www.ranzcp.org/Files/ranzcp-attachments/Resources/College_Statements/Position_Statements/ps60-pdf.aspx [last accessed 19 November 2013]

⁵⁸ Hong Kong Psychological Society, *Position Paper for Psychologists Working with Lesbians, Gays, and Bisexual (LGB) Individuals* (2012). Available at: http://www.hkps.org.hk/padmin/upload/wpage1_26download2_Position%20Paper%20on%20LGB.pdf [last accessed 19 November 2013]

⁵⁹ Psychological Society of South Africa, *An Open Statement from the Psychological Society of South Africa to the People and Leaders of Uganda Concerning the Anti-Homosexuality Bill 2009* (2009). Available at: <http://www.psyssa.com/documents/Open%20Statement%20from%20PsySSA%2023-02-10.pdf> [last accessed 19 November 2013]

⁶⁰ Rao, T. S. and Jacob, K.S., ‘Homosexuality and India’, *Indian Journal of Psychiatry*, 2012;54:1–3. Available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3339212/> [last accessed 19 November 2013]

⁶¹ Sandels, A., ‘Lebanese medical group says being gay is not a disease’ *Los Angeles Times*, 12 July 2013. Available at: <http://articles.latimes.com/2013/jul/12/world/la-fg-wn-lebanon-homosexuality-20130712> [last accessed 2 December 2013]

⁶² Payne, E, ‘Group apologizes to gay community, shuts down “cure” ministry’, CNN, 8 July 2013. Available at: <http://edition.cnn.com/2013/06/20/us/exodus-international-shutdown/> [last accessed 2 December 2013]

Given the overwhelming medical opinion that conversion or reparative therapies at best do not work, and at worst are damaging to individuals, the notion that homosexuality can be consciously altered is completely without merit.

‘Recruitment’

The proposed law asserts that young people are ‘vulnerable to sexual abuse and deviation’. While sexual abuse of children is a serious problem, explored further in section VI of this report, the proposed law does nothing to help prevent it from occurring. The idea that children are vulnerable to ‘deviation’ is clearly predicated on the idea ‘that homosexuality can only exist as a result of seduction of minors by predatory older perverts’.⁶³ Yet if homosexuality is not, as the proposed law asserts, a mere personal choice but an immutable characteristic, then on what logical basis could children be ‘recruited’ into homosexuality?

As will be demonstrated in the following section, the idea that expanded criminalisation is required to prevent the recruitment of children into the homosexual lifestyle, as well as the destruction of the traditional African family unit, has no evidentiary basis.

⁶³ Watney, S., ‘School’s Out’ in Fuss, D. (ed.), *Inside/Out* (1991), p. 387

III. Is expanded criminalisation necessary to protect the traditional African family unit?

A third commonly cited reason for expanding criminalisation of homosexuality is the notion that it undermines the traditional African family unit, eventually leading to the destruction of the family, and by extension, the destruction of the nation. Speaking in 2008, President Museveni described homosexuality as *mtumbavu* – Swahili for ‘stupid’ – and urged Ugandan citizens:

*Don't fear, resist and do not compromise on that. It is a danger not only to the believers but to the whole of Africa.*⁶⁴

When speaking in 2012, however, President Museveni demonstrated he had evolved in his understanding of the issue of homosexuality, saying:

*If there are some homosexuals, we shall not kill or persecute them but there should be no promotion of homosexuality.*⁶⁵ (emphasis added)

His recent reported rejection of the proposed law indicates further unease about its punitive provisions, if not its overall aims.⁶⁶ In spite of President Museveni's evolution on the subject, however, there are those both within Uganda and across Africa who insist that criminalisation or expanded criminalisation is necessary to protect the traditional African family unit.

Professor Sylvia Tamale has examined critically what is meant when African leaders invoke the ‘traditional African family unit’ in order to justify their opposition to homosexuality. She argues that such a concept is meaningless in the context of the diverse traditions and cultures across the African continent. Among the examples she cites is the practise of female-husbands and non-sexual marriages between women amongst the Igbo of Nigeria.⁶⁷

What, then, do proponents of such a position actually mean by the term ‘traditional family unit’?

Presumably the term describes families which are headed by an opposite-sex couple, united in a monogamous marriage, and who have produced a number of children. Putting aside the issue of whether such a family structure could be conceived of as ‘traditionally’ African, can it really be said that homosexuality affects such heterosexual family structures?

If the protection of heterosexuality required the expanded criminalisation of homosexuality – and if without such expanded criminalisation an ever increasing number of children would ‘learn’ to be gay or unmarried women would turn to same-sex sexual conduct out of sexual starvation – then those African countries which have never criminalised homosexuality would by now face serious demographic problems. If the consequence of not criminalising homosexuality was that boys and girls were growing up to be gay and lesbian, then the fertility rates, population growth rates and birth rates of those countries which had never criminalised would be in terminal decline. Furthermore, if the arguments put forward by the proponents of criminalisation are correct, that without harsh penal sanctions generations

⁶⁴ Olupot, M. and Edyegu, D., ‘Museveni Backs Church Against Gays’, *New Vision* (Uganda), 17 August 2008. Available at: <http://www.newvision.co.ug/D/8/12/644954> [last accessed 8 October 2013]

⁶⁵ BBC News, ‘Uganda's President Yoweri Museveni: Don't kill gay people’, 17 December 2012. Available at: <http://www.bbc.co.uk/news/world-africa-20754891> [last accessed 19 November 2013]

⁶⁶ BBC News, ‘Uganda President Yoweri Museveni Blocks Anti-Gay Law’, 17 January 2014. Available at: <http://www.bbc.co.uk/news/world-africa-25775002> [last accessed 29 January 2014]

⁶⁷ Tamale (2009), at n. 21, p. 50.

of children will be lost by being ‘recruited’ into ‘the gay lifestyle’, then the countries which have existed for generations without criminalisation would be in the midst of a population crisis.

