THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Buteera, DCJ; & Kiryabwire, Kibeedi, Mugenyi & Gashirabake, JJCC)

CONSOLIDATED CONSTITUTIONAL PETITIONS NO. 14, 15, 16 & 85 OF 2023

1. HON. FOX ODOI-OYWELOWO
2. FRANK MUGISHA
3. PEPE ONZIEMA
4. JACKLINE KEMIGISA
5. ANDREW MWENDA
6. LINDA MUTESI
7. KINTU NYAGO
8. JANE NASIIMBWA
9. PROF SYLVIA TAMALE
10. DR. BUSINGYE KABUMBA
11. SOLOME NAKAWEESI KIMBUGWE
12. KASHA JACQUELINE NABAGESERA
13. RICHARD SMITH LUSIMBO
14. ERIC NDAULA
15. WILLIAMS APAKO
16. HUMAN RIGHTS AWARENESS & PROMOTION FORUM (HRAP)
17. RUTARO ROBERT
18. MUSIIME ALEX MARTIN
19. MUTEBI EDWARD
20. NABUYANDA JOHN SOLOMON
21. LET'S WALK UGANDA LTD
22. BISHOP JAMES LUBEGA BANDA

PETITIONERS

VERSUS

1. ATTORNEY GENERAL
2. PASTOR MARTIN SEMPA
3. ENG. STEPHEN LANGA
4. FAMILY LIFE NETWORK LIMITED

RESPONDENTS

AND

THE SECRETARIAT OF THE JOINT UNITED NATIONS PROGRAMME ON HIV/ AIDS (UNAIDS) ..... AMICUS CURIAE

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JUDGMENT OF THE COURT

A. Introduction

1. Following the enactment of Uganda's Anti-Homosexuality Act, 2023, *Constitutional Petitions No. 14, 15, 16 and 85 of 2023* were lodged in this Court challenging the constitutionality of that statute. By consent of the parties, those constitutional petitions have since been consolidated into the present consolidated petition.

2. The consolidated petition broadly contests the procedure adopted by the Ugandan Parliament in the enactment of the Anti-Homosexuality Act; the effect of the impugned law on past judicial decisions touching on related matters, as well as the financial implications it poses to the country's budgetary framework. It does also question the propriety of a previous constitutional amendment that introduced constitutional prohibition against same-sex marriages. It more substantively challenges sections of the Anti-Homosexuality Act for their contravention of constitutional rights and freedoms that are guaranteed under the Uganda Constitution, as well as international human rights instruments to which Uganda is a party.

3. The petition is opposed by the office of the Attorney General of Uganda, which denies any constitutional violations either in the procedure adopted in the enactment of the Anti-Homosexuality Act or the more substantive contraventions alleged by the petitioners. In addition, specific aspects of the consolidated petition are also opposed by Messrs. Martin Sempa, Stephen Langa and Family Life Network Limited ('the second, third and fourth respondents'), who successfully moved the Court for admission to the petition as interested parties and duly filed their respective Answers to the Petition.

4. At the hearing of the consolidated petition, Nicholas Opio, Derrick Tukwasibwe, Henry Byansi, Fridah Mutesi and Paul Wasswa represented the first to eighth petitioners; Ónyango Owor, Francis Tumwesigye, Edward Ssemambo and Susan Baluka represented the fifth and ninth to sixteenth petitioners; Tonny Tumukunde and Benon Makumbi represented the seventeenth to twenty-first petitioners, while the twenty-second petitioner was represented by David Henry Mukiibi. On the other hand, the first respondent was represented by Martin Mwambutsya, Geoffrey

Atwine Barbra Nakanaaba, Elizabeth Namakula, Jackie Amusugut, Lazak Tibakuno, Samuel Kananda, Raymond Nganzi, Matthew Zaalwa Muhesi; the second respondent was represented by Mr. Gwaya Tegulle, and the third and fourth respondents were represented by Mr. Edward Kato Sekabanja.

5. Pursuant to its admission as *amicus curiae* in the case, an *amicus* brief was additionally received from the Secretariat of the Joint United Nations Programme on HIV/ AIDS (UNAIDS). The *amicus curiae* was represented at the hearing by Joseph Kyazze, Stephen Tumwesigye, and Begumya Rushongoza.

B. **Issues for Determination**

6. The parties framed the following issues for the Court's determination.

Procedural issues (arising from Constitutional Petitions No. 14 & 15 of 2023):

(1) Whether the Anti-Homosexuality Act alters the decisions and/ or judgments of court in contravention of Article 92 of the Constitution.

(2) Whether the Private member's bill that introduced the Anti-Homosexuality Act, 2023 imposes a charge on the Consolidated Fund or any other public fund in contravention of Article 93(a)(ii) of the Constitution.

(3) Whether the Anti-Homosexuality Act, 2023 was enacted without meaningful and adequate public participation in contravention of Objective II(1) of the National Objectives and Directive Principles of State Policy and Articles 1, 2(1) & (2), 8A, 20, 36, 38, 79 of the Constitution.

(4) Whether the conduct of the Speaker of Parliament during the process of enacting the Anti-Homosexuality Act, 2023 was inconsistent with Articles 2(1) & (2), 89(1) and (2) of the Constitution.

(5) Whether the procedure of amending the Constitution to introduce Article 31(2)(a) was in contravention of Articles 1(1), 44(a) and 94 of the Constitution.

Substantive issues:

(6) Whether sections 6, 7, 9, 11(1)(2)(a) – (e), 14(1) & (2) & 15(1) & (2) of the Anti-Homosexuality Act, 2023 are inconsistent with the principle of legality guaranteed under Article 28(12) of the Constitution.

(7) Whether sections 1, 2(1) – (4), 3(1) & (2)(c) – (f), (h), (j), (3) – (4), 5(2), 6, 12, 13 & 16 of the Anti-Homosexuality Act, 2023 are inconsistent with the right to equality and freedom from discrimination guaranteed under Articles 21(1)(2)(3)(4), 32(1), 43(2)(c) & 45 of the Constitution.

(8) Whether sections 2(1) – (4), 3(1), (2)(c) – (f), (h) & (j), (3) & (4), 5(2), 6, 9, 11(2)(d), 12, 13(1), 16 of the Anti-Homosexuality Act, 2023 are inconsistent with the right to human dignity and protection from inhuman treatment guaranteed under Articles 24 & 44(a) of the Constitution.

(9) Whether sections 2(1) – (4), 3(1), (2)(c) – (f), (h) & (j), 3(3)(4), 4, 5(2), 6, 11(1) – (3), & 14(1) – (3) & (5) of the Anti-Homosexuality Act, 2023 are inconsistent with the right to privacy of person, home, correspondence and other property guaranteed under Articles 26(1), 27(1) & 43(2)(c) of the Constitution.

(10) Whether sections 2(1) – (4), 3(1), (2)(c) – (f), (h) & (j), (3) & (4), 5(2), 6, 7 & 11(1), (2)(e) & (3) of the Anti-Homosexuality Act, 2023 are inconsistent with the right to freedom of speech, expression, thought, conscience, belief and religion guaranteed under Articles 29(1)(a), (b) & (c) & 43(2)(c) of the Constitution.

(11) Whether section 11(2)(c) and (e) of the Anti-Homosexuality Act, 2023 is inconsistent with the right to freedom of association and civic participation guaranteed under Articles 29(1)(e), 38 & 43(2) of the Constitution.

(12) Whether sections 2, 3, 9, 11(1) – (3), 12, 13 & 14(1) – (5) of the Anti-Homosexuality Act, 2023 are inconsistent with the right to practice one's profession, carry on lawful occupation, trade or business under Article 40(1) & (2) of the Constitution.

(13) Whether sections 9, 11(1), (2)(d) & 14(1)(2) of the Anti-Homosexuality Act, 2023 are inconsistent with the right to access health services, decent shelter, right to property and other general social justice and economic development guaranteed under Objectives XIV & XX of the National Objectives and Directive Principles of State Policy & Articles 8A, 26, 45 & 287 of the Constitution.

(14) Whether there are any remedies available to the parties?

7. We have carefully scrutinised the pleadings filed in this matter and judiciously considered the legal arguments of learned counsel. We have also addressed our minds to the voluminous literature placed on record, including authorities from other jurisdictions to which we have been referred by the learned counsel. As we commence our interrogation of the issues before us, we consider it necessary to retrace the broad principles governing the Court's interpretative function and the evidential rules applicable thereto.

Rules of constitutional interpretation

8. The general rules of constitutional interpretation as severally laid down by the courts in Uganda have since been aptly summed up in **David Welsey Tusingwire v The Attorney General (2017) UGSC 11** as follows:

   i. The Constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of its inconsistency. See Article 2(2) of the Constitution. Also see **Rtd. Dr. Col. Kiiza Besigye v Y. K. Museveni, Presidential Election Petition No. 2 of 2006 (SC).**

   ii. In determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See **Attorney General v Salvatori Abuki, Constitutional Appeal No. 1 of 1998** (SC)

   iii. The entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See **P. K. Ssemwogerere & Another v Attorney General, Constitutional Appeal No. 1 of 2002** (SC) and **The Attorney General of Tanzania v Rev. Christopher Mtikila (2010) EA 13**.

   iv. A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their social, economic and political cultural values so as to extend the benefit of the same to the maximum possible. See **Okello Okello John Livingstone & 6 Others v The Attorney General & Another, Constitutional Petition No. 1 of 2005** (and) **South Dakota v South Carolina 192, USA 268. 1940**.

   v. Where the words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

   vi. Where the language of the Constitution or statute sought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it. See **Attorney General v Major Gen. David Tinyefuza, Constitutional Appeal No. 1 of 1997** (SC).

   vii. The history of the country and the legislative history of the Constitution is also (a) relevant and useful guide to constitutional interpretation. See **Okello Okello John Livingstone & 6 Others v The Attorney General & Another** (supra).

   viii. The National objectives and Directive principles of state policy are also a guide in the interpretation of the Constitution. Article 8A of the Constitution is instructive for applicability of the objectives.

9. The following additional rules of interpretation were espoused in **Uganda Law Society v. Attorney General (2020) UGCC 4**:

> (1) All provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument.
>
> (2) The words of the Constitution prevail over all unwritten conventions, precedents and practices.

10. The highlighted rules of interpretation shall invariably be tempered by the applicable rules of evidence. We are acutely aware that before us is a challenge to the legislative function of Parliament. Hence, mindful of the importance of the doctrine of separation of powers and out of a sense of deference to the role of the legislative branch of government in a constitutional democracy, self-restraint by the judicial branch when dealing with challenges to the constitutionality of laws is a matter of prudence. This form of restraint is what has been coined as the *presumption of constitutionality*. It manifests in the notion that a statutory or other legislative enactment is presumed to be constitutional and hence, for evidential purposes, '**the burden is upon him** (or her) **who attacks it to show that there has been a clear transgression of the constitutional principles**.' *See* ***Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar & Others, AIR 1958 SC 538***.

11. That proposition is in tandem with the renown evidential rule that he who alleges must prove. Thus, section 101(1) of the Evidence Act, Cap. 6 provides that '**whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove those facts**.' Accordingly, the petitioners being the party that seeks to have this Court give judgment in their favour would bear the onus of proof of all the material facts that underpin this petition. They would thus bear the legal burden of proof that makes it incumbent upon the claimant to prove what he contends.[1] Stated differently, the petitioners as the party desiring the Court to decide in their favour, do bear the duty to satisfy the Court that the conditions which entitle them to judgment have been established.

12. In respect of a particular allegation, however, the burden lies upon that party for whom the substantiation of that allegation is an essential component of his or her

[1] See Halsbury's Laws of England, Civil Procedure, Vol. 12 (2020), para. 697.

case.[2] Hence, the emphasis in section 103 of the Evidence Act that '**the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence**.'[3] This brings to the fore the rights limitation analysis that shall be highlighted later in this judgment.

13. For present purposes, it will suffice to state that the petitioners bear the legal burden of establishing the totality of their case as against the respondents. However, each party would bear the onus of proof of the specific allegations made by it that, if not substantiated, would leave the gravamen of its complaint or defence (as the case may be) unproven. That position resonates with the principle espoused in *Halsbury's Laws of England*[4] that in respect of a particular allegation the burden of proof lies upon the party for whom the substantiation of that particular allegation is an essential component of his/ her case.

14. However, once the party bearing the legal burden of proof has established a particular allegation or claim on *prima facie* basis, the evidential burden (or the burden of adducing evidence) would shift to the opposite party. The notion of a shifting evidential burden was underscored in **Col. (Rtd) Dr. Besigye Kizza v Museveni Yoweri Kaguta & Another, Election Petition No. 1 of 2001**. Citing *Sarkar's Law of Evidence Vol. 2, 14th Ed, 1993 Reprint, 1997, pages 1338 – 1340*, Odoki, CJ observed that '**there can be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies**.'

15. Ultimately, the duty upon this Court is appositely summed up in the US Supreme Court case of **US v Butler, 297 US 1 (1936)** as cited with approval by this Court in **Centre for Public interest law (CEPIL) & Others v The Attorney General (2021) UGCC 44** (unreported). It was held:

> There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When

[2] Ibid. at para. 698.
[3] See section 103 of the Evidence Act.
[4] Civil Procedure, Vol. 12 (2020), para. 698

> an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. *(Our emphasis)*

16. It is within the foregoing broad jurisprudential framework that the contestations in this petition shall be interrogated. Needless to say, this list is not exhaustive and recourse shall be made to related precepts from other jurisdictions to the extent applicable.

C. **Procedural Issues**

Issue No. 1: **Alteration of previous court decisions**

17. The first to eighth petitioners contend that the enactment of the Anti-Homosexuality Act, 2023 had the purpose, objective and/or effect of altering the decision of this Court in *Prof. J. Oloka-Onyango & Others v Attorney General (2014) UGCC 14*, as well as the High Court's decisions in *Kasha Jacqueline & Others v Rolling Stone Ltd & Another, Miscellaneous Cause No. 163 of 2010*; *Victor Juliet Mukasa & Another v Attorney General, HCMC No. 247 of 2006* and *BN vs Uganda, Criminal Appeal No. 381 of 2016*. This is alleged to constitute a violation of Article 92 of the Constitution.

18. The petitioners argue that the Anti-Homosexuality Bill, 2023 was in *pari materia* with the impugned Anti-Homosexuality Bill, 2013 and therefore the enactment of the latter law was intended to alter and/or vary the decision in *Prof. J. Oloka-Onyango & 9 Others v Attorney General (supra)* that struck down the Anti-Homosexuality Act, 2014. The petitioners' contestations are grounded in various similarities between the presently impugned Act and the Anti-Homosexuality Act, 2014 that we do not deem it necessary to reproduce here. In learned Counsel's estimation, the determination of *Prof. J. Oloka-Onyango & Others v Attorney General (supra)* on a preliminary objection duly resolved all the issues raised in that petition in favour of the petitioners therein and had binding effect. Counsel cite the decisions in **Ham Enterprises Limited & Others v Diamond Trust Bank**

Limited & Another (2023) UGSC 15 and **Tukamuhebwa George & Others v Attorney General & Another, Constitutional Petition No. 59 of 2011** to buttress their argument.

19. With regard to the supposed alteration of the decision of the High Court in *Kasha Jacqueline & Others v. Rolling Stone Ltd & Another* (supra), it is argued that by criminalizing consensual same-sex activity between adults and the leasing of premises for homosexual activity, the Anti-Homosexuality Act threatens the right to privacy of person and home, and encourages the profiling of homosexual persons. The petitioners assert that the Anti-Homosexuality Act strips LGBTQI+ Ugandans of their rights and freedoms as conferred in both the *Kasha Jacqueline* case and *Victor Juliet Mukasa & Another v. Attorney General* (supra), in violation of Article 92 of the Constitution.

20. Conversely, the first respondent contends that the petitioners' contestations are misplaced given that the parties, facts and issues in the cited cases are different from those in this petition. In relation to the *Prof. J. Oloka-Onyango* case, it is argued that the court did not delve into the merits of that petition but determined it on the basis of a procedural flaw whereby the Anti-Homosexuality Act 2013 had been passed without requisite quorum. It is thus opined that the decision in that case was not final in respect of the question of homosexuality in Uganda, but did provide guidance to Parliament on procedural compliance in legislative processes; hence the passing of the current Anti-Homosexuality Act, 2023 with quorum. Reference is made to a similar approach by the National Assembly of South Africa following the decision of the South African Constitutional Court in **Doctors for Life International v Speaker of the National Assembly, Constitutional Court Case No. 12 of 2005**.

21. With regard to the *Kasha Jacqueline* case, on the other hand, it is argued that the dispute was not about homosexuality *per se* but about personal rights and freedoms, hence the court's decision that the fact of being homosexual was not a crime in itself under section 145 of the Penal Code Act until one commits a prohibited act. Similarly, the decision in the *Victor Juliet Mukasa* case is opined to be about the rights to privacy, property, personal liberty, and freedom from torture and inhuman treatment as enshrined in Articles 23, 24 and 27 of the Constitution,

and not homosexuality *per se*. It is argued that, unlike those cases, the instant petition challenges the constitutionality of the Anti-Homosexuality Act, a law that addresses issues that were not in contention in those cases.

22. Upon careful consideration of the parties' respective legal arguments, it becomes necessary to reproduce the invoked constitutional provision. Article 92 of the Constitution reads as follows:

> Restriction on retrospective legislation
>
> **Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.**

23. Headings or titles to a constitutional or statutory provision are instructive as to the thrust or subject matter of the provision they relate to. We thus commence our interrogation of this issue with recourse to the thrust of the restriction on retrospective or retroactive legislation. *Black's Law Dictionary*[5] defines the term 'retroactive' in relation to statutes as '**extending in scope or effect to matters that have occurred in the past**.' It more explicitly defines a retroactive or retrospective law as follows:

> A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. **A retroactive law is not unconstitutional unless it .... divests vested rights, or is constitutionally forbidden.** *(Our emphasis)*

24. Article 92 reflects the intention of the framers of our Constitution in capturing the spirit of the foregoing prohibition vis-à-vis the divestiture of already vested rights. Within that contextual background, we take the view that the plain and natural meaning of that constitutional provision is to prohibit the enactment of laws that have retrospective application and thus alter or change the effect of past judgments in terms of the legal rights or obligations already conferred by them upon the parties thereto. The question then is whether the Anti-Homosexuality Act, 2023 did so change the import of the decisions cited by the petitioners as to render the law unconstitutional.

[5] 8th Edition, p. 1343

25. We have carefully considered the judgment in *Prof. J. Oloka-Onyango & Others v Attorney General (supra)*. It was rendered in respect of the Anti-Homosexuality Act of 2014, which the court adjudged to have been passed without the requisite quorum. Although the petitioners in that case challenged the constitutionality of several substantive provisions of that Act, the veracity of those claims was never tested by the court. Consequently, given that no determination was made as to the constitutional rights of the petitioners in that case, it cannot be suggested that the current Anti-Homosexuality Act changes or obliterates undeclared rights.