Yet social data indicate that the supposed logical outcome voiced by pro-expanded criminalisation rhetoric has not occurred. Using three population indicators – fertility rates, birth rates and population growth rates – it is clear that such concerns have no evidentiary basis.

Fig 2: Top 10 African fertility rates

<i>Country</i>	<i>Children born/woman 2013 est.</i>	<i>Is homosexuality criminalised?</i>
<i>Niger</i>	7.03	No
<i>Mali</i>	6.25	No
<i>Somalia</i>	6.17	Yes
<i>Uganda</i>	6.06	Yes
<i>Burkina Faso</i>	6.00	No
<i>Burundi</i>	5.99	Yes
<i>Zambia</i>	5.81	Yes
<i>South Sudan</i>	5.54	Yes
<i>Angola</i>	5.49	Yes
<i>Congo</i>	5.49	No

Source: CIA World Factbook 2013.

An exploration of African fertility reveals that Niger, a country which does not criminalise homosexuality, ranks first based on 2013 estimates, with an average of 7.03 births per woman.⁶⁸ In second place is Mali, a country which also does not criminalise homosexuality, with an average of 6.25 births per woman. Uganda is fourth on the list, with an average of 6.06 births per woman.

Fig 3: Top 10 African birth rates

<i>Country</i>	<i>Births/1000 population 2013 est.</i>	<i>Is homosexuality criminalised?</i>
<i>Niger</i>	46.84	No
<i>Mali</i>	46.06	No
<i>Uganda</i>	44.50	Yes
<i>Burkina Faso</i>	42.81	No
<i>Zambia</i>	42.79	Yes
<i>Somalia</i>	41.45	Yes
<i>Burundi</i>	40.04	Yes
<i>Malawi</i>	39.98	Yes
<i>Congo</i>	39.63	No
<i>Angola</i>	39.16	Yes

Source: CIA World Factbook 2013.

In terms of birth rates in Africa, yet again, it is countries which do not criminalise which make up the first and second position, with Niger and Mali having recorded birth rates of 46.84 and 46.06 respectively.⁶⁹

⁶⁸ CIA World Factbook (2013). Fertility Rates Country Comparison. Available at: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2127rank.html> [last accessed 25 September 2013]

⁶⁹ CIA World Factbook (2013). Birth Rate Country Comparison. Available at: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2054rank.html> [last accessed 25 September 2013]

Uganda is third with 44.50 births per 1000 persons, followed by Burkina Faso, yet another country which does not criminalise, with 44.50 births per 1000 persons.

Fig 4: Top 10 Sub-Saharan African population growth rate

<i>Country</i>	<i>(%) 2013 est.</i>	<i>Is homosexuality criminalised?</i>
<i>Zimbabwe</i>	4.38	Yes
<i>South Sudan</i>	4.23	Yes
<i>Uganda</i>	3.32	Yes
<i>Niger</i>	3.32	No
<i>Burundi</i>	3.08	Yes
<i>Burkina Faso</i>	3.06	No
<i>Mali</i>	3.01	No
<i>Ethiopia</i>	2.90	Yes
<i>Zambia</i>	2.89	Yes
<i>Congo</i>	2.86	No

Source: CIA World Factbook 2013.

Statistics regarding population growth rates in Africa show that 40 % of the top 10 is represented by countries which do not criminalise. Uganda is placed fifth, with a population growth rate of 3.32% based on 2013 estimates, placing it in exactly the same position as Niger, which also has a population growth rate of 3.32%. Burkina Faso, Mali and Congo also feature in the top 10 global growth rate, at numbers 6, 7 and 10 respectively.

Niger, Mali, Burkina Faso and Congo – all countries which do not criminalise – rank highly on the indicators. They are countries which either inherited the Napoleonic legal code from France, under which homosexuality was decriminalised, or a derivative code. The four countries should, if the arguments about the destruction of the family are correct, be languishing with declining populations, decreasing birth rates and low fertility rates. Their societies have lived without criminalising homosexuality for generations, yet they occupy top positions on the population indicators, with many ranking either the same as Uganda, or higher.

This not only demonstrates that fears about the destruction of the traditional African family unit are unfounded but that the underlying assumption that homosexuality is ‘contagious’; that children will somehow be recruited into the so-called ‘homosexual lifestyle’ unless tough criminal sanctions are in place, is completely without merit. Nor is it feasible to suggest that unmarried women will become lesbians out of sexual frustration. Niger, Mali, Burkina Faso and Congo do not have swathes of ever-increasing populations of gay men and lesbian women, and the traditional African family unit which forms part of their respective societies is very much alive and well.

IV. Is expanded criminalisation necessary to maintain strong religious convictions?

A fourth commonly cited reason for the maintenance and strengthening of criminalisation is the notion that religious conviction calls for such measures. Yet an examination of various statements made by prominent - global religious figures, supported by comparative statistical data on religious conviction in sub-Saharan Africa paints a very different picture.