26. We discern no contradiction between that finding and the observation in **Tukamuhebwa George & Others v Attorney General & Another** (supra), to which we were referred, that a dismissal on a point of law resolves the dispute. For purposes of the prohibition in Article 92, to the extent that the dismissal on a point of law did not in the *Prof. J. Oloka-Onyango* case resolve the constitutionality of the Anti-Homosexuality Act of 2014, it did not confer or vest any legal rights thereunder that would be obliterated or altered by the current statute.

27. On the other hand, the subject matter of the *Kasha Jacqueline* case was the infringement of the applicants' right to life and privacy on account of the respondents' publication of their pictures in the *Rolling Stone* newspaper as homosexuals and recruiters of homosexuals, with calls for their hanging. The newspaper publication was adjudged to have threatened the applicants' right to human dignity and privacy, and protection from inhuman treatment as guaranteed by Articles 24 and 27 of the Ugandan Constitution, and an injunction was issued against any such further publication. In so deciding, the court expressly stated that the matter before it was not about homosexuality but rather the fundamental rights and freedoms that were under threat. It did not interrogate the constitutionality of homosexuality vis-à-vis the fundamental rights and freedoms enshrined in the Constitution. That issue was neither before the court in the *Kasha Jacqueline* case nor did the court attempt to resolve it. It follows therefore that the current Anti-Homosexuality Act would not *ipso facto* negate the legal rights of the litigants in that case.

28. The same position would equally apply to the *Victor Juliet Mukasa* case, where the High Court found the State liable for the police's public undress and indecent

assault of an applicant in violation of the prohibition under Article 24 of the Constitution against torture, cruel, inhuman and degrading treatment. That case was similarly steeped in human rights violations rather than homosexuality *per se*. Therefore, without delving into the merits of this case under this point of law, the current Anti-Homosexuality Act would not necessarily obviate the applicant's human rights as restated by the trial court with the effect of altering the decision in that case. With regard to *BN vs Uganda* (supra), the petitioners neither avail the decision nor make any legal arguments on it, the only reference to it being the assertion in paragraph 62 of Hon. Fox Odoi's Affidavit in support of the consolidated petition. They do bear the burden of proof of their case therefore failure to substantiate their claim leaves that duty undischarged and the allegation remains unproven.

29. In the result, we find that the Anti-Homosexuality Act,2023 was not passed in violation of Article 92 of the Constitution and accordingly, resolve ***Issue No. 1*** in the negative.

Issue No. 2: **Charge on the Consolidated Fund**

30. The first to eighth petitioners' contestations hinge on two broad arguments: first, that sections 16(1) and (2) and 17 of the Anti-Homosexuality Act impose a charge on the Consolidated Fund and are to that extent unconstitutional and, secondly, that the Certificate of Financial Implications that was issued in this case did not address the impact of the Anti-Homosexuality Bill on the economy so as to enable the legislators make an informed decision on it.

31. In the first instance, the petitioners contend that a private member of the House should not introduce a Bill or move a motion, and the House should not consider such a Bill or motion, if it imposes a charge or has the effect of altering an existing charge on the Consolidated Fund or any other public fund of Uganda. They cite the following observation in **Parliamentary Commission v Wilson Mwesigye (2019) UGSC 11**:

> Article 93 bars Parliament from proceeding on either a bill or a motion unless that bill or motion is introduced by Government in a specific number of cases which include, (a) (ii) the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge

otherwise by reduction. The Constitution specifically bars Parliament from considering bills or motions which would include resolutions that impose a charge upon the Consolidated Fund or **alteration of such existing charge other than by way of reduction**. *(Petitioners' emphasis)*

32. The petitioners opine that no legislation can be implemented without the imposition of a charge on the Consolidated Fund or any other public funds of Uganda. In their view, the statement in the Certificate of Financial Implications that was issued in this case, which is to the effect that the law will be implemented using funds already allocated by Parliament, is an admission that the law imposes a charge on the Consolidated Fund or in the alternative, alters an existing charge. This position is premised on the notion that the Prisons Service Probation, Social and Welfare Officers would be paid for man hours spent rendering the rehabilitation envisaged under section 16 of the impugned Act. To the extent that such payment would accrue from the Consolidated Fund or other related public funds in Uganda, the Court is invited to find that the Anti-Homosexuality Act imposes a charge on the Consolidated Fund or related public fund in contravention of Article 93(a)(ii) of the Constitution.

33. Under the second leg of this objection, it is argued that the format and contents of a Certificate of Financial Implications are set out in the Public Finance Management Act, 2015 but the certificate that was issued in this case did not comply with section 76(3) of that Act on the question of the impact of the Bill on the Ugandan economy. The petitioners thus seek declarations that, first, the parliamentary action of passing the Anti-Homosexuality Bill contravened Article 93(a)(ii) of the Constitution and is, to that extent, null and void; and, secondly, section 16 of the resultant Act is inconsistent with the same constitutional provision insofar as it imposes a charge on the Consolidated Fund.

34. In response, the first respondent contends that the Certificate of Financial Implications issued in respect of the Anti-Homosexuality Bill, 2023 is indicative of the Bill not creating a charge on the Consolidated Fund, and in full compliance with Article 93 of the Constitution as construed by the Supreme Court in **Parliamentary Commission v Mwesigye Wilson** (supra). Such compliance is purportedly augmented by the confirmation in that certificate that the (then) Bill would be implemented within the existing budgetary provisions. The petitioners are faulted

for falling short on proof that the implementation of sections 16 and 17 of the Anti-Homosexuality Act would impose a charge on the Consolidated Fund (or other public fund) that is outside the existing budgetary allocations of the implementing agencies. For ease of reference, Article 93(a)(ii) of the Constitution provides that '**Parliament shall not, unless the bill or the motion is introduced on behalf of the Government proceed upon a bill, including an amendment bill, that makes provision for ... the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction**.'

35. Meanwhile, section 76 of the Public Finance Management Act that has been invoked by the petitioners provides as follows:

> **Cost estimates for Bills**
>
> **(1) Every Bill introduced in Parliament shall be accompanied by a certificate of financial implications issued by the Minister.**
>
> **(2) The certificate of financial implications issued under subsection (1) shall indicate the estimates of revenue and expenditure over the period of not less than two years after the coming into effect of the Bill when passed.**
>
> **(3) In addition to the requirements under subsection (2) the certificate of financial implications shall indicate the impact of the Bill on the economy.**
>
> **(4) Notwithstanding sub sections (1), (2) and (3), a certificate of financial implication shall be deemed to have been issued after 60 days from the date of request for the certificate.**

36. On the other hand, clauses (d), (e) and (f) of the impugned Certificate of Financial Implications read as follows:

> *(d)* *Alignment to National Development Policies and Programs*
>
> *The Bill is aligned to the National Development Agenda, specifically the Community Mobilization and Mindset Change Program of the Third National Development Plan, which aims to empower families, communities and citizens to embrace national values and actively participate in sustainable development.*

(e) *Funding and Budgetary implications*

The bill will be implemented within the existing budgetary provisions of the implementing agencies which will include; Law enforcement, Judiciary, medical institutions among others.

(f) *Expected savings and/or Revenue to Government*

The Bill is not anticipated to directly generate revenue or savings for the Government.

37. Before delving into the merits of this issue, we are constrained to state from the onset that we are unable to abide the petitioners' unqualified statement that all legislative Bills have financial implications, as to do so would be to adjudge Article 93 of the Constitution that prohibits charges on the Consolidated Fund under designated circumstances to be superfluous and inconsequential. That cannot have been the intention of the framers of the Ugandan Constitution.

38. On the contrary, the function of a Certificate of Financial Implications was quite conclusively settled by the Supreme Court in **Male H. Mabirizi & Others v Attorney General, Consolidated Constitutional Appeal No. 2, 3 & 4 of 2018** (unreported). Ekirikubinza, JSC did in that case observe that '**every Bill whether introduced by Government or a Private Member at a certain point has financial implications in terms of administrative and operation costs** (and therefore) **it can never be said that any Bill should have a 'zero' financial cost**.' The learned judge thereupon substantiated that observation with her rejection of the notion that a budget-neutral Bill, the financial obligations of which could be accommodated within existing budgetary provisions, would pose financial implications to the Consolidated Fund. This is in tandem with the majority position in that case, the essence of which is that Article 93 prohibits charges on the Consolidated Fund that cannot be accommodated within existing budgetary provisions. For the avoidance of doubt, we reproduce the pertinent decisions below.

39. Katureebe, CJ quite categorically held that Article 93 of the Constitution prohibits a charge on the Consolidated Fund '**beyond that already budgeted for**' by the implementing institutions, succinctly outlining the function of a Certificate of Financial Implications in that regard as follows:

> The import of the certificate of financial implications was that the Minister was satisfied that those provisions could be accommodated within the medium term framework without imposing any extra expenditure beyond that budgeted for within that period.

40. Mwangusya, JSC similarly considered budgetary constraints to form the thrust of the prohibition in Article 93 against private members' bills. He observed:

> The essence of that article is to enable the government plan on how such charge or others' imposition on consolidated fund can be effectively implemented by it without causing unnecessary restraints on its budget. *(our emphasis)*

41. In the same vein, Tumwesigye, Ag. JSC alludes to budgetary considerations in his interpretation of Article 93, observing that '**what Article 93 requires is for the Minister to indicate, among other things the likely expenditure the bill is likely to cause on the national budget once the provisions contained in the bill are brought into force as Act of Parliament**.' We do abide the apex court's interpretation of Article 93. We would respectfully add that in our view the phrase '***imposition of a charge***' in Article 93(a)(ii) envisages the creation of a hitherto unknown expenditure; while the phrase '***alteration of any such charge***' in the same constitutional provision denotes a change to an otherwise acknowledged expenditure vote.

42. It thus becomes apparent that Article 93 of the Constitution does recognise that there could be private members Bills that do not either create charges or alter existing charges so as to present financial implications. Hence the prohibition thereunder that reserves for introduction by the Government side such Bills as would create a charge on the Consolidated Fund (or indeed any other public fund) that cannot be accommodated within the existing budgetary framework or which otherwise alter pre-existing charges by increment. We would therefore disallow the proposition by the petitioners that clause (e) of the Certificate of Financial Implications in this case, which essentially confirms that the financial implications presented by the Bill could be accommodated within pre-existing budgetary provisions, is an admission that the law imposes a charge on the Consolidated Fund or otherwise alters an existing charge.

43. In any event, it has not been demonstrated by the petitioners that the implementation of sections 16 and 17 of the Act would impose a charge on the Consolidated Fund or alter any existing charge. The argument that the Prisons Service Probation, Social and Welfare Officers would be paid for the man hours spent rendering the rehabilitation envisaged under section 16 is speculative and not supported with proof that the necessary public servants would in fact be paid on man-hour basis rather than within the pre-existing, pre-budgeted and un-altered Prisons Service wage bill.

44. Even if perchance it had been established that section 16 does create a charge on the Consolidated Fund, we are alive to the principle advanced in **Parliamentary Commission v Mwesigye Wilson** (supra) that '**the provision under article 93 of the Constitution is more about the entry point when a motion, a bill or amendment that has the effect of an increase of the charge on the Consolidated Fund must be introduced on behalf of Government**.' This is aptly summed up in **Male H. Mabirizi & Others v Attorney General** (supra) where, in his interrogation of Article 93 of the Constitution, Opio-Aweri, JSC sums up the question before the court as '**whether at the time of the introduction of the Bill it offended the Constitution**.'

45. The import of the foregoing decisions is that a certificate of financial implications should be issued prior to the commencement of the parliamentary proceedings in respect of the applicable Bill, and once so issued it would only be applicable to the Bill as first presented to the House before the introduction of amendments that could have the effect of creating a charge on the Consolidated Fund. Such amendments would require a separate Certificate of Financial Implications that addresses the Bill as amended.

46. In this case, the petition depicts the original Bill in respect of which the Certificate of Financial Implications was issued to have had seventeen clauses before additional amendments were subsequently introduced by the Committee of Legal and Parliamentary Affairs. For instance, at page 7670 of the Hansard of 21st March 2023 (Annex FO–5 to Mr. Fox Odoi's affidavit in support of the petition) it is clear that the then clause 15 (now clause 16) was introduced by the Committee.

47. In **Male H. Mabirizi & Others v Attorney General** (supra), the majority position was that the amendments to the original Bill that had the effect of creating charges on the Consolidated Fund could be severed from the resultant Act as opposed to striking down the entire Act on that account. It follows, therefore, that had the present petitioners proved that section 16 (that was introduced to the Bill by way of amendments) did in fact create a charge on the Consolidated Fund, it too would have been liable to suffer the fate of severance from the Act.

48. Turning to the second leg of this procedural issue, section 76(2) of the Public Finance Management Act requires a Certificate of Financial Implications to give an indication of '**the estimates of revenue and expenditure over the period of not less than two years after the coming into effect of the Bill when passed**;' while sub-section (3) of the same section additionally calls for an indication in a certificate of '**the impact of the Bill on the economy**.' It is observed that despite their pleadings on the non-compliance of the Certificate of Financial Implications with both sub-sections (2) and (3); in their closing legal arguments the petitioners only took issue with its non-compliance with the latter statutory provision and seemingly abandoned the former. In any case, subsection (2) simply requires an indication (rather than detailed specificity) of revenues and expenditure that could accrue from the approval of a Bill. Therefore, insofar as clauses (e) and (f) of the certificate availed in this case do indicate that expenses from the Anti-Homosexuality Bill as first introduced could be accommodated within the budgetary framework for the period in question and no revenues are expected from it, they do comply with that statutory provision.

49. With regard to subsection (3), it is recognised that the impact of the Bill on the economy is not directly addressed in the certificate, clause (d) thereof simply alluding to the Bill's alignment with national development policies and programs in general terms. The question would be what implications this omission would pose to the resultant Act. In **Male H. Mabirizi & Others v Attorney General** (supra), it was held that the overarching objective of a Certificate of Financial Implications is to provide satisfaction to the Speaker of Parliament that the provisions of a Bill before the House can be accommodated within the existing budgetary framework.

Budgetary considerations would thus be the primary focus of a certificate's compliance with Article 93 of the Constitution.

50. In this case, we find that clause (e) of the certificate of financial implications does meet that objective. For the avoidance of doubt, the clause is reproduced below.

> *The bill will be implemented within the existing budgetary provisions of the implementing agencies which will include; Law enforcement, Judiciary, medical institutions among others.*

51. Would then a Certificate of Financial Implications that abides the constitutional prerogative in Article 93 of the Constitution but is non-compliant with an incidental statutory requirement negate the constitutionality of a statute in respect of which the certificate was issued? More so, where another subsection of the same statutory provision – section 76(4) of the Public Finance Management Act – makes provision for such certificate to be deemed to have been issued where no certificate has been issued at all?

52. It seems to us that non-compliance with a statutory provision might be contestable before the ordinary courts of law but would not invoke this Court's interpretative jurisdiction. Furthermore, given that under section 76(4) of the Act a Certificate of Financial Implications is simply presumed to have been issued after the lapse of the prescribed period, it is inconceivable that a certificate that does not comply with sub-rule (3) of the same statutory provision would have been intended to vitiate the constitutionality of a Bill in respect of which it is issued. If non-compliance with the more substantive provisions of section 76(1), which requires every Bill introduced in Parliament to be accompanied by a Certificate of Financial Implications, would lead to such certificate being deemed to have been so issued; it follows that a certificate that omits to provide indication of the economic outlook of a Bill before the House but does address the pivotal budgetary implications of the Bill as espoused in **Male H. Mabirizi & Others v Attorney General** (supra) does abide the dictates of Article 93 of the Constitution and its non-compliance with a related statutory provision would not necessitate the annulment of the resultant Act.

53. Economic outlook, though necessary, does not go to the root of the certificate. Certificates of Financial Implications do not necessarily serve the purpose of enabling legislators to make an informed decision on the potential consequences

of their vote on a Bill before them, as we understood the petitioners to propose. Rather, as was held in the **Male H. Mabirizi & Others** case, they primarily address the question of budgetary compliance; while the decision to vote one way or another in the House is the result of parliamentary debates, which members of parliament (MPs) would presumably have adequately and resourcefully prepared for themselves.

54. In the result, we find no violation of Article 93(a)(ii) of the Constitution. ***Issue No. 2*** is resolved in the negative.

Issue No. 3: **Public participation in legislative processes**

55. The first to eighth petitioners contend that the Anti-Homosexuality Bill was introduced to Parliament on 9th March 2023, referred to the Committee on Legal and Parliamentary Affairs on the same day and as at 22nd March 2023 when the Bill was returned to the House, the Committee stage of the Bill had taken only six days rather than the forty-five days allotted by the parliamentary rules of procedure. In their view, the Ugandan people were not extensively consulted at any stage of the legislative process; and the hasty passing of the Bill denied them the opportunity to exercise the power conferred upon them under Article 1 of the Constitution, or participate in the legislative process in contravention of Article 38(2) of the Constitution.

56. They argue that public involvement in legislative processes forms an integral part of Uganda's constitutional framework and therefore cannot be sidestepped particularly where a Bill that is under consideration has adverse effects on fundamental rights and freedoms. This argument is anchored in **Doctors for Life International v Speaker of the National Assembly** (supra), where it was *inter alia* held that '**the duty to facilitate public involvement will require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them**.'

57. It is further argued that the procedure adopted by Parliament in the passing of the Anti-Homosexuality Bill does not meet the qualitative and quantitative test envisaged in Articles 1(1), (2) and (3), 38(2) and 94 of the Constitution which, in the petitioners' view, underscore the Ugandan peoples' right to participate in the

legislative process. The Court is urged to adopt the principles that validate public consultations as espoused in **R. v London Borough of Haringey, ex parte Moseley (2014) UKSC 56** and **Glenister v President of the Republic of South Africa & Others (2011) (7) BCLR 651 (CC)**, both of which *inter alia* allude to the adequacy of time allocated for such consultations. The Committee on Legal and Parliamentary Affairs is thus faulted for denying the second and third petitioners the opportunity to present their views on the Bill.

58. Learned Counsel contend that Uganda's constitutional dispensation bars MPs from unilaterally and whimsically legislating from an uninformed, partial and emotional perspective, proposing that the Constitution envisages a participatory democracy under which MPs and the people they represent would undertake mutually supportive roles. It is their contention that law-making that is clothed in secrecy is anathema to the notion of constitutional democracy and therefore the legislature ought to be held accountable by making provision for public participation in its legislative processes. Reference is made to the authority of **Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces & Others (2016) (10) BCLR 1277** for the proposition that public participation is a vital tenet of the legislative process that cannot be dispensed with, and therefore the lack of meaningful public participation in the enactment of Uganda's Anti-Homosexuality Act rendered the process fundamentally flawed and unconstitutional.

59. In the same vein, the ninth to sixteenth petitioners fault the Committee on Legal and Parliamentary Affairs for undertaking a public consultation process in respect of the Anti-Homosexuality Bill that lasted only three and a half days (from 14th – 17th March, 2023), and was largely perfunctory. It is their contention that the ninth, tenth and sixteenth petitioners, as well as several individuals and organizations that were invited to interact with the Committee were given notice of less than 24 hours to prepare and in some instances were accorded only 15 minutes to present their submissions. Reference in that regard is made to the affidavit evidence of Professor Sylvia Tamale, Dr. Busingye Kabumba and Dr. Adrian Jjuuko. This, in the petitioners' view, would not constitute meaningful public participation

particularly where the thirty submissions received by the Committee were mainly from government agencies and self-proclaimed anti-homosexuality activists.