Homosexuality and religion

The basis for the persecution of LGBT people in the Judeo-Christian and Islamic tradition lies originally in two Biblical sources; Leviticus 18:22 and 20:13 and Paul 1 Romans have been variously interpreted to condemn same-sex sexual relations between two men⁷⁰ on the one hand and to define only holiness among sectors of the Jewish community⁷¹ (the priest-class or Levites) on the other. Equally Paul's statements have been used to justify the persecution of gay men while at the same time other commentators have seen them as a very limited condemnation of certain forms of prostitution (male or female).⁷² There is no consensus among theologians on what these passages actually mean and many believe that the original Hebrew and Greek words have consistently been mistranslated in order to give them a homophobic gloss.⁷³

Increasingly a more liberal view has gained ground among the major churches, and religious leaders have condemned the persecution and criminalisation of LGBT people. In a statement in 2010 Archbishop Desmond Tutu, former Primate of the Anglican Church of Southern Africa, called for an end to persecution of people based on their sexual orientation and gender identity:

*All over the world, lesbian, gay, bisexual and transgender people are persecuted. They face violence, torture and criminal sanctions because of how they live and who they love. We make them doubt that they too are children of God – and this must be nearly the ultimate blasphemy.*⁷⁴

Furthermore, in an editorial dated 12 December 2012 Archbishop Tutu directly addressed Ugandan MPs and stated that 'God does not discriminate among members of our family'. He wrote:

⁷⁰ Gill, J., 'Leviticus 18:22'. Available at <http://www.biblestudytools.com/commentaries/gills-exposition-of-the-bible/leviticus-18-22.html> [last accessed 17 December 2013].

⁷¹ Siker, J. S., *Homosexuality and Religion*, Greenwood (2007), p. 67.

⁷² Boswell, J., *Christianity, social tolerance, and homosexuality: gay people in Western Europe from the beginning of the Christian era to the fourteenth century*, University of Chicago Press (1981),

⁷³ Johns, L. L., *Homosexuality and the Bible: A Case Study in the Use of the Bible for Ethics*. Available at: <http://ljohns.ambs.edu/Homosexuality.htm> [last accessed 19 December 2013]; Townsley, J., 'Paul, the Goddess Religions and Queer Sects: Romans 1 23-28', *Journal of Biblical Literature*, vol. 130, no. 4, (2011), pp. 707-28. Available at:

http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/journal_of_biblical_literature/v130/130.4.townsley.pdf [last accessed 19 December 2013].

⁷⁴ Tutu, Archbishop D., *Statement at UN High Level Panel on Ending Criminal Laws and Violence*, 17 September 2010. Available at: <http://unescoiglobe.wordpress.com/2010/12/12/archbishop-desmond-tutu-when-ever-one-group-of-human-beings-is-treated-as-inferior-to-another-hatred-and-intolerance-will-triumph/> [last accessed 2 December 2012].

*One thing that Ugandan legislators should know is that God does not discriminate among members of our family. God does not say black is better than white, or tall is better than short, or football players are better than basketball players, or Christians are better than Muslims ... or gay is better than straight.*⁷⁵

In a report by a major medical journal, *The Lancet* entitled 'A call to action for comprehensive HIV services for men who have sex with men', Archbishop Tutu was quoted as saying:

*[T]o the extent that legal discrimination, those old laws and statutes that make them inferior still exist, it is up to all to work to change those laws. I have no doubt that in the future, the laws that criminalise so many forms of human love and commitment will look the way the apartheid laws do to us now — so obviously wrong.*⁷⁶

Dr. Thabo Makgoba, Anglican Archbishop of Cape Town and Metropolitan of Southern Africa has called for an end to violence directed at lesbian, gay, bisexual and transgender people. In October 2013, he released a video statement, in which he directly addressed gay viewers:

*Don't fear... You've been given this task of helping the rest of humanity to realise that we are called to respect and we are called to honour each other. People may come and say this is un-African, and I'm saying love cuts across culture.*⁷⁷

The Anglican Church of Southern Africa opposes the criminalisation of homosexuality. In 2010, the Anglican Bishops of Southern Africa issued a joint statement opposing the sentencing of two gay men in Malawi to 14 years imprisonment for 'unnatural acts and gross indecency'. They called the sentence a 'gross violation of human rights' inconsistent with the teachings of the Scriptures 'that all human beings are created in the image of God and therefore must be treated with respect and accorded human dignity' and added that:

*Though there is a breadth of theological views among us on matters of human sexuality, we are united in opposing the criminalisation of homosexual people ... [we] appeal to lawmakers everywhere to defend the rights of these minorities.*⁷⁸

Key figures within the Roman Catholic Church have expressed strong opposition to the criminalisation of homosexuality. On 4 February 2013, Archbishop Vincenzo Paglia, head of the Pontifical Council for the Family, stated that he would like the Church to challenge jurisdictions where homosexuality was a crime.⁷⁹

In 2008, the Holy See delegation to the UN General Assembly issued a statement that the Holy See

⁷⁵ Tutu, Archbishop D., 'To Ugandan MPs: God does not discriminate among our family', *Daily Monitor*, 12 December 2012. Available at: <http://www.monitor.co.ug/OpEd/Commentary/To-Ugandan-MPs--God-does-not-discriminate-among-our-family/-/689364/1641946/-/v9anyg/-/index.html> [last accessed 2 December 2013]

⁷⁶ Beyrer, C. et al. (2012), 'A call to action for comprehensive HIV services for men who have sex with men', *The Lancet*. Vol 380 (9839), 424 at 428. Available at: [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(12\)61022-8/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)61022-8/fulltext) [last accessed 2 December 2013].

⁷⁷ Human Rights Watch. Video: *South Africa: Archbishop Condemns Anti-LGBT Violence* (2013), available at: <http://www.youtube.com/watch?v=9YdSbvp1UUk> [last accessed 9 December 2013]

⁷⁸ Statement by the Anglican Bishops in Southern Africa, 'The Imprisonment of Stephen Monjeza and Tiwonge Chimbalanga', 26 May 2010, available at: <http://archbishop.anglicanchurchsa.org/2010/05/imprisonment-of-stephen-monjeza-and.html> [last accessed 2 December 2013]

⁷⁹ Archbishop Vincenzo Paglia, speaking at a Vatican press conference, 4 February 2013. Available at: http://articles.washingtonpost.com/2013-02-04/national/36738671_1_gay-marriage-maryland-and-washington-state-gay-couples [last accessed 2 December 2013]

advocates the elimination of ‘every sign of unjust discrimination towards homosexual persons’ and ‘urges States to do away with criminal penalties against them’.⁸⁰ In an earlier press conference, Vatican spokesman Fr Federico Lombardi declared that ‘the Church is contrary to legislation that criminalises homosexuality’.⁸¹