60. They contend that the purported public consultations go against the letter and spirit of Objective II(i) of the National Objectives and Directive Principles of State Policy, and Articles 36 and 38 of the Constitution insofar as they inhibited the participation of sexual minorities and other persons opposed to the impugned Act in the '*decision-making processes*,' contrary to the constitutional provision for Ugandan citizens to participate in the affairs of government either individually or through civic organisations. Furthermore, the public consultation process adopted by the Committee is alleged to offend the law-making process that was envisaged under Rule 129(2) of the parliamentary rules of procedure formulated under Article 94(1) of the Constitution, which accord a Committee forty-five days within which to undertake public consultations and report to the House. In the petitioners' estimation, given the background leading to the introduction of the Anti-Homosexuality Bill, its human rights and constitutional implications and the penalties proposed therein, there was no conceivable reason to rush through the consultation process; neither is the perfunctory manner in which the consultations were conducted consistent with the duty of Parliament under Articles 20(2) and 79 of the Constitution to protect Uganda's democratic governance and the rights of its citizenry and minorities to participate in it.

61. The case of **Doctors for Life International v Speaker of the National Assembly** (supra) is cited in support of the view that the value of meaningful public participation is to foster participatory democracy as opposed to mere representative democracy. Hence the emphasis in Article 1(1) of the Constitution that '**all power belongs to the people who shall exercise their sovereignty in accordance with this Constitution**.' In the petitioners' view, Objective II(i) of the National Objectives and Directive Principles of State Policy and Articles 8A, 20, 36, 38 and 79 of the Constitution are couched in terms that imposed a duty upon Parliament to facilitate Ugandans' participation in the public consultation process in respect of the Anti-Homosexuality Bill, but the House reneged on its duty. Citing the Supreme Court of Kenya's decision in **British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary**

for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties), Mastermind Tobacco Kenya Limited (Affected Party) (2019) eKLR, it is proposed that public participation is not a mere formality but a substantive constitutional requirement. In that case it was observed:

> Public participation must be real and illusory. It is not a cosmetic or a public relations act. it is not a mere formality to be undertaken as a matter of course just to 'fulfil' a constitutional requirement. There is need for both qualitative and quantitative components in public participation.

62. It is the petitioners' contention that insofar as lack of adequate public participation in the legislative process was in **Doctors for Life International v Speaker of the National Assembly** (supra) adjudged to render invalid a statute that resulted from that process; Uganda's Anti-Homosexuality Act that was enacted without meaningful public participation is equally null and void in its entirety. The nullification of a law for non-adherence to parliamentary procedure is opined to be an accepted constitutional law precept on the basis of this Court's decision in **Prof. Oloka Onyango & Others v The Attorney General (2014) UGCC 14** that '**the failure to obey the law (rules) rendered the whole enacting process a nullity**.' Similarly, in **Male H. Mabirizi & Others v. The Attorney General, Consolidated Constitutional Petition No. 49 of 2017, 3, 5, 10 & 13 of 2018**, this Court struck down aspects of the Constitutional (Amendment) Bill No. 1 of 2018 *inter alia* citing the lack of public consultations. This Court is thus urged to declare the Anti-Homosexuality Act null and void for having been passed without meaningful and adequate public participation in contravention of Articles 1, 2, 8A, 20, 36, 38 and 79 of the Constitution.

63. In response, the first respondent contends that the Ugandan Parliament enacted the Anti-Homosexuality Act in the exercise of its legislative mandate under Article 79 of the Constitution so as to protect the family and children's rights within the precincts of Objective XIX of the National Objectives and Directive Principles of State Policy and Article 34(4) of the Constitution. Learned State Counsel propose that the public did participate in the enactment of the Act by representation through their MPs, as well as through views expressed in the media and presentations made to the House's Committee on Legal and Parliamentary Affairs. In their estimation, therefore, the passing of the Anti-Homosexuality Bill was consistent

with the democratic principles of public participation enshrined in Articles 1, 2, 8A, 20, 36, 38, 79 and 94(1) of the Constitution.

64. It is argued that what would amount to public participation under the foregoing constitutional provisions was settled by the Uganda Supreme Court in **Male H. Mabirizi K. Kiwanuka v The Attorney General** (supra),[6] in which public participation was adjudged to have been achieved on the basis of parliamentary debates by duly elected people's representatives, the consultation undertaken by the Committee on Legal and Parliamentary Affairs, and media debate on radio and television shows throughout the country. The decision in that case was purportedly followed by this Court in **Centre for Public Law Limited v The Attorney General (2023) UGCC 6** and deference made to the observation of the learned Chief Justice that public participation may ensue through the Ugandan people getting directly involved in the processes that underpin key decisions or through their elected leaders, including MPs and local leaders.

65. State Counsel contend that the foregoing cases confirm that the notion of public participation is satisfied by either individual or representative participation, MPs being formally recognised as the representatives of the people for that purpose. This Court is invited to acknowledge that the MPs' debate on the Anti-Homosexuality Bill, as reflected in the Hansard of 21st March 2023,[7] was informed by public outcry, social and broadcast media discussions and homosexuality victims' narrations on the '*painful and gruelling stories*' of children and families that were '*dying in silence*' from the psychological trauma of forced recruitment of children into homosexual acts.

66. It is further argued that given the latitude under rule 129(2) of the parliamentary rules of procedure whereby the Committee on Legal and Parliamentary Affairs need only make such inquiries in respect of a Bill as it considers expedient or necessary (provided that it reports back to the House within forty-five days); the Committee acted well within its discretionary mandate in undertaking public consultation on the Bill in the manner it did. In State Counsel's view, Article 90 of the Constitution and the rules of procedure made under Article 94 of the

[6] At p. 46.
[7] At p. 7810, paras. 11 – 13.

Constitution vest parliamentary committees with the exclusive preserve to determine their *modus operandi*; therefore the petitioners' propositions on the subject of public participation would have the effect of establishing a non-existent rule about meaningful participation in clear contravention of those constitutional and procedural provisions.

67. In this case, it is opined, public consultations were indeed undertaken whereby the Committee solicited written and oral submissions from various stakeholders as depicted in the Committee's report; undertook a meticulous examination of the Bill, and made such inquiries as it considered expedient and/ or necessary. Furthermore, the views of the House during the debate were not contested but rather, the Bill was passed with an overwhelming majority of members present and voting in accordance with renown parliamentary democratic processes. It is therefore proposed that the petitioners' contestations with regard to individual representation and the rights of minorities are misplaced.

68. The first respondent contends that the second and third petitioners' allegation that they sought but were denied audience before the Committee on Legal and Parliamentary Affairs is not supported by any evidence, neither is the allegation that some civil society organisations were denied a hearing by the Committee borne out by either the Hansard or the Committee's report. It is proposed that the 45-day rule in rule 129(2) of the parliamentary rules of procedure is a maximum period to cover public consultation, examination of the Bill and reporting back to the House, and not solely restricted to public inquiries as was insinuated by the petitioners. State Counsel contend that the Anti-Homosexuality Act was urgently needed in response to the public outcry for the protection of children and, in accordance with the requirements of section 3(2) of the Children's Act, had to be enacted within the minimum possible time. That statutory provision provides that '**in all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the matter is likely to be prejudicial to the welfare of the child**.'

69. State Counsel question the petitioners' allegation that there was no country-wide consultation on the Bill, arguing that the diversity of the stakeholders that appeared before the Committee is indicative of the diverse views of the Ugandan people and,

in any case, the MPs that participated in the enactment of the impugned Act provided nation-wide representation within the confines of Articles 1, 38 and 79 of the Constitution.

70. In a bid to distinguish **Doctors for Life International v Speaker of the National Assembly** (supra) from the facts of the present case, it is argued that unlike the circumstances of the former case where no written submissions were received or public hearings held despite the constitutional duty upon the legislature to facilitate such consultative processes; in the present case the Committee duly discharged its discretion and undertook some public consultation on the Bill. State Counsel thus maintain that the Anti-Homosexuality Bill was enacted in accordance with Articles 1, 2, 8A, 20, 36, 38 and 79 of the Constitution.

71. This issue brings to the fore the question of public participation in legislative processes. We consider it necessary for ease of reference to reproduce the invoked constitutional provisions.

> *Objective II(i)* *Democratic principles.*
>
> **The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.**
>
> *Article 1: Sovereignty of the People*
>
> **(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.**
>
> **(2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.**
>
> **(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.**
>
> **(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.**

Article 2: Supremacy of the Constitution.

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

Article 8A: National interest

(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

(2) Parliament shall make laws relevant for purposes of giving full effect to clause (1) of this Article.

Article 20: Fundamental and other human rights and freedoms

(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.

(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.

Article 36: Protection of rights of minorities,

Minorities have a right to participate in decision-making processes, and their views and interests shall be taken into account in the making of national plans and programmes.

Article 38: **Civic rights and activities**

(1) Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.

(2) Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.

Article 79: Functions of Parliament

(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda .

(2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.

(3) Parliament shall protect this Constitution and promote the democratic governance of Uganda.

72. In **Centre for Health, Human Rights and Development (CEHURD) & Others v The Attorney General & Another, Constitutional Petition No. 22 of 2015** (unreported) this Court observed that '**Article 8A of the Constitution simply entrenches the National Objectives and Directive Principles of State Policy as justiciable provisions of the Constitution to which the State can be held to account**.' In the same case, whereas Article 38 was broadly construed to confer upon Ugandans the right to participate in the governance of the country, either individually or by representation; as well as influence governance policies through civic organisations, Article 38(2) was specifically adjudged to be inapplicable to that case on the premise that the instrument that was under challenge (as is in this case) was an Act of Parliament as opposed to a policy or policies *per se*. It was observed:

> Although government policy might very well influence public Bills tabled before the House, it seems to me that once an enacted statute has been challenged any policy that might have informed its formulation would be inapplicable to a determination of its constitutionality. In any case, such policies could have been dropped in the course of debate during the legislation process.

73. Meanwhile, Objective Principle II(i) of the National Objectives and Directive Principles of State Policy and Article 38(1) of the Constitution were literally interpreted to '**encourage Ugandans to actively participate in their own governance by empowering them with the right to so engage either individually or by representation**.' We do abide that construction of Articles 8A and 38(2) of the Constitution, and find no reason to revisit this Court's interpretation thereof. Whereas we do similarly abide the Court's construction of Objective II(i) of the National Objectives and Directive Principles of State Policy and Article 38(1) of the Constitution, we consider it necessary to expound that position against the provisions of Article 1 of the Constitution, the interpretation of which is in contention presently but was not in issue in **Centre for Health, Human Rights and Development (CEHURD) & Others v The Attorney General & Another** (supra).

74. In the matter before us, we have been extensively referred to a different albeit related aspect of the decision in **Doctors for Life International v Speaker of the**

National Assembly (supra) as persuasive authority for the nature of public participation envisaged in legislative processes. The first to eighth petitioners rely on the following dictum in that case:

> To sum up, the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil that constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. **In the end, however, the duty to facilitate public involvement will require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less**. *(Petitioners' emphasis)*

75. On the other hand, the ninth to sixteenth petitioners rely on the following observations in the same case:[8]

> It is necessary to stress here that a complaint relating to failure by parliament to facilitate public involvement in its legislative processes after parliament has passed the bill will invariably require a court to consider the validity of the resulting bill. If the court should find that parliament has not fulfilled its obligation to facilitate public involvement in its legislative processes, the court will be obliged under section 172(1)(a) to declare that the conduct of parliament is inconsistent with the constitution and therefore invalid. This would have an impact on the constitutionality of the bill that is the product of that process. The purpose and effect of litigation that is brought in relation to the bill after it has been passed by Parliament is therefore to render the bill passed by parliament invalid. This is precluded by the express provisions of section 167(4)(b).

76. With the greatest respect, we are unable to abide the petitioners' propositions above. First and foremost, they would not be tenable in a modern democracy that derives its legitimacy from the broad concepts of political participation and representation. Hence the following observation of the Indian Supreme Court in **Suresh Kumar Koushal & Another v NAZ Foundation & Others, Civil Appeal No. 10972 of 2013**:

> Every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of

[8] At para. 46.

the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution.[9]

77. In turn, the Ugandan Supreme Court did in **Male H. Mabirizi Kiwanuka & Others v Attorney General** (supra) assert the view that the context within which a statute is enacted is critical to a determination of the sufficiency of public participation. Arach Amoko, JSC proposed that what would amount to 'a reasonable opportunity' for public participation in legislative processes ought to depend on the circumstances of each case.'[10] In the same vein, addressing the position advanced by the Kenyan Constitutional Court in **Law Society of Kenya v Attorney General, Constitutional Petition No. 3 of 2016** that public participation ought to be real and not illusory, and should not be subjected to mere formality for the fulfilment of a constitutional duty, Katureebe, CJ held:

> I am not persuaded by the view that consultation has to be a fully quantitative exercise. One should avoid the temptation of taking public consultation or participation in a legislative process as though it were a referendum exercise. **It has to be borne in mind that in a situation that does not call for a referendum, the elected representatives hold the mantle to do such as they perceive their electorates' views**. .... The above holding by the Kenyan Constitutional Court had more to do with the specific provisions that are in the Kenyan Constitution and the County Governments Act of Kenya. **As such, the same standard or parameter is neither universally applicable nor can it apply with equal force in Uganda**. *(Our emphasis)*

78. The foregoing position was followed by this Court in **Centre for Health, Human Rights and Development (CEHURD) & Others v The Attorney General & Another** (supra), where it was additionally observed that whereas section 72(1)(a) of the South African Constitution did oblige the South African National Council of Provinces to '**facilitate public involvement in the legislative and other processes of the Council and its committees**' (hence the observation in **Doctors for Life International v The Speaker of the National Assembly & Others** (supra) that all parties interested in a piece of legislation be accorded '*a real opportunity to have their say*'); there was no corresponding unequivocal

[9] At p. 54.

[10] The South African case of **The Minister of Health v New Clicks South Africa (Pty) Ltd (2005) ZACC 25** (per Sachs, J) cited.

obligation under the Ugandan Constitution that would persuade the Court to abide that decision.

79. The **Male H. Mabirizi Kiwanuka** and **CEHURD** cases advance the view that the duty to facilitate public participation so as to afford citizens the opportunity to be heard neither has universal application nor would it necessarily apply with equal force in Uganda given the absence in the Ugandan Constitution of the unequivocal duty found in section 72(1)(a) of the South African Constitution.

80. The question of failure to facilitate public participation rendering a resultant law null and void (as argued by the ninth to sixteenth petitioners) would suffer the same fate, as would the adequacy of public participation propounded in another South African Constitutional Court case of **Glenister v President of the Republic of South Africa & Others** (supra); grounded as they are in a constitutional obligation that is unique to the South African Constitution.[11] Similarly, the Kenya Supreme Court's decision in **British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties), Mastermind Tobacco Kenya Limited (Affected Party)** (supra), which re-echoes the discredited sentiments in **Law Society of Kenya v Attorney General** (supra), would be equally inapplicable to Uganda's constitutional dispensation as clarified by the Supreme Court in the **Mabirizi** case.

81. We respectfully do not share the view of the ninth to sixteenth petitioners that Objective II(i) of the National Objectives and Directive Principles of State Policy and Articles 8A, 20, 36, 38 and 79 of the Constitution oblige the Ugandan Parliament to facilitate Ugandans' participation in the public consultation process for the reasons we shall expound forthwith. The petitioners seek to rely on the following observation in **Doctors for Life International v Speaker of the National Assembly** (supra):[12]

> The duty to facilitate public involvement in the legislative process is an aspect of the right to political participation. International and regional human rights instruments provide a useful guide in

[11] Section 118(1) of the South African Constitution that is in contention in the **Gleinster** case is in *pari materia* with section 27(1) that is in issue in the **Doctors for Life International** case.

[12] At para. 89

understanding the duty to facilitate public involvement in the context of our country. I consider it necessary therefore to refer to the right to political participation as understood in international law.

82. The right to political participation is then adjudged in that case to consist of at least two elements: '**a general right to take part in the conduct of public affairs; and a more specific right to vote and/ or to be elected**.'[13]

83. It behoves this Court to deduce the intention of the framers of the Constitution with regard to the nature and scope of public participation in Uganda. The National Objectives and Directive Principles of State Policy are instructive on the interpretation to be drawn from any constitutional provision. *See Objective I(i) thereof.* Objective II(i) of the National Objectives and Directive Principles of State Policy addresses the governance and democratic principles that are incidental to the right to political participation espoused in **Doctors for Life International v Speaker of the National Assembly** (supra) above. That Objective clarifies that the Ugandan State should be premised on the empowerment and encouragement of the active participation of all citizens at all levels of their governance. This begets the question as to whether the *empowerment* and *encouragement* of active public participation contemplated in that constitutional provision would necessarily translate into an obligation upon the Ugandan polity to facilitate the nature of public participation espoused by the petitioners.

84. As was quite persuasively observed in **Doctors for Life International v Speaker of the National Assembly** (supra), such political participation would entail '**a general right to take part in the conduct of public affairs**,' which for present purposes is conferred in Articles 36 and 38(1) of the Ugandan Constitution; and '**a more specific right to vote and/ or to be elected**' as delineated in Article 1(4) of the Constitution. It seems to us that an understanding of the more specific right conferred under the right to political participation would shed light on the nature and scope of the more general right of citizens to participate in the conduct of public affairs. It is therefore to Articles 1 and 2 of the Constitution that we turn.

[13] Reference in that regard is made to Ebbesson, '**The Notion of Public Participation in International Environmental Law**,' (1997) *8 Yearbook of International Environmental Law*, 51 at 70-2.

85. The main thrust of Articles 1(1), (3), and 2 of the Constitution, is to recognise the supremacy of the Constitution as underscored by the Ugandan people, who literally agree to be governed in accordance with that people-centred Constitution. Article 1(2) articulates the aspiration that the Ugandan people would be governed '**through their will and consent**,' which *will and consent* as to who by and how they shall be governed is under clause (4) stated to be expressed '**through regular, free and fair elections of their representatives or through referenda**.'

86. Article 1(4) is particularly pertinent to the issue under consideration insofar as it underscores the expectation that the Ugandan people shall express their preferred mode of governance either by representative participation through the election of their representatives or, more directly, by individual participation through referenda. This would lend credence to the position adopted in the **Male H. Mabirizi Kiwanuka** case (Katureebe, CJ) that '**in a situation that does not call for a referendum, the elected representatives hold the mantle to do such as they perceive their electorates' views**.' It does thus resolve the construction to be applied to Article 38(1) of the Constitution, which literally empowers, urges and confers upon Ugandans the right to participate in the governance of the country either individually through a referendum or by representation through their elected representatives. The '*affairs of government*' that are contemplated under that constitutional provision would include the legislative processes that are under contestation in this petition.