In 2009 Philip J. Bené, Legal attaché, Permanent Observer Mission of the Holy See to the United Nations, issued a statement at a panel meeting at the UN General Assembly during Human Rights Day stating that the Holy See is opposed to violations of human rights against homosexual persons. The statement read:

*[The Holy See] opposes all forms of violence and unjust discrimination against homosexual persons, including discriminatory penal legislation which undermines the inherent dignity of the human person ... [T]he murder and abuse of homosexual persons are to be confronted on all levels, especially when such violence is perpetrated by the State ... we continue to call on all States and individuals to respect the rights of all persons and to work to promote their inherent dignity and worth*⁸²

The current *Catechism of the Catholic Church* states categorically that ‘men and women who have deep-seated homosexual tendencies ... must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.’⁸³

Religion in Africa

Statements from religious figures across the globe certainly demonstrate that religious conviction does not require criminalisation or persecution of homosexuality. But can the same be said to apply to individual adherents across sub-Saharan Africa? That is to say, has religious conviction crumbled in the countries which do not criminalise homosexuality?

Cross-national research conducted by the Pew Forum on Religion and Public Life in 2010 refutes the notion that a lack of persecution of homosexuality can be linked with weakening of religious convictions. Although the research explores a number of issues pertaining to religious tensions in sub-Saharan Africa, the report uses a number of indicators which are directly relevant to exploring the link between criminalisation and religious sentiment.

Christianity and Islam are relatively recent imports to Africa’s spiritual and religious landscape, imposed through colonialism. In 1900, just 9% of sub-Saharan Africans were Christian, while just 14% were Muslim. At the time, the overwhelming majority (74%) practised traditional African religions.⁸⁴ According to historical estimates from the World Religion Database, the total number of Muslims and Christians combined was less than a quarter of the entire population at the beginning of the twentieth century. By 2010 the number of Muslims and Christians had risen to 29% and 57% respectively, while the number practising traditional African religions dropped to just 17%.

⁸⁰ Statement of the Holy See Delegation at the 63rd Session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity (18 December 2008)

⁸¹ ‘Don’t criminalise homosexuality: Vatican spokesman’, *Catholic News Service*, 8 December 2008.

⁸² Statement of the Holy See Delegation at a panel meeting of the UN General Assembly, 10 December 2009.

⁸³ Catechism of the Catholic Church, 2358. Available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm [last accessed 17 December 2013].

⁸⁴ Pew Research Center’s Forum on Religion and Public Life, ‘Tolerance and Tension: Islam and Christianity in Sub-Saharan Africa’ in *Pew Forum on Religion and Public Life* (2010). Available at: http://www.voltairenet.org/IMG/pdf/Islam_and_Christianity.pdf [last accessed 25 September 2013]

The percentage of individuals in sub-Saharan Africa to whom religion is very important in their lives remains high regardless of whether homosexuality is criminalised or not.

Fig 5: Respondents saying religion is very important in their lives

<i>Country</i>	<i>(%)</i>	<i>Is homosexuality criminalised?</i>
<i>Senegal</i>	98	Yes
<i>Mali</i>	93	No
<i>Tanzania</i>	93	Yes
<i>Guinea Bissau</i>	90	No
<i>Zambia</i>	90	Yes
<i>Rwanda</i>	90	No
<i>Cameroon</i>	89	Yes
<i>Ghana</i>	88	Yes
<i>Mozambique</i>	87	Yes
<i>Liberia</i>	87	Yes
<i>Kenya</i>	87	Yes
<i>Nigeria</i>	87	Yes
<i>Chad</i>	86	No
<i>Djibouti</i>	86	No
<i>Uganda</i>	86	Yes
<i>DR Congo</i>	82	No
<i>Ethiopia</i>	79	Yes
<i>South Africa</i>	74	No
<i>Botswana</i>	69	Yes

Source: Pew Research Center (2010).

“Tolerance and Tension: Islam and Christianity in Sub-Saharan Africa”

The country with the second highest positive response to the statement that religion plays a very important role in their lives was Mali (93%), a country which does not criminalise homosexuality. This places it level with Tanzania, a country which currently criminalises. In joint third place are Guinea Bissau and Rwanda, two countries which do not criminalise homosexuality, along with Zambia. All of the states mentioned so far scored higher than Uganda (86%), while Chad and Djibouti, two countries which do not criminalise, also scored the same as Uganda.

On this indicator, the data demonstrate there is no correlation between non-criminalisation and any supposed decline in the role religion plays in the lives of African citizens. Countries that do not criminalise are well represented in the top half of the list, with 3 out of the top 6 currently not criminalising homosexuality. The importance religion plays in the lives of Africans is not linked to the level of criminalisation within a particular state – expanded criminalisation will therefore do nothing to bolster religious conviction.

Perhaps linked to the fear of loss of religion is the notion that there is a stark choice between retaining African customs, norms and cultural identity (and expanding criminalisation), or succumbing to the influence of Western culture. The indicators on religion in sub-Saharan Africa demonstrate that states can retain their African identity and religious convictions, and yet not persecute homosexuality through expanded criminalisation. Proponents of a contrary view could not genuinely assert that Mali or Niger are outposts of foreign Western values, simply because they do not criminalise homosexuality, or that Chad or DR Congo are not representative of African culture.

The data clearly lay to rest the notion that expanded criminalisation is necessary to maintain religious conviction. Across all indicators, empirical evidence refutes such a position. While some in Uganda – and

other countries that are considering expanding criminalisation of homosexuality – may believe that without stringent persecution the religious convictions of citizens will falter, there is no evidentiary support for this. Countries that do not criminalise homosexuality score the same or higher than Uganda on indicators such as on whether religion plays a very important role in their citizens' lives. This suggests that fears that a lack of expanded criminalisation will lead to an erosion of religious sentiment, or a concomitant loss of faith, are deeply misguided. The data also demonstrate that in countries where anti-homosexuality laws are strongly enforced, as occurs in Cameroon,⁸⁵ rates of religious conviction are no stronger or higher. In fact, on a number of indicators, Cameroon was placed lower than many States, which currently do not even criminalise homosexuality.

Further, if the statements made by religious leaders are taken into account, not only is there is no religious requirement that sexual minorities be persecuted with expanded criminalisation through the coercive power of the state, but such persecution is actively discouraged. Whatever one's religious or moral view about diverse sexualities, those views are separate and distinct from the domain of criminal law, which should only concern itself with the protection of members of society from harm as in the case of non-consensual sex, coercive sex, sex with minors, incest, sex trafficking, sexual exploitation of children and the like.

⁸⁵ Human Rights Watch, *Guilty By Association: Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law* (2013). Available at: http://www.hrw.org/sites/default/files/reports/cameroon0313_ForUpload.pdf [last accessed 14 October 2013]

V. Does expanded criminalisation help prevent the spread of HIV?

A fifth commonly cited justification for expanded criminalisation of homosexuality in Uganda, as well as in other African states, is that it will help curb the spread of HIV. The hysteria around homosexuality and HIV in Africa is illustrated by the following statement by the former President of Namibia in 1998, when he said:

*Homosexuality is the deepest level of depravity...There will also be no end to disease...The things they do would multiply the rate of the spreads of AIDS [sic].*⁸⁶

However, the assumption that criminalisation or expanded criminalisation will help control certain high-risk groups and thereby reduce infection rates runs contrary to empirical evidence. As the evidence below confirms, it is discriminatory laws criminalising homosexuality that undermine HIV/AIDS prevention and treatment, and therefore, it is criminalisation itself which facilitates the spread of HIV.⁸⁷

Criminalisation and HIV/AIDS

Public health arguments in favour of criminalisation were considered by the UN Human Rights Committee ('HRC') in *Toonen v. Australia*. The HRC rejected the argument that criminalisation of homosexuality was necessary on public health grounds – namely to stop the spread of HIV – stating such measures in fact had the opposite effect to that intended, impeding public health programmes by 'driving underground many of the people at risk of infection'.⁸⁸ It is a position which was echoed in the 2011 International Guidelines on HIV/AIDS and Human Rights, jointly issued by the Office of the High Commissioner for Human Rights ('OHCHR') and the United Nations Programme on HIV/AIDS ('UNAIDS'). In it, they stated that the threat of criminal sanction can deter individuals from seeking HIV services as people 'will not seek [HIV services] if this would mean facing discrimination, lack of confidentiality or other negative consequences'.⁸⁹

In 2012, the Global Commission on HIV and the Law pointed out the international consensus that non-criminalisation of homosexuality 'is an essential component of a comprehensive public health response to the elevated risk of HIV acquisition and transmission among men who have sex with men'.⁹⁰ It also found that men who have sex with men ('MSM') are at nineteen times greater risk of HIV infection than other men. Criminalisation was found to have both caused and boosted that figure. For example, UNAIDS reports that in Caribbean countries where homosexuality is criminalised, almost one in four MSM is infected with HIV. In the absence of such criminal sanctions, the prevalence among MSM is only one in

⁸⁶ Former President Frederick Chiluba of Zambia, quoted in *Times of Zambia*, October 19 1998, in Reddy, V., 'Homophobia, human rights and gay and lesbian equality in Africa', *Agenda: Empowering Women for Gender Equity*, Vol. 16, No. 50 (2001), p. 84

⁸⁷ UNAIDS/UNDP Action Framework, Universal Access for Men who have Sex with Men and Transgender People (2009), p. 5.

⁸⁸ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8(5).

⁸⁹ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights* (2010), p. 78.

⁹⁰ United Nations Development Programme, *Global Commission on HIV and the Law, Report Risks, Rights & Health*, 9 July 2012, p. 48.

fifteen.⁹¹ A report in the medical journal *The Lancet* found that disparities in the prevalence of HIV infection in several African and Caribbean countries were directly related to the status of criminalisation:

*The odds of HIV infection in black MSM relative to general populations were nearly two times higher in African and Caribbean countries that criminalise homosexual activity than for those living in countries where homosexual behaviour is legal. The odds of being infected with HIV are significantly greater in Caribbean countries that criminalise homosexual sex than in those where such behaviour is legal.*⁹²

According to UNAIDS, 'although sex between men is often associated with a discrete HIV epidemic, it should also be regarded as linked to the epidemic in the general population'.⁹³ This is because sex between men occurs across a range of sexual and gender identities, and across all socioeconomic contexts. MSM are often married to women, particularly where discriminatory laws or social stigma of male sexual relations exist.⁹⁴

The result of criminalisation is that many people living with HIV are terrified of getting help as they fear stigmatisation and prosecution when seeking treatment. Thus they continue to live with the disease in private and infect others they may come into contact with. For example, empirical research conducted in Senegal in 2002 found that 88% of MSM also had sex with women, and of those, 20% engaged in anal sex with a woman.⁹⁵ For those interviewed, condom usage was low. Asked if they used condoms during their last sexual encounter, only 14% of those who engaged in receptive anal sex, 23% of those who engaged in penetrative anal sex and 37% of those who engaged in intercourse with women replied that they had.⁹⁶

Various UN experts have also voiced their concern at the negative effects of criminalisation on HIV programmes. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders, and the Independent Expert on the situation of human rights in Burundi underscored the negative health impact of criminalisation of homosexuality in a communication to the government of Burundi in 2009. In it, they stated that the measures in Burundi's draft penal code which sought to criminalise homosexuality would have a detrimental effect on Burundi's fight against HIV/AIDS, as an

⁹¹ UNAIDS, *Global Report on the AIDS Epidemic 2008* (2008). Available at: http://data.unaids.org/pub/GlobalReport/2008/jc1511_gr08_executivesummary_en.pdf [last accessed 2 December 2013].