87. We are alive to the provision in rule 129(2) of the parliamentary rules of procedure for a Committee of the House to which a Bill is referred to '**make all such inquiries in relation to the Bill as** (it) **considers expedient or necessary**.' However, we do also recognise that the rule is couched in terms that invoke the Committee's discretion as to whether such inquiries or consultations would be expedient or necessary. We do not construe that procedural discretion to impose a constitutional obligation upon the Committee to undertake the extensive and protracted consultations alluded to by the petitioners. Articles 1(4) and 38(1) of the Ugandan Constitution would appear to relegate matters that require the individual participation of Ugandans to specific questions framed under national referenda.

88. In like measure, Article 36 ought to be construed within the confines of the sovereignty of the people and their right to express themselves on how they should be governed, as articulated in Article 1(4) of the Constitution. So that, the right of sexual minorities to participate in legislative decision-making processes would similarly be by representative participation through their elected representatives, as well as the submission of views to the applicable Committee of the House. In this case, we find evidence in the Hansard of 21st March 2023 that a minority report was tabled before the House in respect of the report by the Committee on Legal and Parliamentary Affairs. That would presuppose that minority views were presented to the Committee by the two signatories of the minority report. The minority report includes reference to international human rights instruments that were supposedly offended by the Bill. We take the view, therefore, that the minority positions advanced by the legislators that tabled that minority report did represent the views of the sexual minorities that would be adversely affected by the passing of the Anti-Homosexuality Bill.

89. In addition, there is uncontroverted evidence on record that at the Committee stage, the Bill attracted views from the following groups: the public sector represented by the Attorney General, the Ministries of Gender, Labour and Social Development and Ethics and Integrity, the Office of the Director of Public Prosecution, the Uganda Police Force and the Law Development Centre; six civil society organisations namely Coalition Against Homosexuality, Family Life Network, Chapter Four Uganda, Human Rights Awareness and Promotion Forum, Akina Mama Wa Afrika and Women's Probono Initiative; a Pastors Forum that included Bishop David Kiganda, Pastor Dr. Martin Sempa, Reverend Canon Christine Shimanya; Pastor Samuel Kusasira, Pastor Edson Muhawenimano, Pastor Herbert Kayitale, Bishop Geoffrey Batera and Pastor Dennis Kayizi; individuals with specialist knowledge of the issues before the Committee including Professor Sylvia Tamale and Dr. Busingye Kabumba (Academia), Anthony Muhwezi and Viola Kanso (Advocates), Elisha Mukisa (a victim of homosexuality), George Oundo (a formerly gay man) and Dr. Herbert Luswata, the Secretary General of the Uganda Medical Association. *See paragraph 97 of the first petitioner's affidavit.* While the foregoing list of persons is by no means representative of the Uganda population, it demonstrates the Committee's

adherence to the discretionary consultative duty outlined in rule 129(2) of the parliamentary rules of procedure.

90. The petitioners contend (albeit with no proof) that the groups that made submissions to the Committee were largely inclined towards the Bill and therefore their submissions were skewed, inexhaustive and non-representative of the views of sexual minorities. We do recognise the need to protect the fundamental rights of those who may dissent or deviate from the majoritarian view in any democracy, and the duty upon courts to ensure that the majority view does not trample over the fundamental rights of minorities. So that, even if it might not have changed the trajectory of the Bill in a democratic dispensation where the majority views take the day, the minorities' views ought to be listened to and considered for what they are worth. We most certainly find no plausible reason for the failure by the Committee to give the second and third petitioners audience before it upon their request.

91. Nonetheless, given the evidence on record, which depicts the majority view in the House to have been manifestly in support of the Bill, we do not think that more extensive consultations with sexual minorities would have led to a different legislative result, neither has any evidence to that effect been furnished before the Court. In those circumstances, the Committee cannot be faulted for considering it neither expedient nor necessary to engage in further inquiries on the Bill, as it is well entitled to do under rule 129(2) of the House's Rules of Procedure. We therefore find no violation of Articles 1, 2, 20, 36, 38, 79 or 94(1) of the Constitution. ***Issue No. 3*** is resolved in the negative.

Issue No. 4: **Conduct of Speaker of Parliament**

92. The ninth to sixteenth petitioners contend that Articles 2(1) and (2), 89(1) and (2), and the oath of that office, impose a duty upon the Speaker of Parliament to be impartial while presiding over the House, a standard that she fell short of during the debate on the Ant-Homosexuality Bill. The standard of impartiality and decorum expected of the holder of that office is opined to have been laid down in the case of **Hon. Francis Zaake v The Attorney General, Constitutional Petition**

No. 6 of 2022 (unreported),[14] the gist of which is purportedly that biased conduct by a Speaker of Parliament contravenes the Ugandan Constitution and vitiates the resultant proceedings. Reference is further made to the case of **Nabam Rebia v Deputy Speaker Arunachal Pradesh Legislative Assembly (2016) 8 SCC 1, 224 – 225** where the Indian Supreme Court observed:

> The Speaker is expected to have a sense of elevated independence, impeccable objectivity and irreproachable fairness, and above all absolute impartiality. This expectation is the constitutional warrant; not a fond hope and expectation of any individual or group. The Speaker has the duty to see that the business of the House is carried out in a decorous and disciplined manner. This functioning requires him (sic) to have unimpeachable faith in the intrinsic marrows of the Constitution, constitutionalism and 'Rule of Law.'

93. A statement made during the parliamentary proceedings of 2nd March 2023 that '*Ugandans must see and hear those who are supporting homosexuality*' is opined to amount to threats by the Speaker; while additional statements made during the proceedings of 9th March 2023 such as '*we shall know the by their deeds*' and '*what you are going to do will impact on the next generation, your children*' are considered to depict outright bias by her. It is argued that the Speaker's biased and intimidating utterances sought to and did influence the outcome of the parliamentary vote in contravention of rule 77 of the parliamentary rules of procedure, and the threatening atmosphere created in the House negated objectivity and rationality in the debate on the Anti-Homosexuality Bill. The Speaker is further faulted for her comment on 9th March 2023, while referring the Bill to the Committee, that parliament '*want(s) them* (the homosexuals) *to be heard even their illegality and immorality*' as it created fear within the sexual minorities. It is argued that the Speaker thereby rallied the House to vote in favour of the Anti-Homosexuality Act in contravention of Article 89(2) of the Constitution.

94. Conversely, the first respondent contends that the Speaker offered necessary guidance to the House in the passing of the Bill and neither violated Article 89(2) of the Constitution nor rule 77 of the parliamentary rules of procedure. It is argued that the petitioners fall short on proof that the Speaker's comments amount to a violation of Article 89(2), which prohibits a Speaker from casting a vote in the

[14] At pp. 104, 105.

House. It is further argued that aside from the fact that the Speaker does not serve as an arbiter in Parliament and therefore the question of bias is misplaced, there is no evidence either that she did demonstrate bias, hostility or ridicule towards those with opposing views on the Bill. Rather, the supposedly offensive comments are opined to have been tantamount to guidance to the House in accordance with the Speaker's remit under rule 77 of the House's Rules of Procedure.

95. The respondent proposes that the decision in **Hon. Francis Zaake v The Attorney General** (supra) is inapplicable to the matter before the Court presently as the issue in that case was conflict of interest and not bias; but, in any event, it is not binding on this Court and pending determination on appeal. Additionally, we understand the first respondent to argue that to the extent that the Speaker and Deputy Speaker are the only persons mandated to preside over the House, even where they have views on any social or cultural issue (as they are entitled to have), the principle of necessity would dictate that they are not disqualified from steering the House on account of such bias.

96. The impugned conduct of the Speaker of Parliament during the enactment of the Anti-Homosexuality Act is alleged to have violated Articles 2(1) & (2), 89(1) and (2) of the Constitution. Those constitutional provisions, as well as the parliamentary procedural rule invoked by the petitioners are reproduced below.

Article 2: Supremacy of the Constitution.

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

Article 89: Voting in Parliament.

(1) Except as otherwise prescribed by this Constitution or any law consistent with this Constitution, any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting in a manner prescribed by rules of procedure made by Parliament under article 94 of this Constitution.

(2) The person presiding in Parliament shall have neither an original nor a casting vote and if on any question before Parliament the votes are equally divided, the motion shall be lost.

Rule 77: Speaker not to participate in debate.

The Speaker shall not take part in debate before the House, but may give guidance to the House on a matter before it.

97. Article 2 of the Constitution is a self-explanatory provision that has been severally construed to literally allude to the Ugandan Constitution as the *grundnorm* of the Ugandan legal system, from which all laws cascade and in respect of which they each must adhere. Article 89, on the other hand, addresses the manner of voting in parliament, subsection (1) introducing the parliamentary rules of procedure made under Article 94 of the Constitution to clarify how such voting should ensue; while subsection (2) explicitly prohibits a Speaker that is presiding over the House from voting. We find no evidence on record that the Speaker voted in respect of the Anti-Homosexuality Bill therefore we do not find any violation of Article 89(2) of the Constitution.

98. The insinuation here would appear to be that the Speaker influenced debate on the Bill and thus rallied MPs to vote for it. We are constrained to state from the outset that we do abide the view that the parliamentary rules on voting, having been incorporated under Article 89(1) of the Constitution, would form part of the constitutional order and thus invoke this Court's interpretative jurisdiction. *See* ***Paul K. Semwogerere & Another v The Attorney General, Constitutional Appeal No. 1 of 2000***. Under the same authority, the same position would pertain to the procedural rules on quorum as introduced within the constitutional order under Article 88(1) of the Constitution.

99. However, rule 77 of those Rules neither addresses voting in the House nor the question of quorum. It simply prohibits the Speaker from participating in parliamentary debates. The conduct of parliamentary debates is not addressed in the Constitution, arising solely under Part XII of the parliamentary rules of procedure, while voting in the House is addressed under Part XV of the Rules and the quorum of the House is highlighted in rule 24.

100. We do not think it was the intention of the framers of the Constitution that every flawed parliamentary process arising from Parliament's rules of procedure would constitute a constitutional violation simply because the Rules were enacted under Article 94(1) of the Constitution. Whereas for instance the denial of a MP's right to a fair hearing in contravention of Parliament's procedural rules might very well occasion a constitutional infringement under the bill of rights; a violation of the procedural rules would not *ipso facto* constitute a constitutional violation by the mere fact of the flouted rule having been enacted under Article 94(1) of the Constitution. To contemplate otherwise would be to peddle the analogous absurdity whereby electoral processes undertaken under electoral laws enacted within the precincts of Article 76 of the Constitution could similarly be challenged before this Court, rather than the electoral courts to which electoral disputes are submitted.

101. We find fortitude for this view in **Male H. Mabirizi Kiwanuka & Others v Attorney General** (supra) and **Attorney General v Maj. Gen. David Tinyefuza** (supra). In the **Male H. Mabirizi Kiwanuka** case, Arach Amoko, JSC held that the failure by the Speaker of Parliament to comply with rule 26 of the applicable parliamentary rules of procedure was an irregularity but not a violation of the Constitution that would lead to the nullification of the resultant Act, essentially positing that non-compliance with parliamentary rules of procedure would not necessarily amount to a constitutional violation, let alone one that would render an Act of Parliament emanating therefrom unconstitutional.

102. In addition, Katureebe, CJ deferred to the separation of powers as espoused in **Attorney General v Maj. Gen. David Tinyefuza (1998) UGSC 74** as follows (per Kanyeihamba, JSC):

> The doctrine of separation of powers demands and ought to require that unless there is the clearest of cases calling for intervention for the purposes of determining constitutionality and legality of action or the protection of the liberty of the individual which is presently denied or imminently threatened, **the courts must refrain from entering arenas not assigned to them either by the constitution or laws of Uganda. It cannot be over-emphasized that it is necessary in a democracy that courts refrain from entering into areas of disputes best suited for resolution by other government agents. The courts should only intervene when those agents have exceeded their powers or acted unjustly, causing injury thereby**. *(our emphasis)*

103. Emphasizing the resolution of procedural contradictions in parliament through internal mechanisms, the learned Chief Justice then held:[15]

> The Rules of Procedure of Parliament allow a member to move a motion challenging the decision of a Speaker of which a member is dissatisfied with. Where a member does not take up that option, which the law provides to him or her, it is not open in my view to call in the court to determine how the Speaker should conduct the business of the House.

104. Consequently, whereas the Speaker's conduct might indeed have depicted undue partiality in her guiding of the debate, that would have been a matter for the House itself to address under its procedural rules. It is our finding, therefore, that a violation of rule 77 of the parliamentary rules of procedure would not amount to a constitutional violation so as to invoke this Court's jurisdiction.

105. Before taking leave of this issue, we are constrained to observe that **Hon. Francis Zaake v The Attorney General** (supra) is inapplicable to the circumstances of this petition. The bone of contention in that case was the (im)propriety of the Speaker presiding over a matter in which she was a *de facto* complainant. In this case, however, it is her partial guidance of the House debate that is under challenge. Considering the overwhelming support the Bill attracted from the House, we are unable to abide the view that the Speaker's conduct so influenced the debate as to affect the vote on the Bill. We therefore find no violation of Article 89(1) of the Constitution.

106. In the result, we find no merit in ***Issue No. 4*** and do hereby resolve it in the negative.

Issue No. 5: **Constitutional proscription against same-sex marriage**

107. The first to eighth petitioners contend that Article 31(2a) of the Constitution as it currently stands did not originate from the *Constitution Amendment (No. 3) Bill of 2005* ('the Bill'). As such, it was not considered by the Legal and Parliamentary Affairs Committee while scrutinizing the Bill, and neither was it one of the Committee's recommendations in its report dated 25 May 2005. This report formed the basis of the parliamentary debate on the Bill. The first to eighth petitioners

[15] In the **Male H. Mabirizi Kiwanuka** case.

contend that the impugned clause arose from an amendment moved by Hon. Abdu Katuntu on the floor of Parliament after the second reading of the Bill, which motion was subsequently passed by the August House.

108. The petitioners question the procedure adopted in passing the impugned clause for contravening Article 1(1) of the Constitution and Parliament's Rules of Procedure insofar as the amendment was never subjected to public consultation, engagement and/or involvement, and Hon. Abdu Katuntu did not circulate his amendment to the members of Parliament, the Committee or the Clerk to Parliament prior to moving his motion on the floor of the House. It is alleged that he only wrote to the Attorney General and the Chairperson of the Committee.

109. Echoing their earlier position on this issue, it is the petitioners' contention that public participation and involvement in legislative processes is constitutionally provided for and must be complied with, especially where the proposed legislation has adverse effects on fundamental human rights and freedoms. They cite the cases of **Doctors for Life International v. Speaker of the National Assembly** (supra), **R. v. London Borough of Haringey, ex parte Moseley** (supra) and **Glenister vs. President of the Republic of South Africa and Others** (supra) in that regard. The petitioners further contend that the failure by Parliament to comply with the constitutional imperative on public participation rendered the amendment introduced in Article 31(2a) to the Constitution invalid and unconstitutional. For this proposition, they cite the case of **Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces & Others** (supra).

110. In their view, that amendment offends Articles 1(1), 38(2) 44(a) and 94 of the Constitution and rule 124 of the parliamentary rules of procedure. Furthermore, the introduction and passage of Article 31(2a) of the Constitution is alleged to have the effect of perpetually subjecting the minority to inhuman and degrading treatment, subhuman status and thus amounts to inhuman or degrading treatment by legislation, in violation of Article 44(a) of the Constitution.

111. Conversely, the first respondent contends that the impugned clause did in fact arise from the *Constitution Amendment (No. 3) Bill of 2005*, which Bill was subjected to extensive public consultation and participation. It is the learned

Attorney General's contention that when the Bill came up for debate before the Committee of the Whole House, Hon. Abudu Katuntu proposed an amendment to Clause 11(2)(a) of the Bill to make its wording more prohibitive as follows: *"Marriage between people of the same sex is prohibited by this Constitution"* in substitution to the original wording of the Bill in the following terms: *"(2a) Marriage is lawful only if entered into between a man and woman."*

112. It is argued that Hon. Katuntu's motion on the amendment of clause 11 of the Bill was well within Parliament's mandate and the MPs overwhelmingly voted to allow the amendment. It is further argued that the said amendment never changed the substance of Clause 11 of the Bill but only clarified and emphasized that marriages between people of the same sex are prohibited and not recognized in Uganda. Furthermore, it is opined, the MPs acted within the law during the entire process of conceptualization, presentation, consideration and passing of the resultant Act. As such, there was no contravention of Articles 1(1), 44(a) and 94 of the Constitution as alleged by the first to eighth petitioners.

113. We note that the process under which the amendment of Article 31(2a) ensued is alleged to have flouted the imperative of public participation in legislative processes as supposedly delineated under Articles 1(1), while the substance of Article 31(2a) is considered to contravene the constitutional freedom from torture and cruel, inhuman and degrading treatment as enshrined in Article 44(a) of the Constitution. Reference is also made to the violation of Article 94(1) of the Constitution to the extent that rule 124 of the parliamentary rules of procedure was enacted under that constitutional provision.

114. It will suffice to point out here that the civic right of Ugandans to participate in their governance as delineated in Article 38 of the Constitution was never raised in the first to eighth petitioners' pleadings. We would therefore disallow their belated attempt to bring it into contention.

115. On the other hand, in our determination of *Issue No. 3*, we did find that Articles 36 and 38(1) of the Constitution confer a general right to participate in public affairs, while Article 1 (particularly clause (4) thereof) confers a more specific right to vote and/ or be elected. Article 1 of the Constitution thus represents the aspiration of

the Ugandan people to be governed through their will and consent, which *will and consent* as to who by and how they shall be governed is expressed through regular, free and fair elections of their representatives or through referenda. This typifies the nature of representative participation that was in **Male H. Mabirizi Kiwanuka & Others v Attorney General** (supra) construed to mean that '**in a situation that does not call for a referendum, the elected representatives hold the mantle to do such as they perceive their electorates' views**.'

116. In this case, the constitutional amendment that yielded Article 31(2a) of the Constitution was subjected to the procedure laid down in Articles 259 and 262 of the Constitution. Article 262 provides for members of Parliament to legislate such an amendment on the Ugandan people's behalf. We find no evidence on record that the procedure outlined in that provision was flouted.

117. It has been alleged that the procedure adopted by the House violated rule 124 of the parliamentary rules of procedure and therefore (by infection) Article 94(1) of the Constitution under which that rule was enacted. We would respectfully abide our earlier decision herein that we do not think it was the intention of the framers of the Constitution that every flawed parliamentary process in respect of rules enacted under the general provisions of Article 94(1) of the Constitution would necessarily constitute a constitutional violation so as to invoke this Court's jurisdiction. The only exceptions to that position would be the rules on quorum and voting in the House that are enacted within the specific precincts of Articles 88 and 89 of the Constitution. Those rules were in **Paul K. Semwogerere & Another v The Attorney General** (supra) adjudged to be part of the constitutional framework. Rule 124 does not fall within either category of rules.

118. In any case, contrary to the petitioners' assertions, the evidence of the Clerk to Parliament establishes that there was no breach of that procedural rule. The rule sets out the functions of the Standing and Sessional Committees of Parliament as follows:

> ***The functions of Standing and Sessional Committees in addition to their specific functions under these rules shall include the following-***
>
> ***(1) to discuss and make recommendations on Bills laid before Parliament;***

(2) to initiate any Bill within their respective areas of competence;

(3) to assess and evaluate activities of Government and other bodies;

(4) to carry out relevant research in their respective fields; and

(5) to report to Parliament on their functions.

119. The Clerk to Parliament's additional affidavit in support of the first respondent's case reveals that Article 31 of the Constitution was one of the constitutional provisions that were proposed for amendment under *Bill No. 6 of 2005* in respect of what came to be known as *The Constitution (Amendment) (No. 3) Act, 2005*. Clause 11 of the Bill provided for the amendment of Article 31 of the Constitution by the insertion of a newly proposed Article 31 (2a) into the Constitution that read: "*Marriage is only lawful if it is entered into by a man and woman.*" The full wording of Clause 11 of the said Bill is reproduced below:

> **11. Amendment of Article 31 of the Constitution**
>
> *Article 31 of the Constitution is amended –*
>
> *(a) By substituting for clause (1) the following –*
>
> *"(1) A man and woman are entitled to marry only if they are each of eighteen years and above and are entitled at the age –*
>
> *(i) To found a family; and*
>
> *(ii) To equal right at and in marriage, during marriage and at its dissolution.*
>
> *(2) By inserting immediately after clause (2) the following –*
>
> *"(2a)* ***Marriage is lawful only if entered into between a man and woman***.
>
> (Emphasis added)

120. The same affidavit evidence demonstrates that after the first reading, the Bill was sent to the Legal and Parliamentary Affairs Committee. The Committee scrutinized the Bill, received the views of the public on it, and (in compliance with rule 124(a) above) submitted its findings and recommendations in a report to the House. After the second reading, when the Bill and the Report of the Committee came up for debate before the Committee of the Whole House, Hon. Abdu Katuntu

moved a motion for Clause 11(2)(a) of the Bill to be made prohibitive rather than regulatory. He proposed that the phrase '*Marriage is lawful only if entered into between a man and woman*' in the Bill be substituted with the following phrase: *"Marriage between people of the same sex is prohibited by this Constitution.'* The motion was passed by Parliament, with members voting by show of hands. There is nothing on record to suggest that the Bill at the second and third readings was not supported by two-thirds of the MPs present and voting, as prescribed in Article 260 of the Constitution. In fact, the vote is not in contention at all.

121. With respect, we do not share the petitioners' view that there was a breach of rule 124 of the parliamentary rules of procedure simply because the proposal that introduced Article 31(2a) was not part of the Committee's Report. The fact that the Committee did not specifically recommend an amendment to Article 31 of the Constitution neither barred the honourable MP from moving his motion nor the House from considering the motion. Parliament retained the prerogative to accept, reject, modify or amend the Committee's recommendations. That is the essence of parliamentary debate in the Committee of the Whole House. The House reserves to itself the final decision as to the substance of legislation that they wish to enact on behalf of the Ugandan people. We accordingly reject the view that Article 31(2a) of the Constitution was enacted in breach of Article 1(1) of the Constitution and rule 124 of the parliamentary rules of procedure. We find no constitutional violation of either Article 1(1) or 94(1) of the Constitution.

122. With regard to the alleged breach of Article 44 of the Constitution, in very brief submissions that are unsupported by evidence, the first to eighth petitioners argue that Article 31(2a) has the effect of perpetually subjecting sexual minorities to the sort of inhuman and degrading treatment that is prohibited under Article 44(a) of the Constitution. No submissions were forthcoming from the first respondent on this matter. For ease of reference, Article 44(a) is reproduced below.

> *Article 44:* *Prohibition of derogation from particular human rights and freedoms.*
>
> **Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms –**
>
> **(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;**

123. Meanwhile, Article 31(2a) of the Constitution provides as follows: ***'Marriage between persons of the same sex is prohibited.'***

124. For the avoidance of doubt, the evidential burden in any litigation will rest upon the party bearing the legal burden of proof to prove his/ her case to the required standard. If that party fails to adduce evidence, s/he would have failed to discharge this burden and there would be no need for the opposite party to respond.[16] In the matter before us, the affidavit evidence in support of the alleged inhuman and degrading treatment is reproduced below.

(1) Mr. Fox O. Odoi, the first petitioner depones that '*the effect of Article 31(2)(a) was to relegate the minority to subhuman status and was therefore an inhuman and degrading treatment by legislation.*'

(2) Ms. Linda Mutesi, the sixth petitioner, depones that '*the introduction and passage of Article 31(2)(a) of the Constitution has the effect of perpetually subjecting the LGBT community to inhuman and degrading treatment.*' The deponent further reiterates the first petitioner's unsubstantiated assertion that the passage of Article 31(2)(a) of the Constitution '*relegated the LGBT community to subhuman status and was a constitutional framework for legalizing inhuman and degrading treatment.*'

(3) Ms. Jane Nassimbwa, the eighth petitioner and a mother to a transgender child, narrates the difficulty of raising such a child as follows:

(i) When I became certain that that is her identity and she is certain about it, I accepted her and realised that the love that I have for her is bigger than the prejudices I was struggling with. I promised to be there for her and to support her no matter what as long as that is what she felt about herself.

(ii) Raising her from 2013 was tough. We lived under constant threats and fear because of the prejudices and hate many people in the community had. It was common for people to dismiss her as a cursed and useless child because of her gender identity. Some have repeatedly asked where I got the 'cursed child' from.

(iii) On several occasions I was verbally and physically attacked by members of the community for having a child who identifies and behaves as a girl yet they believe the child is a boy. The attackers demanded to know how she became

[16] See Halsbury's Laws of England (supra) at para. 699.

a girl. This made me fear that some people may physically indecently assault her in an attempt to find their answers.

125. It becomes apparent that there is no evidence of the inhuman and degrading treatment experienced by any of the deponents above that accrues from the specific prohibition in Article 31(2a) of the Constitution against same sex marriage. Whereas the difficulties highlighted by the eighth petitioner in raising a transgender child are recognised, they neither address the specific prohibition in the impugned constitutional provision nor establish that her transgender child sought to but was prohibited from entering a same sex marriage or, more importantly, the inhuman and degrading treatment experienced by the child was on that account.

126. It is trite law that the burden of proof in constitutional petitions that hinge on human rights violations rests with the petitioner, who has the duty to establish a *prima facie* case of the rights violation, whereupon the burden would shift to the respondent to justify the limitation of the invoked right. *See* ***Charles Onyango Obbo & Another v Attorney General (2014) UGSC 81***. What is meant by a *prima facie* case is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence. *See* ***Col. (Rtd) Dr. Besigye Kizza v Museveni Yoweri Kaguta & Another*** *(supra)*. Hence, as opined in *Halsbury's Laws of England*, the '*evidential burden*' (or the burden of adducing evidence) in this petition '**rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side.**'[17]

127. In this case, therefore, the onus of proof of breach of Article 44(a) rests with the petitioners. We find no evidence whatsoever of the inhuman and degrading treatment occasioned by the prohibition in Article 31(2a) of the Constitution. The best evidence in this regard would have been from persons that have been denied such a marriage but none was forthcoming in this case. We thus find no merit in this allegation and accordingly find no violation of Article 44(a) of the Constitution. ***Issue No. 5*** is resolved in the negative.

[17] Supra at para. 697.

128. In the result, we find no merit in the five procedural issues. It is to the substantive issues that we now revert.

D. **Substantive Issues**

Issue No. 6: **Principle of legality**

129. The petitioners contest sections 6, 7, 9, 11(1)(2)(a) – (e), 14(1) and (2), and 15(1) and (2) of the Anti-Homosexuality Act for their alleged inconsistency with the principle of legality guaranteed under Article 28(12) of the Constitution. All the petitioners submitted legal arguments on this issue albeit with divergent focus.

130. The first to eighth petitioners provide a broad overview of the issue, arguing that clarity, certainty and foreseeability are critical to criminal legislation, particularly where the criminal law proposes severe penalties, as is purportedly the case under the Anti-Homosexuality Act. In their view, the rationale behind this is to engender consistency in the interpretation and application of the law, as well as clarity on the nature of the offence with which an accused person is charged so as to enable an effective and fair trial. It is argued that although Article 28(12) of the Constitution does offer protection against legal uncertainty, the Anti-Homosexuality Act is practically and judicially unenforceable on account of the overly broad definition of the criminalised conduct therein, and the conflict between the criminalised conduct and the human rights of those that engage in such conduct.

131. Reference is made to the case of **Prosecutor vs Thomas Lubanga Dyilo**[18] for the proposition that a criminal offence must be clearly defined; the definition of a crime should be strictly construed, not being extended by analogy and '**in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted**.' In that case, Article 7 of the Rome Statute was adjudged by the International Criminal Court (ICC) to embody the principles that '**only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and .... criminal law must not be extensively construed to an accused's detriment**.' Similarly, in **The Sunday Times v**

[18] ICC-01/04-01/06, pp 600 - 606

United Kingdom[19] the European Court of Human Rights (ECTHR) held that '**a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct**.'

132. Reference is further made to the cases of **Lawrence & Others v Texas, 539 U.S 558, pp. 578 – 579** and **Dudgeon v United Kingdom, ECTHR 7575/ 76, p. 39** in support of the observation by the United Nations (UN) that the wording of anti-homosexuality laws is often '*vague and undefined*' and '*used to punish individuals on the basis of their sexual orientation and gender identity in violation of international human rights standards*.'[20] It is suggested that in **Lawrence & Others v Texas** (supra) the court considered the anti-homosexuality law's definition of '*deviate sexual intercourse*' to be overly broad and capable of being used to criminalise a wide range of consensual sexual conduct, including consensual homosexual activity between consenting adults. It was observed in that case:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexuals seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

133. Meanwhile, in **Dudgeon v United Kingdom** (supra), the ECTHR faulted Northern Ireland's anti-homosexuality law for prohibiting buggery and general gross indecency between males without suitable reference to peculiar circumstances and consent, which the court considered to be a deviation from the approach taken by other European Union (EU) Member States. It was observed:

> Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery ...., there can be no doubt that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislation; it is on that basis that the case has been argued by the Government, the applicant and the Commission. Furthermore, the offences are committed whether

[19] ECTHR 6538/74, 26 April 1979, p.49

[20] See UN Fact Sheet at https://www.unfe.org/ system/unfe-43-UN Fact Sheets – FINAL – Criminalization (1).pdf

> the act takes place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants are consenting. ... In practice there is legislation on the matter in all the member states of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the member states is that it prohibits generally gross indecency between males and buggery whatever the circumstances.

134. The first to eighth petitioners argue that the provisions of Uganda's Anti-Homosexuality Act are similarly too imprecise to facilitate successful and enforceable prosecutions. Given its broad definition of the '*offence of homosexuality*' to include the actual performance of sexual acts, as well as any '*attempt*' to perform a sexual act or '*manifesting*' the intention to do so by '*some overt act*'; the Act is alleged to be unclear as to what would amount to overt acts or which overt acts would constitute a manifestation of the intention to perform a sexual act. In the petitioners' view, this provision is susceptible to broad (mis)interpretation that, coupled with the duty under section 14(1) of the Act to report suspected acts or intentions to engage in homosexuality, could perpetuate gross abuse. It is accordingly opined that the Anti-Homosexuality Act violates the Common Law, Article 28(12) of the Constitution and the requirement under international law for the precision and conciseness of criminal laws.

135. It is additionally proposed that, by making the '*promotion of homosexuality*' an offence, section 11 of the Act entails an unduly broad, vague and all-encompassing criminal offence that is unclear as to what would amount to '*material promoting or encouraging homosexuality*'[21] or what would be envisaged as '*facilitating activities that encourage homosexuality.*'[22] It is argued that the vagueness of these statutory provisions could potentially criminalise a vast range of innocent conduct, rendering it impossible for persons to know when they are running afoul of the law. Reference is made to the case of **Bayev & Others v. Russia**,[23] where an activist who stood in front of a secondary school with a placard reading '*homosexuality is normal*' had been charged under the Russian '*gay propaganda*' law. The ECTHR held that Russian laws that banned the promotion of non-traditional sexual relationships among minors were discriminatory and in breach of the right to freedom of

[21] As delineated in section 11(2)(b).
[22] See section 11(2)(c) of the Act.
[23] ECTHR 67667/ 09, 20 June 2017, p. 62

expression and '**by adopting such laws the** (Russian) **authorities reinforce stigma and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society**.'

136. Reference is further made to **Miller v. California**,[24] where the U.S. Supreme Court acknowledged '**the inherent dangers of undertaking to regulate any form of expression**' and delineated the criteria to be followed before material could be deemed obscene. A later Supreme Court decision in **Reno v. American Civil Liberties Union**[25] ruled that anti-indecency provisions of a Communications Decency Act which criminalised the intentional transmission of '*obscene or indecent*' messages to a minor violated the constitutional rights to freedom of speech, deciding that '**the many ambiguities concerning the scope of** (the Act's) **coverage render it problematic for First Amendment purposes. For instance its use of the undefined terms 'indecent' and 'patently offensive' will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean**.'

137. The same petitioners argue that courts in the past have made it clear that there must be a distinction between criminal sexual behaviour and private sexual acts between freely consenting adults. Reference in that regard is made to **Toonen v. Australia**,[26] where the UN Human Rights Committee held that laws that criminalise homosexual conduct violate the International Convention on Civil and Political Rights (ICCPR) insofar as they fail to distinguish between consensual sexual activity in private and other non-consensual activity in the public domain. It is proposed that in like measure, the Ugandan Anti-Homosexuality Act goes beyond simply banning certain forms of sexual conduct to become a legal tool of vague provisions intended for the discrimination, harassment, blackmail and abuse of persons on the basis of their sexual or gender identity, in contravention of all international human rights standards. This Court is invited to nullify sections 6, 7, 9, 11(2)(c)(d)(e) and 15 of the Anti-Homosexuality Act for violating the principle of legal certainty enshrined in Article 28(12) of the Constitution.

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[24] United States Supreme Court, 413 U. S 15, 21 June 1973, p. 413.
[25] United States Supreme Court, 521 U. S 844, 26 June 1997, p. 845.
[26] UNHRC Communication No. 488/ 1992.

138. The ninth to sixteenth petitioners, on the other hand, restrict themselves to the alleged non-compliance of sections 9, 11(1) and (2)(a)(b)(c)(d)(e), and 14(1) and (2) of the impugned Act with Article 28(12) of the Constitution. They rely upon the construction of Article 28(12) in **Francis Tumwesige Ateenyi v The Attorney General (2022) UGCC 5**, where it was held that a criminal offence should define with clarity what its element are. In their view, sections 9 and 11(1) and 2(c) and (d) of the Anti-Homosexuality Act offend the principle of legality that is protected under Articles 28(12) and 44(c) of the Constitution insofar as they criminalise the lease or sub-lease of property for purposes of homosexuality or '*activities that encourage homosexuality*'; and any form of financial support to '*facilitate*' such activities or the '*observance*' or '*normalisation*' of homosexuality. It is opined that the terms '*any form of financial support*', '*facilitate activities that "encourage" homosexuality*' and '*observance*' or '*normalisation*' of homosexuality are undefined, vague and ambiguous rendering it difficult for a person to know what exactly s/he/ it is being accused of, in contravention of the principle of legality which is a component of the non-derogable right to a fair hearing.

139. Without quite explaining how the additional constitutional provisions are flouted by the impugned law and in a marked departure from their pleadings that restrict the invoked principle of legality to Article 28(12) of the Constitution; the petitioners invite the Court to find section 11(1) and (2)(c) of the impugned Act to be inconsistent with Objectives XIV(b), XX and XXVII(i)(b) of the National Objectives and Directive Principles of State Policy, and Articles 2, 8A, 20, 21(1) and (2), 24, 28(12), 44(a) (c), 45 and 287 of the Constitution. We pause here to observe that there is no Objective XXVII(i)(b) under the National Objectives and Directive Principles of State Policy.

140. Nonetheless, the ninth to sixteenth petitioners further argue that section 11(1) and (2)(a) of the Act, which prohibits the promotion of homosexuality through the encouragement or persuasion of any person to '*perform a sexual act with another person of the same sex or to do any other act that constitutes an offence under the Act,*' is vague, ambiguous and overly broad, and hence inconsistent with Article 28(12) and 44(c) of the Constitution. It is opined that those statutory provisions are vague, uncertain and ambiguous as to the proscribed acts and, although section

11(2) purports to define what amounts to *promotion of homosexuality*, it uses terms such as *encourages* or *persuades* which are not defined. Similarly, section 14(1) and (2) of the Act is contested for imposing a duty upon the public to report any person suspected to have committed or intending to commit an act of homosexuality or any other offence under the Act, without clarifying with certainty the level of suspicion that ought to trigger the reporting obligation.

141. In a nutshell, the ninth to sixteenth petitioners posit that the vagueness, uncertainty and ambiguity of the impugned statutory provisions renders it impossible or difficult to determine what conduct is acceptable and what is criminalised and outlawed, contrary to established constitutional dictates on legal certainty. Reference in that regard is made to **Charles Onyango Obbo & Another v Attorney General** (supra) and **Francis Tumwesige Ateenyi v The Attorney General** (supra).

142. Meanwhile, the seventeenth to twenty-first petitioners restrict their challenge under this issue to sections 14 and 15 of the impugned Act. It is their contention that section 14(1) and (2) is void-for-vagueness to the extent of its inconsistency with the principle of legality guaranteed under Article 28(12) of the Constitution. The vagueness of those provisions is alleged to lie in its failure to define what constitutes '*reasonable suspicion*' and the terms '*knowledge*' and '*intent*' as used therein. It is proposed that the impugned provisions are susceptible to abuse on account of political or business rivalry, family wrangles, employment issues etc, so that anyone can maliciously make allegations of homosexuality against another with a view to causing them embarrassment, hatred, isolation or reputational damage. The said provisions are thus alleged to offend public policy and the presumption of innocence and are, to that extent, unconstitutional. On the other hand, section 15 of the Act is impugned for being contradictory of the reporting obligation conferred under section 14 of the same Act. In the petitioners' view, such vague contradictions in the Anti-Homosexuality Act would render it difficult to comply with or enforce.

143. The twenty-second petitioner similarly restricts his challenge under this issue to section 11(1) and (2)(a) of the impugned Act, arguing that Article 28(12) of the Constitution imposes a duty upon Parliament to pass penal laws that are clear and

unambiguous; the dictates of the principle of legal certainty being that a statutory intent to abrogate or restrict fundamental freedoms or to depart from the general legal system ought to be expressed with clarity and criminal conduct be so clearly defined that any person is able to deduce what would amount to criminal conduct. Reference is made to **R. vs Secretary of State for the Home Department; Ex parte Simms (2000) 2 AC 115, 131**,[27] where it was held (per Lord Hoffman):

> The principal of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. That is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

144. The petitioner further argues that the principle of legal certainty guides statutory interpretation through a rule of lenity or strict construction that posits that in construing an ambiguous criminal statute, courts should resolve the ambiguity in favour of an accused person. It thus provides assurance that no person that is accused of a criminal offence is caught off guard by broader statutory interpretations than could reasonably have been anticipated; so that, where an equivocal word or ambiguous sentence leaves reasonable doubt of its meaning that the canons of interpretation cannot resolve, the benefit of the doubt should be extended to the accused person and against the legislature that failed to explain itself. It is opined that the rule of lenity is reserved for situations in which reasonable doubt persists about a statute's intended scope despite the application of renown rules of statutory interpretation, kicking in at the end of the statutory interpretation process to preserve the legislative supremacy of Parliament where recourse to one interpretation over another fails to yield the intention of the legislature.