UNAIDS, *Keeping Score II: A Progress Report towards Universal Access to HIV Prevention, Treatment, Care and Support in the Caribbean* (2008). Available at: http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2008/20081206_keepingcorei_i_en.pdf [last accessed 2 December 2013]

⁹² Millett, G. et al, 'Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora', *The Lancet*, Vol. 380, Issue 9839, pp. 411-423 (28 July 2012). For the full report see: http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/The_Lancet_Common_roots_a_contextual_review_of_HIV_epidemics_in_black_men_who_have_sex_with_men_across_the_African_diaspora.pdf [last accessed 2 December 2013]

⁹³ UNAIDS Policy brief, 'HIV and Sex Between Men' (2006). Available at: http://www.unaids.org/en/media/unaids/contentassets/dataimport/publications/irc-pub07/jc1269-policybrief-msm_en.pdf [last accessed 19 September 2013]

⁹⁴ Ibid.

⁹⁵ Niang, C. et al, *Meeting the sexual health needs of men who have sex with men in Senegal*, Horizons Report, New York: Population Council (2002), p. 2. Available at: <http://www.popcouncil.org/pdfs/horizons/msmsenegal.pdf> [last accessed 19 September 2013]

⁹⁶ Ibid.

absence of criminalisation represented a 'substantial measure' in restricting its spread.⁹⁷ The most recent report by UNAIDS in December 2013 reiterated the need to remove punitive laws regarding key populations in the battle against HIV/AIDS, with particular reference to laws criminalising same-sex sexual conduct.⁹⁸

Prominent African figures have also recognised that criminalisation of homosexuality has negative effects on public health. Botswana, a country which currently criminalises homosexuality, has one of the highest rates of HIV/AIDS in the world, with an estimated 17% of the population HIV positive. In response to the HIV/AIDS epidemic, the former President of Botswana, Festus Mogae, has called for the decriminalisation of homosexuality as a means of fighting the spread of infection.⁹⁹ Archbishop Desmond Tutu, head of the Desmond Tutu HIV Foundation, believes that decriminalising homosexuality is essential in improving HIV/AIDS prevention and treatment. He argues that the homosexual stigma that accompanies HIV/AIDS has prevented proper global consideration of how the virus can proportionately affect both heterosexual and homosexual individuals.¹⁰⁰ Similarly, at a reception hosted by UNAIDS, Zambian First Lady, Christine Kaseba-Sata, said that '[s]ilence around issues of men who have sex with men should be stopped', before adding '[a]nd no one should be discriminated against on the basis of their sexual orientation'.¹⁰¹

The negative health impact of criminalisation was underscored by the United Nations Secretary-General, Ban Ki-moon, in his 2009 address on World AIDS Day; he said:

*Yet discrimination against sex workers, drug users and men who have sex with men only fuels the epidemic and prevents cost-effective interventions. We must ensure that AIDS responses are based on evidence, not ideology, and reach those most in need and most affected.*¹⁰²

HIV/AIDS and the proposed law

One of the underlying principles of successful HIV programming is non-discriminatory access to sexual health services. Given the overwhelming medical and scientific evidence which demonstrates criminalisation of homosexuality has severe negative consequences for HIV programmes – and therefore public health in general – the expanded criminalisation in the proposed law can only further exacerbate the situation in Uganda.

⁹⁷ Grover, A., *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Addendum 1, UN Doc: A/HRC/14/20/Add.1, para. 14 [only available in French]

⁹⁸ *UNAIDS Report on the Global Epidemic 2013* (2013), p. 90. Available at: http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2013/gr2013/UNAIDS_Global_Report_2013_en.pdf

⁹⁹ BBC News, 'Botswana HIV: Mogae in call to legalise homosexuality', 19 October 2011. Available at: <http://www.bbc.co.uk/news/world-africa-15368752> [last accessed 19 September 2013]

¹⁰⁰ Weber, K., 'Desmond Tutu Claims Decriminalizing Homosexuality Can Improve HIV/AIDS Treatment', *Christian Post*, 23 July 2012. Available at: <http://www.christianpost.com/news/desmond-tutu-claims-decriminalizing-homosexuality-can-improve-hiv-aids-treatment-78633/> [last accessed 9 December 2013]

¹⁰¹ Esselink J., 'First Lady Of Zambia Stuns The Continent By Calling For An End To Homophobia', *The New Civil Rights Movement*, 8 November 2013. Available at: <http://thenewcivilrightsmovement.com/first-lady-of-zambia-stuns-the-continent-by-calling-for-an-end-to-homophobia/news/2013/11/08/78342#.UpM4E5nFjR> [last accessed 25 November 2013]

¹⁰² See Message of the Secretary-General on World AIDS Day, 1 December 2009, available at: http://data.unaids.org/pub/PressStatement/2009/20091201_SG_WAD09_message_en.pdf [last accessed 9 December 2013]

VI. Will expanded criminalisation of homosexuality reduce instances of child abuse?

A sixth commonly cited reason for supporting criminalisation or expanded criminalisation of homosexuality is that it is necessary for the protection of children. In order to assess properly such a position, it is necessary to explore critically the issue of child abuse in Uganda within the context of child abuse in sub-Saharan Africa more broadly.

Child abuse in the sub-Saharan context

A 2013 cross-national study conducted in 10 African countries – Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe – analysed the results of self-administered questionnaires distributed to school children between the ages of 11 and 16 in 2003, and then again in 2007. The report found that 19.6% of female students and 21.1% of male students aged 11-16 years recorded that they had endured forced or coerced sex.¹⁰³ That number rose to 28.8% of females and 25.4% of males in 16 year olds.