145. It is against that background that the twenty-second petitioner re-echoes the proposition that section 11(1) and (2)(a) is vague and arbitrary given the absence of a definition as to what the *encouragement* and *promotion* of homosexuality entails. The cited provisions are alleged to be incapable of clear construction by

[27] Referred to hereinafter as '*Ex parte Simms.*'

persons affected by them and, in the absence of legislative guidance, the courts are unable to determine what actions would amount to the encouragement and promotion of homosexuality. He seeks to rely on the case of **Suresh Kumar Koushal & Another v NAZ Foundation & Others** (supra) for the proposition that when undertaking the judicial review of legislation that touches on matters of high constitutional importance such as human rights, courts are obliged to exercise their own jurisdiction with less deference to the intention of the legislature. However, we note that the foregoing position in fact emanated from the High Court of Delhi and was not the Supreme Court decision in the cited case. We revert to a more detailed discussion of both decisions later in this judgment.

146. Be that as it may, the twenty-second petitioner additionally makes reference to the case of **A.K. Roy & Others v Union of India & Others (1982) 1 SCC 271**, as cited with approval in **Suresh Kumar Koushal & Another v NAZ Foundation & Others** (supra).[28] We consider it prudent to reproduce the court's observation in its entirety below, dutifully highlighting the excerpts that the petitioner sought to rely upon:

> **The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution** since the decision in Maneka Gandhi [1978] 2 SCR 621. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. **Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the prescribed area, when measured by common understanding**. In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', 'maintenance of harmony between different religious groups' or 'likely to cause disharmony or hatred or ill-will', or 'annoyance to the public', (see Sections 124A, 153A(1)(b), 153B(1)(c), and 268 of the Penal Code). These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language. *(petitioner's emphasis)*

[28] At pp. 83, 84.

147. Furthermore, without making any effort to acknowledge his source, counsel for the twenty-second petitioner disingenuously advances as his view the Indian Supreme Court's observation in **K.A. Abbas v. The Union of India (UOI) & Another (1970) 2 SCC 780**. Again, for completeness, we reproduce the entire excerpt as cited with approval in **Suresh Kumar Koushal & Another v NAZ Foundation & Others** (supra)[29]:

> The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution.

148. Reference is further made to **Charles Onyango Obbo & Another v Attorney General** (supra) for the proposition that section 11(1)and (2)(a) of the Anti-Homosexuality Act is vague and therefore inconsistent with the principle of legality enshrined in Article 28(12) of the Constitution.

149. On the other hand, the first respondent appears to restrict the principle of legality as delineated in Article 28(12) of the Ugandan Constitution to a prohibition against the conviction of any person for a criminal offence that is not defined and the penalty therefor prescribed by law; which imposes a duty upon Parliament to pass penal laws that are clear and unambiguous. In broader terms, it is argued that the principle of legality requires that the legislative intention to restrict fundamental freedoms or depart from the general system of law ought to be expressed with irresistible clarity. Reference in that regard is made to **Uganda vs Abdalla Nabil Salam, High Court Civil Suit No. 4 of 2016**. The first respondent further cites **Centre for Domestic Violence Prevention & Others v Attorney General, Constitutional Petition No. 13 of 2014** for the proposition that a statutory provision cannot be declared void on account of uncertainty unless no sensible or ascertainable meaning can be applied to it.

[29] At pp. 84, 85.

150. In response to the petitioners' discomfiture with the perceived ambiguity and non-definition of the terms *overt*, *manifestation*, *reasonable suspicion*, *intends to commit*, *facilitate*, *encourage*, *observance*, *normalization* and *material promoting or encouraging homosexuality* in the impugned Act; it is argued that words in a statute are only defined where the legislature intended them to have a meaning which is different from the ordinary meaning of the word. This was supposedly not the case with the Anti-Homosexuality Act, where (it is opined) the words used are concise, clear, unambiguous and can be construed in their natural and ordinary sense. Learned State Counsel defer to the rule of statutory interpretation articulated in **Attorney General v General David Tinyefuza** (supra) where it was observed that words or phrases that are clear and unambiguous should be given their primary, plain, ordinary or natural meaning, recourse only being made to a liberal, general or purposive interpretation where the language of or a statute is imprecise or ambiguous.

151. It is argued that section 9 of the Act prohibits the use of premises for homosexuality or to commit any other offence under the Act but a person can only be indicted under that provision if s/he is aware that the premises in question are being used for those outlawed acts. It is thus opined that, to the extent that section 9 defines the offence thereunder and the penalty therefor, it is neither unclear nor ambiguous and abides the provisions of Article 28(12) of the Constitution.

152. In like vein, it is argued that section 11 of the Act prohibits the promotion of homosexuality and prescribes a penalty for any breach of that prohibition. Not only are the terms *homosexuality* and *sexual act* defined under section 1 of the Act, but section 11(2)(b)(c)(d) and (e) clarify what is meant by *promotion of homosexuality*. In state counsel's view, paragraphs (b), (c), (d) and (e) depict the circumstances under which the offence of promotion of homosexuality is committed, while paragraph (d) necessitates an element of knowledge before a person can be charged thereunder. It is therefore argued that those statutory provisions do not violate the principle of legality that is guaranteed under Article 28(12) of the Constitution.

153. It is further proposed that the reporting requirement under section 14 of the Act is consistent with the duty upon a citizen under Article 17(1)(f) of the Constitution

to cooperate with lawful agencies in the maintenance of law and order; the actual arrest of a suspected offender being restricted to a police officer. The standard of suspicion pursuant to which such arrest may ensue is opined to have been defined in section 14 as '*reasonable suspicion*' and therefore there is no vagueness in the provision.

154. Furthermore, it is argued that insofar as section 15 of the Act prohibits the intentional reporting of false or misleading allegations against a person, the element of intentionality sufficiently defines the offence of false sexual allegations and, coupled with the prescribed penalty, renders the said provision in compliance with Article 28(12) of the Constitution. The first respondent dismisses any suggestions of contradiction between sections 14 and 15 as the latter provision does not criminalize reporting *per se* but only criminalizes false reporting.

155. Finally, although no legal arguments were submitted by the petitioners on the alleged ambiguity of sections 6 and 7 of the Act; the first respondent does address them too on the premise that the issue was alluded to in petition. It is argued that section 6 does not create any offence and therefore is not in violation of the principle of legality; while by prohibiting the publication of victims' identities and/ or personal details without the requisite authority and prescribing a penalty for a breach of this prohibition, section 7 purportedly seeks to protect victims of sexual offences created under the Act and is in full compliance with the principle of legality.

156. The first respondent accordingly invites the Court to dismiss any allegations of ambiguity in all the impugned statutory provisions or purported inconsistency with Article 28(12) of the Constitution.

157. As we commence our interrogation of this issue, we consider it necessary to establish common ground on the two principles that have been used interchangeably by the petitioners and attributed to Article 28(12) of the Constitution. The *principle of legality* is common to all legal systems and is based on the requirement of certainty of the law. On the other hand, *legal certainty* is articulated differently in the different legal systems.

158. In continental legal systems that espouse civil law, legal certainty is defined in terms of maximum predictability of officials' behaviour, making the scope of a

criminal offence as precise as possible (lex certa) and restricting the discretionary power of a judge to its strict minimum to accord citizens the power to know precisely in advance which types of behaviour will lead to criminal liability, and which will not.[30] Meanwhile, at common law (the system to which Uganda subscribes), the relationship between legal certainty and legality is often explained in terms of a citizen's ability '*to organise his affairs in such a way that he does not infringe the law*', or having the right to an adequate warning from public officials that engaging in certain behaviour will result in criminal liability. When criminal offences are drafted in vague and ambiguous ways, or when they have a retroactive effect, citizens are not only faced with unpredictable behaviour by enforcement officials, they are also denied a fair opportunity to avoid punishment.[31]

159. In Uganda, the principle of legality is enshrined in Article 28(12) of the Constitution, which stipulates as follows:

> **Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed by law.**

160. That constitutional provision has been the subject of judicial interpretation in a number of cases. In **Attorney General v Salvatori Abuki (1999) UGSC 7C**, the unanimous position of the Uganda Supreme Court was that although the provision placed a duty upon the legislature to legally define a criminal offence, it neither required the definition of each word in a criminal law provision nor did it necessarily require such definition to be limited to the statutory provision that creates the offence. Wambuzi, CJ, with whom all the other learned judges agreed, held:

> Quite clearly the Article [28(12] requires a criminal offence to be defined by law. It does not require every word used in the law to be defined. Nor does it require the offence to be defined in the section which creates the offence. ... What is required is to expound the words used. If the meaning is not plain, then the Court is under a duty to construe the words to give effect to the objects of the Legislature and to do justice to the parties.

161. In the same case, Tsekooko, JSC relied on the principles of statutory interpretation to arrive at the same conclusion. He observed:

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[30] See *Clae, Erik; Devroe, Walter; Keirsblick, Bert, Facing the limits of the law, 2009, Springer, pp. 92, 93.*

[31] This is what is often referred to as the 'void-for-vagueness' or 'fair warning principles.'

> Does clause (12) of Article 28 require that every word or a group of words creating a criminal offence in any enactment should be precisely as in an English Dictionary? Is that what is required by Article 28(12)? I think not. ... By application of, or resort to, rules of statutory interpretation, we can ascertain whether or not the offence is defined. We know for example that every Statute must be interpreted on the basis of its own language since words derive their own colour and content from the context and we know that the object of the Statute is paramount consideration. See Lall vs. Jeypee Investment (1972) E.A. 512 and Attorney-General vs. Prince Ernest of Hanover (1957) A.C. 436. Subject to constitutional requirements, in construing a Statute, it is the duty of the Court to give full effect to the apparent intention of the legislature in so far as it is possible without straining the natural meaning of the words used: R. vs. Makusud Ali (1942) E.A.C.A 76. It is not proper to treat Statutory provision as void for mere uncertainty, unless the uncertainty cannot be resolved and the provision can be given no sensible or ascertainable meaning and must therefore be regarded as meaningless. Fawcett Properties vs. Buckingham Country Council (1960) 3 All E.R. 503 at page 507; Salmon vs. Dancombe (1886), 11 App. Cas. 627 P.C. at page 634. For purposes of construction, the contexts of words which are to be construed includes not only that particular phrase or section in which they occur, but also the other parts of the Statute: Inland Rev. Comm. vs. Herbert (1913) A.C. 326 H.L. at page 332.

162. For present purposes we draw particular inspiration from the caution attributed to **Fawcett Properties v Buckingham County Council (1960) 3 All ER 503 at 507** against treating a statutory provision as void for mere uncertainty '**unless the uncertainty cannot be resolved and the provision can be given no sensible or ascertainable meaning and must therefore be regarded as meaningless**.' That decision was followed by this Court in **Centre for Domestic Violence Prevention & Others v Attorney General** (supra), where it was held (per Egonda-Ntende, JCC):

> There are few cases where a statute has been held to be void because it is meaningless but none because it is uncertain. .... It is therefore not proper to treat statutory provisions as void for mere uncertainty unless the uncertainty cannot be resolved and the provision can be given no sensible or ascertainable meaning and must therefore be regarded as meaningless.

163. In **Francis Tumwesige Ateenyi v The Attorney General** (supra), this Court relied upon the doctrine of vagueness (sometimes referred to as the *void-for-vagueness* principle) to clarify the degree of brevity contemplated under Article 28(12) of the Constitution as follows (per Egonda-Ntende, JCC):

It is a constitutional imperative that a criminal offence is defined and what this means is that it must be specifically defined that it should be clear to all what its elements are. The said elements or ingredients should not be ambiguous, or vague or too broad as to defy specific definition.

164. The doctrine of vagueness was further expounded in **Andrew Karamagi & Another v Attorney General [2023] UGCC 2** as follows (per Kakuru, JCC):

> The 'doctrine of vagueness' is founded on the rule of law, particularly the principles of fair notice to citizens and limitation of enforcement decisions. Fair notice to the citizen comprises a formal aspect, **an acquaintance with the actual text of a statute** and a substantive aspect, an understanding that certain conduct is the subject of legislative restrictions. The crux of the concern for limitation of enforcement is that the law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. The threshold for finding a law vague is relatively high. The factors to be considered include (a) **the need for flexibility and the interpretative role of the courts; (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate**, and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps co-exist. See: R v Nova Scotia Pharmaceutical [1992] 2 SCR 606. The doctrine of vagueness can be summed up in one proposition: **a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria**. *(Our emphasis)*

165. That decision recognises the fallacy of absolute precision in a statutory text, rather approbating such interpretation by the courts as provides intelligible meaning to a statute. It thus underscores the position in **Attorney General v Salvatori Abuki** (supra) that the nullification of a statutory provision would not be warranted where its purported ambiguity or vagueness can be resolved by judicial interpretation. Furthermore, it resonates with the Canadian Supreme Court's observation in **Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927** that '**absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work**.' That was the position adopted by this Court in **Rtd. Col. (Dr.) Kiiza Besigye v Attorney General, Constitutional Petition No. 6 of 2018**, where the applicability of the doctrine of vagueness was adjudged to be subject to the rules of statutory interpretation and, in the case of existing laws, the dictates of Article 274(1) of the Ugandan Constitution, which provides for their interpretation '**with such modifications, adaptations, qualifications and**

exceptions as may be necessary' to bring them into conformity with the Constitution.

166. Obviously, where a statutory provision is not vague or ambiguous at all it would be constitutionally valid. In like measure, where no intelligible standard can be deduced from the wording of a criminal statute there would be no legally defined offence as required under Article 28(12) of the Constitution.

167. Turning to the impugned statutory provisions, they read as follows:

> *Section 6* *Consent to sexual act is no defence*
>
> **The consent of a person to commit a sexual act shall not constitute a defence to a charge under this Act.**
>
> *Section 7* *Confidentiality*
>
> **Any editor, publisher, reporter or columnist in the case of printed materials, announcer or producer in the case of television and radio, producer or director of a film in the case of the movie industry, or any person utilising tri-media facilities or information technology who publishes or causes the publication of the names and personal circumstances or any other information tending to establish the identity of a victim of the offence without the authority of the victim of the offence commits an offence and is liable, on conviction, to a fine not exceeding two hundred and fifty currency points.**
>
> *Section 9* *Premises*
>
> **A person who knowingly allows any premises to be used by any person for purposes of homosexuality or to commit an offence under this Act, commits an offence and is liable, on conviction, to imprisonment for a period not exceeding seven years.**
>
> *Section 11* *Promotion of homosexuality*
>
> **(1) A person who promotes homosexuality commits an offence and is liable, on conviction, to a period not exceeding twenty years.**
>
> **(2) A person promotes homosexuality where the person –**
>
> **(a) Encourages or persuades another person to perform a sexual act or do any other act that constitutes an offence under this Act;**

(b) **Knowingly advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcasting or distribution by any means including the use of a computer, information system or the internet, of any material promoting or encouraging homosexuality or the commission of an offence under this Act;**

(c) **Provides financial support, whether in kind or cash, to facilitate activities that encourage homosexuality or the commission of an offence under this Act;**

(d) **Knowingly leases or sub-leases, uses or allows another person to use any house, building or other establishment for the purpose of undertaking activities that encourage homosexuality or any other offence under this Act; or**

(e) **Operates an organisation which promotes or encourages homosexuality or the observance or normalisation of conduct prohibited under this Act.**

Section 14 *Duty to report acts of homosexuality*

(1) A person who knows or has a reasonable suspicion that a person has committed or intends to commit the offence of homosexuality or any other offence under this Act, shall report the matter to police for appropriate action.

(2) A person who is otherwise prevented by privilege from making a report under subsection (1) shall be immune from any action arising from the disclosure of the information without the consent or waiver of privilege first being obtained or had.

Section 15 *False sexual allegations*

(1) A person who intentionally makes false or misleading allegations against another person to the effect that the person has committed an offence under this Act commits an offence and is liable, on conviction, to imprisonment for a period not exceeding one year.

(2) In this section, an allegation is false and misleading if at any stage of the investigation or prosecution, it is proved that the alleged act did not take place or the information was reported maliciously.

168. The rules of statutory interpretation are appositely summed up in the *Oxford Dictionary of Law, 2009, 7th Edition, p. 295* as follows:

(1) An Act must be construed as a whole, so that internal inconsistencies are avoided.

(2) Words that are reasonably capable of only one meaning must be given that meaning whatever the result. This is called the **literal rule**.

(3) Ordinary words must be given their ordinary meanings and technical words their technical meanings, unless absurdity would result. This is the **golden rule**.

(4) When an Act aims at curing a defect in the law any ambiguity is to be resolved in such a way as to favour that aim (the **mischief rule**).

(5) The rule ***ejusdem generis*** (of the same kind): when a list of specific items belonging to the same class is followed by general words (as in "cats, dogs and other animals"), the general word are to be treated as confined to other items of the same class (in this example, to other domestic animals).

(6) The rule ***expressio unius est exclusion alterius*** (the inclusion of the one is the exclusion of the other): when a list of specific items is not followed by general words it is to be taken as exhaustive. For example, "weekends and public holidays" excludes ordinary weekdays.

(7) The rule ***in pari materia*** (on the like matter): whena prior Act is found to be "on the like matter" it can be used as an aid in construing the statute in question.

(8) The rule ***noscitur a sociis*** (known by its associates): when a word or phrase is of uncertain meaning, it should be construed in the light of the surrounding words.

169. Under the golden rule of interpretation, we might add that words of a legal provision ought to be interpreted in their most natural and customary sense, so that '**words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use**.'[32] Stated differently, the first general maxim of interpretation is that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents.[33] Where words are obscure and equivocal, however, they should be interrogated within their legislative context, including the sense in which lawmakers used the same terms in related provisions or legal instruments. This contextual construction includes '**comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point**.'[34]

170. Against that backdrop, we read no ambiguity whatsoever in sections 6 and 14(2) of the Ant-Homosexuality Act. Whereas the former provision renders the

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[32] See *Blackstone, William, 1723 – 1780, Commentaries on the Laws of England, Boston: Beacon Press, 1962, vol. 1, para.59.*

[33] See *1 M. de Vattel, The Law of Nations; (London,J. Newbury et al. eds., 1760), at 216.*

[34] See *Blackstone, William, Ibid. at para. 60.*

consent of any persons to the performance of a sexual act on or with them immaterial to criminal culpability, the latter section unequivocally grants immunity from legal action to persons that would otherwise be exempted from the reporting obligation under section 14(2) on account of privilege. The sexual act envisaged under section 6 is clearly defined in the interpretation section of the Act. In the same vein, the cross-reference to the rest of the Act under sections 9, 14(1) and 15(1) of the Act in order to ascertain other criminal offences thereunder would not in itself render the impugned provisions vague or ambiguous. On the contrary, it is in tandem with the rule that statutory provisions ought to be interrogated within their legislative context.

171. In relation to the complaint by the first to eighth petitioners that non- definition of the term *overt act* in the Act renders the definition of the '*offence of homosexuality*' imprecise and unclear; we restate the decision in **Attorney General v Salvatori Abuki** (supra) that not all words in a statutory provision must be defined. We do also abide the golden rule of interpretation espoused in the *Oxford Dictionary of Law* that technical words should be ascribed their technical meanings. We thus revert to the contextual construction articulated in *Blackstone*[35] that urges recourse to the sense in which a technical term is used in related laws or legal instruments. In this case, the term *overt act* is succinctly defined in Uganda's Penal Code Act as follows: '**Every act in furtherance of the commission of the offence defined or every act of conspiring with any person to effect that purpose and every act done in furtherance of the purpose by any of the persons conspiring shall be deemed to be an overt act manifesting the intention**.'

172. Similarly, section 7 of the Act clearly creates the offence of publication of a victim's identity and prescribes the penalty therefor, making reference in the definition of the offence to the technical term *tri-media facilities*. Although not defined in the Act, a simple search on any internet search engine would reveal that the term simply relates to the tripartite broadcasting mediums of television, radio

[35] See Footnote 27.

and print media. Given that these are typical broadcast and publication mediums, we find no uncertainty in the reference to that term.

173. Meanwhile, a common thread that runs throughout the petitioners' complaint against section 11 is that although the Act creates the offence of promotion of homosexuality, which it purports to define in section 11(2), the key terms used therein are undefined, vague, uncertain and ambiguous as to what exactly the proscribed acts are. The offensive terms in that regard are '*material promoting or encouraging homosexuality*' in subsection (2)b), '*facilitating activities that encourage homosexuality*' in section subsection 2(c), and '*any form of financial support*', '*facilitate activities that "encourage" homosexuality*' and '*observance*' or '*normalisation*' of homosexuality under subsection (2)(d) of the Act.

174. Again, we are constrained to re-echo the sentiments of the Supreme Court in **Attorney General v Salvatori Abuki** (supra) that Article 28(12) does not require every word used in a criminal statute to be defined. It is the role of a court presiding over a criminal case to construe the words so as to give effect to the objective of the legislature and do justice to the parties. It is only where the ambiguity or uncertainty defies judicial interpretation or is incapable of meaningful construction that a statutory provision would be declared void on account of its vagueness.

175. Is that the case in the matter before us? We think not. In our considered view, without attempting to delve into the merits of each provision (which is done later in this judgment), the plain, natural and ordinary meaning of the words encourage, promote, observe and normalise is sufficient to put any person on notice of the nature of the proscribed conduct under section 11(2) of the Anti-Homosexuality Act. These are ordinary English words that need no special interpretation or definition. Similarly, the nature of publication prohibited under subsection (b) is clearly specified therein in words of common usage.

176. The ninth to sixteenth petitioners do additionally raise the issue of the overly broad nature of section 11(1) and (2)(a) of the Act. The Canadian Court of Appeal did have occasion to clarify the concept of overbreadth in relation to the doctrine of vagueness in **R. v Zundel (1987), 58 O.R. (2d) 129, at pp. 157-58**. It was held:

> Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

177. This view was approbated by the Canadian Supreme Court in **R v Nova Scotia Pharmaceutical [1992] 2 SCR 606**, where it was additionally observed that a vague law on account of overbreadth may constitute an excessive impairment or unjustified limitation of constitutional rights under the proportionality test set out in **R. v Oakes [1986] 1 SCR 103**. As we have observed above, we do not find the terms used in the impugned provisions to be vague and devoid of intelligible meaning. We propose to address any connotations of overbreadth under our rights-limitation analysis in the ensuing issues for consideration.

178. Finally, the ninth to sixteenth petitioners contest section 14(1) of the Act for imposing a reporting obligation on the public to report any person suspected to have committed or intending to commit an act of homosexuality or any other related offence without clarifying the acceptable degree of suspicion for that purpose. The seventeenth to twenty-first petitioners additionally contest the same provision for its omission to define '*reasonable suspicion*' yet section 15 of the Act operates in contradiction thereto.

179. It is trite law that the use of the term '*shall*' in a statute can denote either a mandatory obligation or a directional function. In this case, the intention of the legislature can be deduced from the head title to section 14, to wit '*Duty to report acts of homosexuality.*' In our view this heading has connotations of a mandatory rather than directional reporting obligation under subsection (1) of that section. When read together with section 15 of the Act, this undoubtedly creates an illogical situation where a criminal law that entrenches a reporting obligation on mere suspicion subsequently criminalises allegations made under that obligation that are subsequently found to have been false or misleading. Obviously, any suspicion (however reasonable) is susceptible to being proved wrong. Therefore, to tie such legally authorised suspicion to the offence of false allegations in section 15 would be absurd. To compound matters, section 14(2) appears to place a reporting obligation on persons that would otherwise be protected by professional privilege.

This has the potential to occasion the greatest damage to the previously protected nature of those relationships.

180. We consider the merits of section 14 of the Act under our determination of *Issue No. 9*. For present purposes, however, the question is whether that statutory provision is so vague as to be incapable of intelligible meaning, and thus warrant its being declared void-for-vagueness. *See* ***Attorney General v Salvatori Abuki*** *(supra),* ***Andrew Karamagi & Another v Attorney General*** *(supra) and* ***Irwin Toy Ltd. v. Quebec (Attorney General)*** *(supra).* We think not given that it is crystal clear that section 14 entrenches the mandatory reporting of suspected offences under the Act.

181. We do not find any ambiguity or uncertainty in the evidentiary standard of reasonable suspicion either. In our view, it would simply denote suspicion that is grounded in bona fide or genuine and objective reasons. That would negate the mala fide and subjective reporting that is proscribed under section 15 of the Act. The argument advanced by the first to eighth petitioners and the seventeenth to twenty-first petitioners that the reporting obligation in section 14 is susceptible to abuse on the basis of political or business rivalry, family wrangles, employment issues etc is in our view, speculative in the absence of supporting evidence. We are satisfied, therefore, that sections 14 and 15 of the Act are neither contradictory nor vague or uncertain.

182. Our findings lead to the conclusion sections 6, 7, 9, 11(1)(2)(a) – (e), 14(1) and (2), and 15(1) and (2) of the Anti-Homosexuality Act neither flout Article 28(12) of the Constitution nor infringe the principle of legality. We would therefore resolve ***Issue No. 6*** in the negative.

183. We now turn to ***Issues 7 – 13*** as framed. These issues are not simply substantive from the parties' viewpoint but they are the substratum upon which the rights issues in this case rest. In a nutshell, the petitioners allege violations of the right to equality and freedom from discrimination; right to human dignity and protection from inhuman treatment; right to privacy of person, home, correspondence and other property; right to freedom of speech, expression, thought, conscience, belief and religion; right to freedom of association and civic

participation; right to practice one's profession, carry on lawful occupation, trade or business, and right to access health services, decent shelter, right to property and other general social justice and economic development.

184. As has been observed earlier in this judgment, the burden of proof in constitutional petitions that hinge on human rights violations rests with the petitioner, who has the duty to establish a *prima facie* case of the rights violation, whereupon the burden would shift to the respondent to justify the limitation of the invoked right. Where Article 43 of the Ugandan Constitution is invoked as justification for limitations to the fundamental rights (as has been done in this petition), the court must engage in a rights limitation analysis premised on the criteria laid down in that constitutional provision.

185. It has been proposed that such a limitation analysis ought to consider the following questions. Does the enjoyment of the fundamental right or freedom prejudice the fundamental rights and freedoms of other person or the public interest? If the answer is in the affirmative, is the limitation acceptable and demonstrably justifiable in a free and democratic society, or is it provided by the Constitution? *See* ***Francis Tumwesige Ateenyi v The Attorney General*** *(supra).*

186. The Uganda Supreme Court did in **Charles Onyango Obbo & Another v Attorney General** (supra) articulate the rights limitation analysis in the following terms (per Mulenga, JSC):

> Similarly, under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. In determining the validity of the limitation imposed by section 50 on the freedom of expression, the court must be guided by the values and principles essential to a free and democratic society. In **Mark Gova & Another vs. Minister of Home Affairs & Another,** [S.C. 36/2000: Civil Application No. 156/99], the Supreme Court of Zimbabwe formulated the following summary of criteria, with which I agree, for justification of law imposing limitation on guaranteed rights-
>
> (1) *the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;*
>
> (2) *the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations;*

(3) *the means used to impair the right or freedom must be no more than necessary to accomplish the objective.*

187. It is within that broad premise that the substantive human rights contestations in this petition shall be interrogated. We propose to commence our rights interrogation with ***Issue No. 8*** given that, as shall be expounded shortly, the respect for human dignity is the linchpin upon which all human rights gravitate.

Issue No. 8: **Human Dignity**

188. The first to eighth petitioners argue that the mere presence of the Anti-Homosexuality Act in Uganda's statute books, its title, purpose and the contested provisions target, humiliate and isolate LGBTQI+ persons in violation of their non-derogable right to dignity and freedom from torture and cruel, inhuman and degrading treatment or punishment as guaranteed under Articles 24 and 44(a) of the Constitution. Reference in that regard is made to the case of **Purohit & Another v The Gambia [2003] AHRLR 96**,[36] where the African Court on Human and People's Rights held:

> Human dignity is an inherent basic right to which all human beings .... are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.

189. Further reference is made to **National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & Others, CCT11/98 [1998] ZACC 15**, where it was held:

> (The) symbolic effect (of sodomy laws) is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic ... Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of ... the Constitution.

190. Meanwhile, in **Lawrence v Texas, 539 U.S. 558, 26 June 2003, p. 575** it was held:

[36] Also reported at ACHPR May 2003, p. 57.

> When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres ... The stigma this criminal statute imposes, moreover, is not trivial. ... it remains a criminal offense with all that imports for the dignity of the persons charged.

191. Reference is also made to **Law v Canada (Ministry of Employment and Immigration) [1999] 1 SCR 53** for the proposition that the freedom to live as a member of a group with its own distinct culture and identity is a crucial element of the right to human dignity. In that case the Canadian Supreme Court held that **'(h)uman dignity means that an individual or group feels self-respect and self-worth** .... (it) **is harmed when individuals and groups are marginalized, ignored or devalued**.'

192. Criticizing the notion of conversion therapy, reference is made to a proposition by the *UN Human Rights Council's Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* that conversion practices amount to torture, cruel, inhuman or degrading treatment.[37] In the context of children, the Independent Expert's report in reference above urges that conversion practices run counter to '***states' obligation to protect them from violence, harmful practices and cruel, inhuman or degrading treatment, to respect the right of the child to identity, physical and psychological integrity, health and freedom of expression and to uphold the core principle of taking the best interests of the child as a primary consideration at all times***.'[38]

193. The petitioners additionally cite the concluding remarks in the *Seventh Periodic Report on Ecuador, 11 January 2017, p. 49*, where it is observed that '***given that 'conversion therapy' can inflict severe pain or suffering, given also the absence both of a medical justification and of free and informed consent, and that it is rooted in discrimination based on sexual orientation or gender identity or expression, such practices can amount to torture or, in the absence of one or more of those constitutive elements, to other cruel, inhuman or degrading treatment or punishment***.'

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[37] See *UN Human Rights Council, Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Practices of so-called "conversion therapy", 1 May 2020, p. 62.*

[38] Ibid. at p. 73.

194. In light of what they consider to be significant physical harm suffered by victims of such conversion practices, it is the petitioners' contention that section 16 of the impugned Act clearly violates the right to protection against cruel and inhuman treatment enshrined in Articles 24 and 44(a) of the Constitution, and equivalent rights under Article 1 of the Universal Declaration of Human Rights (UDHR), Article 2 of the International Convention on Civil and Political Rights (ICCPR) and Articles 1, 2 and 16 of the UN Convention against Torture or other inhuman, degrading treatment or punishment (CAT).

195. The petitioners also contest the death sentence for aggravated homosexuality under section 3(1) of the Act which, in their view, violates the right to freedom from torture and cruel and degrading treatment under Article 24 of the Constitution. They cite the case of **Rajabu & Others v. The United Republic of Tanzania [2019] AFCHPR 7**, where the African Court on Human and People's Rights held that hanging is inherently degrading and inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment, and adjudged execution by hanging to violate Article 5 of the ACHPR.

196. The petitioners thus argue that the imposition of the death penalty by hanging violates Uganda's obligations under Article 5 of the African Charter on Human and People's Rights (AFCHPR), Article 15 of the UDHR and Article 3 of the ICCPR, and is accordingly a flagrant violation of Articles 24 and 44(a) of the Constitution. This Court is invited to take into account the weight of jurisprudence from other common law courts that have adjudged the death penalty to violate the right to freedom from torture and cruel and degrading punishment. The Court is particularly urged to adopt the reasoning of the South African Constitutional Court in **S. v Makwanyane & Another, CC 3/94 [1995] ZACC 3**, the High Court of Tanzania in **Republic v Mbushuu *alias* Dominic Mnyaroje & Another [1994] TZHC 7** and the Supreme Court of Canada in **United States v Burns [2001] 1 SCR 283**, all of which held that the death penalty is a violation of the fundamental right to freedom from torture and cruel and degrading treatment.

197. On the foregoing premise, sections 2(1), (2), (3) and (4); 3(1), (2)(c)(d)(e)(f)(h)(j), 3(3) and (4); 5(2) and 6 of the Anti-Homosexuality Act are

considered to violate the right to human dignity and protection from inhuman treatment guaranteed under Articles 24 and 44(c) of the Constitution.

198. On their part, the ninth to sixteenth petitioners challenge the constitutionality of sections 1, 2, 3, 4 and 6 of the Act on the premise that they collectively criminalise consensual homosexuality; and sections 9 and 11, which purportedly prohibit the use of premises by persons identified as homosexuals. It is argued that the impugned statutory provisions violate the non-derogable right to personal dignity and freedom from torture, inhuman and degrading treatment or punishment guaranteed under Articles 24 and 44(a) of the Constitution.

199. The petitioners contend that the ability to engage in and form private sexual relationships is part of human dignity; sexual relationships form an integral part of personal identity and how individuals want to express themselves sexually, and sexual orientation, whether heterosexual or homosexual, is an exercise of bodily autonomy. Reference in that regard is made to paragraph 8 of the ninth petitioner's affidavit. In their view, to criminalise adult consensual same-sex sexual activity is to diminish the dignity and worth of those individuals in society who identify by a particular sexual orientation.

200. It is opined that Article 24 of the Uganda Constitution mirrors Article 5 UDHR, Article 7 of the ICCPR, Article 5 of the ACHPR and provisions of the CAT; Article 5 of the ACHPR specifically addressing inherent human dignity as part and parcel of freedom from torture, inhuman and degrading treatment or punishment in the following terns: '**every individual shall have the right to the respect of the dignity inherent in a human being**.'

201. Without furnishing the decision in question, the petitioners make reference to the nullification by the Botswana Court of Appeal of a section of the Penal Code Act that criminalised consensual same-sex conduct on the basis of the right to dignity. Reference is further made to **National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & 2 Others** (supra), where the Constitutional Court of South Africa held that a law that prohibits same-sex sexual conduct is not only an invasion of homosexual persons' right to privacy but also a violation of their dignity. Further reference is made to the Kenya High Court case

of **P. A. O & Others v Attorney General [2012] eKLR**, where it was held that the right to health, life and human dignity are inextricably bound.

202. It is the petitioners' contention that sections 9 and 11(1) and (2)(d) of the Anti-Homosexuality Act are inconsistent with Articles 24 and 44(a) of the Constitution insofar as they make it an offence for any person to allow and/or lease or sub-lease premises to be used for purposes of homosexuality or activities that encourage homosexuality. In their view, those statutory provisions when read together have the effect of criminalizing and penalising persons that use (or permit the use of) premises, let or sub-let houses, buildings or establishments for purposes or activities that encourage homosexuality.

203. It is argued that the foregoing provisions place a duty upon the owners of premises to inquire into the sexual orientation or preferences of their occupants, tenants, lessees etc; which has the effect of diminishing the dignity and worth of individuals in the society that identify with a particular sexual orientation on account of severe mental anguish. In view of the provisions of sections 7(1) and (2) of the Prevention and Prohibition of Torture Act, 2012, this would amount to cruel, inhuman and degrading treatment.

204. Reference is made to **Attorney General v Salvatori Abuki** (supra) (per Oder, JSC) for the proposition that the rights under Article 24 are entrenched under Article 44(a) as absolute and non-derogable rights, from which no limitation or derogation whatsoever is permitted, and therefore there cannot be any justification for their restriction or violation.

205. In turn, the seventeenth to twenty-first petitioners contend that sections 2(4) and 6 of the Anti-Homosexuality Act infringe the individual's right to bodily autonomy and are therefore inconsistent with Article 20, 21, 24 and 44(a) of the Constitution. They further contend that the enforcement of section 2(1) – (4) of the Act has the potential to expose homosexual individuals to blackmail; police entrapment; violence, and denial of facilities, accommodation and opportunities thereby impairing their human dignity in a manner comparable to the discrimination highlighted under Article 21(1), (2) and (3) of the Constitution. They defer to the interpretation of section 11(2) of the South African Constitution that was rendered

in **The State vs Henry Williams & Others, Case No. CCT 20/ 94**, urging this Court to follow the same approach given the similarities between that provision of the South African Constitution and Article 24 of the Ugandan Constitution. Deference is further made to **Centre for Health, Human Rights & Development (CEHURD) v Attorney General, Const. Petition No. 64 of 2011** in which the Constitutional Court of Uganda affirmed that Article 24 is one of the non-derogable rights under Article 44 of the Constitution.

206. Conversely, the first respondent denies any violation of the right to human dignity and freedom from inhuman treatment whether by the criminalization of homosexuality under section 2; provision for the death sentence under section 3; providing for rehabilitation under section 16, or on account of the prohibition against use of premises for activities that encourage homosexuality under sections 9 and 11(2)(d) of the Act.

207. It is the first respondent's contention that whereas Articles 24 and 44(a) of the Constitution do prohibit any form of torture, inhuman or degrading treatment, what would constitute such torture or treatment is not defined in the Constitution but in section 2 of the Prevention and Prohibition of Torture Act. The decision in **The State vs Henry Williams & Others** (supra) is also relied upon for the proposition that what would amount to cruel, inhuman and degrading treatment differs from case to case and, in the matter before the Court, the petitioners have not demonstrated that the Anti-Homosexuality Act inflicts unjustifiable mental or physical suffering.

208. State Counsel argue that by criminalizing same-sex acts, the Anti-Homosexuality Act does not diminish the dignity and worth of any person but, rather, homosexuality is an 'undignifying' practice that goes against the values, norms and culture of the Ugandan society. In Counsel's view, same-sex sexual acts are considered repugnant by the majority of Ugandans, and they affect the dignity and well-being of children that are recruited into homosexuality.