The research also identified individual, school and community-level risk factors associated with sexual abuse of children. In terms of Individual-level risk factors, the research highlighted insufficient food in the household as particularly significant for both males and females. The lack of awareness of the rights of children was highlighted as a school-level risk factor. In terms of community-level risk factors, higher proportions of adults in favour of transactional sex and higher rates of intimate partner violence were highlighted as significant.

Worryingly, comparison between responses in 2003 and 2007 demonstrated that child sexual abuse was not decreasing and remained a significant problem.

These figures illustrate that child sex abuse has nothing to do with sexual orientation. Just as criminalising heterosexual conduct would do nothing to stop adult males sexually abusing girls, criminalising homosexual conduct will not curb male paedophilia. Sexuality and paedophilia are commonly, but quite erroneously, conflated which merely masks the real problem. Rather, if child protection is the focus, as it should be, then governments should direct resources towards poverty reduction, children's rights, education, and strengthening legal protections and punishment for non-consensual sex and sex with minors, regardless of gender.

Child abuse in Uganda

Although Uganda was not part of the 2013 cross-national study; the trend for all sub-Saharan African states studied was relatively high levels of child-abuse. According to information from various UN experts on Uganda, the situation is equally troubling. The Committee on the Rights of the Child, for example, noted that according to recent studies 'a considerable number'¹⁰⁴ of children in Uganda were victims of sexual exploitation. It also expressed its deep concern at 'the very high incidence of defilement of girls, constituting more than half of the cases of child abuse.'¹⁰⁵ The Committee on the Rights of the Child

¹⁰³ Andersson, N., Paredes-Solís, S., Milne, D. et al, 'Prevalence and risk factors for forced or coerced sex among school-going youth: national cross-sectional studies in 10 southern African countries in 2003 and 2007', *BMJ Open* 2012 (2013) 2:doi: 10.1136/bmjopen-2011-000754

¹⁰⁴ Concluding observations of the Committee on the Rights of the Child: Uganda, UN Doc CRC/C/UGA/CO/2, 23 November 2005, para. 75.

¹⁰⁵ Ibid.

recommended that Uganda take legislative measures and develop ‘an effective and comprehensive policy’¹⁰⁶ to address the sexual exploitation of children.

The Ugandan Police Force annual crime reports demonstrate that defilement – sex with underage girls – is an endemic and serious problem in Uganda. The 2011 report, the most recent annual report available, lists defilement as the second most common registered crime in Uganda, with 7690 incidents reported that year. This represents a 2% increase on the 2010 statistics, in which 7564 incidents of defilement were reported.¹⁰⁷ The same crime report documents 347 investigated cases of indecent assault, up on the 2010 statistics, which documented 247 investigated cases. Although section 128 of the *Penal Code Act* defines indecent assault as when an individual ‘unlawfully and indecently assaults any woman or girl’, section 147 outlines a felony of ‘unlawfully and indecently [assaulting] a boy under the age of eighteen years’. The police statistics on indecent assault are not disaggregated by gender; therefore it is unclear what proportion of the indecent assaults was reportedly committed against boys, rather than women and girls, but research carried out on a regional basis in Uganda indicates that the vast majority of sexual abuse takes place between adult males and under-age girls.¹⁰⁸

Uganda must recognise that sexual abuse of both boys and girls occurs and needs to be addressed through proper, equalised legislative provisions. The gendered nature of the protections contained within the *Penal Code Act* has led the UN Committee on the Rights of the Child to state that ‘the law on sexual abuse is biased against the boy child’¹⁰⁹, and the high incidence rate of defilement of girls indicates that current provisions for girls are not working.

Child abuse and the proposed law

If the reason for promoting the proposed law – and therefore expanded criminalisation of homosexuality between consenting adults – is the protection of children from sexual abuse, then it is clear it will not achieve its aim. Research indicates that one of the major causes of child sexual abuse is poverty, and yet this is in no way addressed by the proposed legislation.¹¹⁰

That adult sexual relations with minors, who are by definition under the age of consent, should be criminalised is beyond question. Yet current legal provisions are biased against the boy-child, and distinguish penal sanctions between victims based on their gender. Even with the legal safeguards in place to protect the girl-child from sexual abuse, it remains the second most common crime in Uganda. This is why prominent opponents to the proposed law from within Uganda, such as Professor Sylvia Tamale, agree in principle with its concerns – the protection of young and vulnerable Ugandans from sexual exploitation and abuse. Where she differs is that her concern extends to all situations of abuse, whether the abuse is opposite-sex or same-sex in nature, and her recognition that criminalising adult, consensual same-sex intimacy does nothing to address these concerns.¹¹¹

¹⁰⁶ Ibid., para. 76.

¹⁰⁷ Uganda Police Force, *Annual Crime Report 2011* (2011), p. 14. Available at: http://www.upf.go.ug/attachments/article/5/Annual_Crime_Report_2011a.pdf [last accessed 25 November 2013].

¹⁰⁸ T. Opobo and A Wandega, *Child Sexual Abuse in Jinja District, Eastern Uganda*, report prepared for the Jinja Network for the Marginalised Child and Youth (2011). Available at: <http://www.terredeshommesnl.org/download/69>; Child Protection in Crisis, *Child Sexual Abuse Prevalence in Uganda* (2012). Available at: http://www.cpcnetwork.org/admin/includes/doc_view.php?ID=868.

¹⁰⁹ Concluding observations of the Committee on the Rights of the Child: Uganda, 23 November 2005, UN Doc CRC/C/UGA/CO/2, para. 75.

¹¹⁰ ECPAT-Uganda, *The Uganda National Plan of Action on Child Sexual Abuse and Exploitation* (2008-2012), available at: http://www.unicef.org/uganda/National_Plan_of_Action_on_CSEC.pdf

¹¹¹ Tamale (2009), above n 21, p. 51. Available at: <http://www.equalrightstrust.org/ertdocumentbank/Sylvia.pdf> [last accessed 25 September 2013].

VII. Are homosexual persons asking for privileges/rights that other citizens do not have?

After a turbulent history characterised by political instability, Uganda promulgated the 1995 Constitution, which is built on the principles of tolerance, good governance, and respect for the rule of law. The Constitution also has provisions for the respect and promotion of the rights of all human beings. These guarantees are available to all persons irrespective of their sexual orientation. Article 21 of the Constitution specifically guarantees equality and freedom from discrimination.¹¹² This therefore means that there is already protection from discrimination by the Constitution. The decision not to expand and, indeed, to end criminalisation will only maintain this guarantee and will not lead to a demand for any other privileges by homosexuals. Homosexuals, as with all citizens of Uganda, are entitled to the full protection of the Constitution, nothing more and nothing less.

Like all other citizens of Uganda, homosexuals contribute to the socio-economic growth of the country. Discrimination through expanded criminalisation only restricts their potential and inhibits their ability to contribute positively to the growth of the economy and the country at large.

¹¹² Article 21 of the 1995 Constitution

Conclusion

This document has taken seven commonly cited justifications for maintaining or strengthening the criminalisation of homosexuality and subjected them to scrutiny through historical and anthropological evidence across Africa and social data from African States, which do not criminalise homosexuality. In each instance, the proposed rationale for expanded criminalisation has been shown to be unsupported by the data – whether it be claims that homosexuality is intrinsically un-African, that homosexuality is mutable and a mental disorder, that the traditional African family unit is undermined without expanded criminalisation, that without expanded criminalisation there will be abandonment of religion, that the spread of HIV requires expanded criminalisation, that homosexuality is synonymous with child abuse or that gay and lesbian persons are asking for special privileges or rights not enjoyed by other Ugandans.

The proposed law will address none of these issues, either because there is no issue to address or because it simply targets the wrong people. Representatives of member states of the United Nations at Uganda's most recent Universal Periodic Review before the Office of the High Commissioner for Human Rights in 2011, from Australia to Argentina, consistently requested of the Ugandan government that the proposed law be shelved and current provisions criminalising homosexuality be repealed on the grounds that they will violate human rights and have a negative impact on issues such as HIV prevention and access to healthcare. As this report has shown there is no justification for the expansion of criminal sanctions against a small group of already marginalised people. Uganda's own Human Rights Commission, in its Annual Report of 2009, indicated that the proposed law would violate Uganda's international human rights treaty obligations and fail to address issues such as HIV prevention and coercive or forced sexual relations.¹¹³

With these aspects in mind, the following section will consider alternatives to the proposed law which will help address issues such as child abuse and discriminatory access to health care.

¹¹³ Uganda Human Rights Commission, 12th Annual Report 2009. Available at: <http://www.rwi.lu.se/NHRIDB/Africa/Uganda/2009%20Annual%20Report.pdf> [last accessed 19 December 2013].

Alternatives to the proposed law

In order to address the legitimate and important concerns regarding sexual abuse, child protection and healthcare – concerns which are not addressed by any of the measures contained in the proposed law – the following alternatives are recommended:

1. Amend sexual offences laws to make them gender neutral, all victims of rape and sexual assault are protected equally

The current definition of rape in the *Penal Code Act 1950* of Uganda fails to ensure protection for male victims. While section 147 deals with ‘indecent assault’ committed against boys under the age of 18, the gendered definition of rape excludes male victims from the protection of the law. Equalising sexual offence laws, by making provisions gender neutral and equalising the sentences for the crimes, would help address the Committee on the Rights of the Child’s concern that current laws are ‘biased against the boy-child’,¹¹⁴ and would ensure all victims of sexual offences were protected equally.¹¹⁵

2. A system of mandated reporting of all forms of suspected child abuse should be implemented

Targeting homosexuals, as provided for in the proposed law, will not protect children from sexual abuse. A stronger and more effective use of limited government resources would be the mandated reporting of all forms of suspected child abuse, especially given the centrality of the issue of child protection in current debates surrounding the proposed law. Such a provision would also comply with the Constitution and the obligation to protect victims, unlike the targeting of consensual same-sex conduct between adults in private.

3. Address risk factors associated with all forms of child exploitation and abuse

If Uganda is serious about reducing child abuse then it will need to confront the reality that it is primarily driven by poverty, not by the sexual orientation of perpetrators. All children are particularly vulnerable to sexual exploitation when their families experience poverty. Reducing poverty overall will neutralise many of the aforementioned risk factors associated with all forms of forced or coerced sex with children.

¹¹⁴ Concluding observations of the Committee on the Rights of the Child: Uganda, 23 November 2005, UN Doc CRC/C/UGA/CO/2, para. 75.

¹¹⁵ The current maximum sentence for rape, as defined in the *Penal Code Act*, is death. Article 6(2) of the ICCPR states that the ‘sentence of death may be imposed only for the most serious crimes’, defined by the Human Rights Committee as crimes that result in the loss of life. The Human Rights Council’s Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions further clarified the interpretation of ‘most serious crimes’, stating: ‘the death penalty can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life’: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/HRC/4/20, 29 January 2007, para. 39-53 and 65. It is therefore recommended that, in equalizing sexual offence laws, Uganda ensures sentences are compliant with international law.

4. Prevent discriminatory access to health services

The expanded criminalisation provided by the proposed law is likely to have the unintended and serious consequence of exacerbating HIV incidence in Uganda, by driving high-risk groups further underground. Resources should be directed toward implementation of the HIV Prevention and Control Bill 2010, rather than implementation of the proposed law.



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