209. In response to the apparent aversion to conversion therapy, it is argued that section 16 only provides for rehabilitation, which is different from conversion practices and which, in any case, is recommended at the discretion of the court on

case-by-case basis. It is proposed that the legislature simply sought to create an avenue by which support could be extended to a convict that needs it, and not to subject them to inhuman or degrading treatment, and thus ought not to be the basis for allegations of breach of Article 24 of the Constitution. In like measure, it is argued that section 5 places an obligation upon persons involved in the investigation, prosecution or trial of offences under the Act to offer support to victims of homosexual acts in order to attend and testify at any ensuing criminal proceedings. The section supposedly empowers courts to order a person that is convicted of the offence of homosexuality or aggravated homosexuality to provide restitution to the victim, in addition to any other penalty imposed.

210. Counsel maintain that nothing in the impugned sections of the Anti-Homosexuality Act permits, authorizes or imposes any acts of torture, cruel, inhuman or degrading treatment, therefore the petitioners' contestations are pre-emptive, biased and without merit. In State Counsel's estimation, far from contravening the right to dignity and freedom from torture, the Act promotes freedom from psychological torture and health risks, and upholds the dignity of humanity. It is argued that the criminalisation of same-sex sexual acts cannot be equated to degrading treatment yet other deviant sexual acts such as incest are similarly criminalised.

211. On his part, citing **Law v Canada (Minister of Employment and Immigration)** (supra), the second respondent proposes that human dignity equates to an individual or group a feeling of self-respect and self-worth, and addresses human beings' physical and psychological integrity and empowerment. The second respondent nonetheless, contends that by imposing sanctions and penalties for the offence of homosexuality or any other related offence under sections 2(1)(4),3(1),(2)(c) - (f), (h) and (j), (3) and (4), 5(2), 6, 9, 11(2)(d), 12, 13(1) and 16 of the Act, the dignity of such individuals is not diminished as such penalties are intended to shape the societal norms of the Ugandan people. The cited statutory provisions are opined to have been meticulously crafted to safeguard societal values and moral standards within Uganda's constitutional framework as articulated in Article 31 of the Constitution, clauses (2a) and (3) of which outlaw homosexuality. In the second respondent's view, the penalties prescribed under

the impugned Act reflect the tenor of other crimes against morality found in Chapter 4 of Uganda's Penal Code Act, such as rape and defilement, all of which attract severe punishments including life imprisonment and a possible death penalty.

212. Reference is made to *McCrudden, Christopher, Human Dignity and Judicial Interpretation of Human Rights, European Journal of International Law, Vol. 19, Issue 4, September 2008, pp. 655 – 724*,[39] where human dignity in the Israeli context is opined to operate as much as a justification for the protection of rights as a constraint on such rights. It is argued that the Constitution is strongly grounded in the value and morals that Ugandans wish to maintain in various aspects of life. In response to the petitioners' claims of bodily autonomy, it is proposed that bodily autonomy cannot be invoked to break the law. Hence the limitation in Article 22(2) of the Constitution against the right of women to terminate pregnancies, although that right is exercised in other countries under the rubric of bodily autonomy.

213. With regard to Article 5 of the ACHPR, it is argued that the African Commission has itself stated that sexual orientation is not an expressly recognized right or freedom under the African Charter and runs contrary to African values as envisaged in the Charter. Reference in that regard is made to the *Final Communique of the Commission's 73rd Ordinary Session, para. 58.*[40] The petitioners' reliance on **National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & Others** (supra) is contested on the premise that whereas the South African Constitution expressly prohibits discrimination on grounds of sexual orientation, no such provision exists in the Ugandan Constitution. It is argued that property rights are no excuse for the use of premises for illegal purposes, and therefore the impugned Act does not violate the right to freedom from torture as defined in the Prohibition and Prevention of Torture Act, neither does it violate the freedom from cruel, inhuman or degrading treatment.

[39] Also available at https://doi.org/10.1093/ejil/chn043

[40] Also available at https://achpr.au.int/index.php/en/news/final-communiques/2022-11-18/final-communique-73rd- ordinary-session

214. Meanwhile, the third and fourth respondents contest the view advanced by the petitioners that a person's sexual orientation forms an integral part of personal identity and how they may want to express themselves sexually, and is an exercise of bodily autonomy in respect of which conversion or reparative therapy has been scientifically discredited. It is argued that there is no evidence in support of that supposedly scientific position yet in paragraph 12 of his affidavit, the third respondent attests to having, in the course of his work with the fourth respondent, encountered several persons who had been recruited into homosexuality but have since, with counselling, abandoned that lifestyle. The notion that same-sex attraction is a fixed state or an integral part of personal identity is dismissed as untrue, and the Court is urged to disallow the proposition that sexual orientation is innate. In Counsel's view, issues concerning what conduct should or should not be allowed, and what is legal or not, as well as the cultural sensitivities of the people of Uganda should be reserved for debate and decision by the legislature.

215. Before delving into the merits of the issues before us, we are constrained to address two procedural issues. First, it is observed that sections 1 and 4 of the impugned Act, which are contested by the ninth to sixteenth petitioners, are in fact not in contention under this issue. To compound matters, those petitioners' challenge to section 4 of the Act is not in the context of the Articles that are invoked hereunder but rather those that are in contention under *Issue No. 13. See paragraph 12(d) of* Constitutional Petition No. 15 of 2023. Section 4 of the Act shall therefore be considered under *Issue No. 13* as pleaded. On the other hand, section 1 of the Act shall be interrogated on the basis of its definition of homosexuality to include consensual, same-sex sexual activity among adults in private. That is the context within which it is challenged under paragraph 12(c)(ii) of Constitutional Petition No. 15 of 2023.

216. We now turn to our determination of the issue. For clarity, Articles 24 and 44(a) of the Constitution as invoked by the petitioners are reproduced below.

> *Article 24:* *Respect for human dignity and protection from inhuman treatment.*
>
> **No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.**

Article 44: *Prohibition of derogation from particular human rights and freedoms.*

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms –

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;

217. The gravamen of the petitioners' contestations hereunder is that certain provisions of the Anti-Homosexuality Act are inconsistent with the constitutional imperative of respect for human dignity and protection from inhuman treatment. For ease of reference, the provisions of the Anti-Homosexuality Act that are considered inconsistent with the right to dignity are reproduced below.

Short & Long Titles:

ANTI-HOMOSEXUALITY ACT, 2023

An Act to prohibit any form of sexual relations between persons of the same sex; to prohibit the promotion or recognition of sexual relations between persons of the same sex, and for related matters.

Section 2 *The offence of homosexuality*

(1) A person commits the offence of homosexuality if the person performs a sexual act or allows a person of the same sex to perform a sexual act on him or her.

(2) A person who commits the offence of homosexuality is liable, on conviction, to life imprisonment.

(3) A person who attempts to perform a sexual act in the circumstances referred to in subsection (1) commits an offence and is liable, on conviction, to imprisonment for a period not exceeding ten years.

(4) For purposes of subsection (3), a person shall be deemed to attempt to commit an offence when the person intending to commit an offence begins to put his or her intention into execution by means adapted to its fulfilment, and manifest his or her intention by some overt act, but does not fulfil his or her intention to such an extent as to commit the act.

(5) For the avoidance of doubt, a person who is alleged or suspected to be a homosexual, who has not committed a sexual act with another person of the same sex, does not commit the offence of homosexuality under this section.

Section 3 *Aggravated homosexuality*

(1) A person who commits the offence of homosexuality in any of the circumstances specified in subsection (2) commits the offence of aggravated homosexuality and is liable, on conviction, to suffer death.

(2) The circumstances referred to in subsection (1) are where –

(a) .....

(b) .....

(c) The person against whom the offence is committed contracts a terminal illness as a result of the sexual act;

(d) The offender is a serial offender;

(e) The offender is a person in authority over the person against whom the offence is committed;

(f) The person against whom the offence is committed is a person with disability or suffers a disability as a result of the sexual act;

(g) .....

(h) The person against whom the offence is committed is of advanced age;

(i) .....

(j) The person against whom the offence is committed was, at the time the offence was committed, unconscious or in an altered state of consciousness due to the influence of medicine, drugs, alcohol or any other substance that impaired his or her judgment.

(3) A person who attempts to perform a sexual act in the circumstances referred to in subsection (1) commits an offence and is liable, on conviction, to imprisonment for a period not exceeding fourteen years.

(4) For the avoidance of doubt, a person who is alleged or suspected to be a homosexual, who has not committed a sexual act with another person of the same sex, does not commit the offence of homosexuality under this section.

Section 6 *Consent to sexual act is no defence*

The consent of a person to commit a sexual act shall not constitute a defence to a charge under this Act.

Section 9 *Premises*

A person who knowingly allows any premises to be used by any person for purposes of homosexuality or to commit an offence under this Act, commits an offence and is liable, on conviction, to imprisonment for a period not exceeding seven years.

Section 11 *Promotion of homosexuality*

(1) **A person who promotes homosexuality commits an offence and is liable, on conviction, to imprisonment for a period not exceeding twenty years.**

(2) **A person promotes homosexuality where the person –**

(a) .....

(b) .....

(c) .....

(d) **Knowingly leases or sub-leases, uses or allows another person to use any house, building or other establishment for the purpose of undertaking activities that encourage homosexuality or any other offence under this Act;**

Section 12 *Disqualification from employment upon conviction*

A person who is convicted of the offence of homosexuality or aggravated homosexuality shall be disqualified from employment in a child care institution or in any other institution which places him or her in a position of authority or care of a child or a vulnerable person until such time as a probation, social and welfare officer determines that the person is fully rehabilitated and no longer poses a danger to a child or a vulnerable person.

Section 13(1) *Disclosure of sexual offences record*

A person convicted of an offence under this Act shall disclose the conviction when applying for employment in a child care institution or any other institution which places him or her in a position of authority or care of a child or other vulnerable person.

Section 16 *Rehabilitation of homosexual*

(1) The court may, upon convicting a person of the offence of homosexuality, order the provision of social services for purposes of rehabilitating the convicted person.

(2) The services referred to in subsection (1) may be provide by the prisons service or by a probation, social and welfare officer of the area where the convicted person is serving his or her sentence.

218. In **Attorney General v Salvatori Abuki** (supra), the majority view was that Article 44 of the Constitution renders non-derogable or absolute the rights conferred under Article 24 of the Constitution. Oder, JSC, with whom Tsekooko, Mulenga and Kanyeihamba, JJSC agreed, stated that position as follows:

> Article 24 of the Ugandan Constitution provides that:
>
> "**24. No person shall be subjected to** *any form of torture, cruel, inhuman or degrading treatment or punishment.*"
>
> (**The italics are added**).
>
> It seems clear that the words italicised have to be read disjunctively. Thus read the article seek to protect the citizens from seven different conditions.
>
> i. Torture;
> ii. Cruel treatment;
> iii. Cruel punishment;
> iv. Inhuman treatment;
> v. Inhuman punishment;
> vi. Degrading treatment;
> viii. Degrading punishment.
>
> Under Article 44 the protection from the seven conditions provided for in article 24 is non-derogable. For me, this means that the rights under article 24 are absolute.

219. We understand that decision to mean that the seven freedoms enlisted in Article 24, namely freedom from torture, cruel treatment, cruel punishment, inhuman treatment, inhuman punishment, degrading treatment and degrading punishment, are non-derogable. This is fairly well settled and is in tandem with the nature of human dignity as one of the foundational sources of freedom, justice and peace. *See paragraph 1 of the Preamble to the UDHR.*

220. However, under international human rights law, the concept of dignity is broader than the imperative of respect for inherent human dignity that is encapsulated in Article 24 of the Constitution. Rather, dignity is considered to manifest as a right, a principle and/or a legal value. Hence the observation in **Beyleveld and Brownsword 1998 *MLR* 661- 662** that;

> Dignity appears in various guises, sometimes as the source of human rights, at other times as itself a species of human right (particularly concerned with the conditions of self-respect); sometimes defining the subjects of human rights, at other times defining the objects to be protected; and sometimes reinforcing, at other times limiting, rights of individual autonomy and self-determination. *(our emphasis)*

221. The petition before us invokes human dignity as a substantive right that is the foundational source of human rights. In that regard, the ninth to sixteenth petitioners contend that the criminalisation of homosexuality under sections 1, 2, 3, 4 and 6 of the Anti-Homosexuality Act diminishes the dignity and worth of those individuals in the Ugandan society who, in exercise of their right to bodily autonomy, identify by a particular sexual orientation. Perhaps less concisely, the first to eighth petitioners similarly allude to the right to human dignity in their discomfort with the intent and purpose of the Anti-Homosexuality Act (as deduced from its title) for targeting, humiliating and isolating LGBTQI+ persons in violation of their right to dignity.

222. On the other hand, dignity as a constitutional value informs the interpretation of many (possibly all) other rights such as the constitutional freedoms encapsulated in Article 24 of the Constitution; and is thus of central significance in rights-limitation analysis. *See* ***Dawood v Minister of Home Affairs [2000] 5 Law Reports of the Commonwealth 147, 2000 (3) SA 936 (CC)***. In that context, human dignity is

invoked by the first to eighth petitioners in respect of sections 3(1) and 16 of the impugned Act, and by the ninth to sixteenth petitioners in respect of sections 9 and 11(1) and (2)(d) of the Act. The seventeenth to twenty-first petitioners allude to a derogation of the same freedoms as an offshoot of the violation of the right to human dignity in the context of sections 2(1) – (4) and 6 of the Act, equating the potential exposure of homosexual individuals to blackmail; police entrapment; violence, and denial of facilities, accommodation and opportunities, to cruel mental and physical suffering comparable to the discrimination highlighted under Article 21(1), (2) and (3) of the Constitution.

223. Aside from the attributes of human dignity highlighted above, how has the principle of human dignity been utilised in constitutional adjudication? Available literature defines human dignity by three elements, which do simultaneously inform its application to constitutional adjudication. In *Steinmann, R, The Core Meaning of Human Dignity, PER/ PELJ 2016 (19),*[41] these basic elements were espoused as follows:

> *(First)* The ontological claim, which refers to man's unique qualities that are priceless and irreplaceable and constitute every individual's inherent dignity. *(Second)* Recognition and respect for inherent dignity relates to types of treatment that are inconsistent with inherent dignity, as proscribed by international and national law texts. McCrudden[42] refers to the second element as the "relational claim". In other words, it emphasises the relationship and expectations of the individual vis-à-vis the perceptions of his community – the so-called dignity of recognition, being the social dimension of dignity. *(Third)* Building on the relational claim, the third common element as the "limited-state claim",[43] embodies the Kantian idea that the state should exist for the sake of the individual, and not vice versa. To acknowledge inherent human dignity, the state is progressively required to provide existential minimum living conditions which are embodied in the second-generation social and economic human rights.

224. That definition proposes the innate humanity of human beings as the substratum of inherent dignity. Additionally, the above article advances the social or relational aspect of human dignity that emphasizes the recognition and respect for the inherent dignity of all persons, and eschews the treatment of human beings

[41] Also available at http://dx.doi.org/10.17159/1727-3781/2016/v19i0a1244
[42] McCrudden, Christopher, 2008 EJIL 679.
[43] Ibid.

in a manner that is proscribed by international instruments and national constitutional dispensations. It thus focuses on the relationship and expectations of individuals with regard to their individual autonomy vis-à-vis the perceptions and interests of their communities or societal culture. This is the mainstay of the petitioners' claims under this issue.

225. The social/ relational aspect to human dignity espoused above resonates with numerous scholarly writings. To begin with, it is proposed that implicit in the inherent claim of dignity is the acknowledgement and acceptance of the diversity of human beings and differences in culture. When dignities compete, the abstract idea of innate human dignity is too general to function on its own, but the social, historical and cultural factors that shape a nation will indicate the weight to be allocated to whichever right.[44] According to *Carozza, Paolo G, Human Dignity in Constitutional Adjudication*,[45] the inconsistencies and controversies in constitutional adjudication on human dignity across jurisdictions rarely arise from the common or supposedly universal understanding of inherent dignity but, rather '**where the requirements of human dignity are more contested and uncertain, and where the broad universal principle needs to be specified concretely in a given social, political, and cultural context** (failure of which**) the meaning of dignity becomes 'elusive' and 'amorphous', even to the point of being arguably just an 'empty shell'**.'

226. The learned scholar compliments a position that had been previously advanced in *McCrudden, Christopher, Human Dignity and Judicial Interpretation of Human Rights*[46] where it is proposed that '**claims to universalism and naturalism in human rights discourse have proven deeply controversial, with some arguing that the inclusion of common principles in these texts or judicial decisions merely camouflages profound disagreement on their application as well the theory supporting them**.' *McCrudden* makes reference to the

[44] See Weisstub, *Honor, Dignity and the Framing of Multiculturalist Values*, 265.
[45] In Research Handbook in Comparative Constitutional Law, Tom Ginsburg & Rosalind Dixon, Eds, University of Notre Dame Law School, 460. Also published at: http://ssrn.com/abstract=1799436
[46] Supra at footnote 38.

following observation by Lord Hoffman in *'Human Rights and the House of Lords', 62 MLR (1999) 159, at 165*:

> Of course we share a common humanity. ... Nevertheless ... the specific answers, the degree to which weight is given to one desirable objective rather than another, will be culturally determined. Different communities will, through their legislature and judges, adopt the answers which they think suit them.

227. Further reference is in *McCrudden, Christopher, Human Dignity and Judicial Interpretation of Human Rights* (supra) made to *Carozza, Paolo G., Subsidiarity as a Structural Principle of International Human Rights Law, 97 AJIL [2003], p. 1*[47] where it is argued that '**there is an inherent tension in international human rights law between upholding a universal understanding of human rights and 'respecting the diversity and freedom of human cultures**.' The author distinguishes between the use of human dignity to foment a communitarian ideal, on the one hand, and an approach that is much more focused on the role of dignity in furthering choices made on the basis of individual autonomy; contrasting the individualist judicial approach vis-à-vis the more communalist approach as follows:

> In brief, the German Constitutional Court adopts a more communitarian approach, whilst the predominant approach to dignity in the US Supreme Court, the Canadian Supreme Court, and the Hungarian Constitutional Court is more individualistic. The South African Constitutional Court appears to be significantly split on the issue. The reasoning of the German Constitutional Court's judgment in the *Lifetime Imprisonment Case* illustrates well a more communitarian approach:
>
> > '[t]he constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself. *This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather of a person related to and bound by the community.* In the light of this community-boundedness it cannot be "in principle unlimited". *The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life;* yet the autonomy of the individual has to be protected.' ***(author's emphasis)***

[47] Also available at https://scholarship.law.nd.edu/law_faculty_scholarship/564

> (By contrast) The Hungarian approach, at least up to 1998, was one in which 'human dignity is limited to the individual considered in his singularity. It empowers the individual to take control over his life without any interference, or indeed any help, from others or from the state. Human dignity ... does not essentially facilitate interaction and relationships between people. Instead, human dignity surrounds the individual in a sort of protective sphere, and thus isolates individuals from each other.

228. These perspectives illuminate the conflict between individuals' right to self-determination, self-perception and bodily autonomy, on the one hand; and the communal or societal right to its own self-determination, self-conceptualisation, and dignity. The right to human dignity is thus pitted against the communal right to social, political and cultural self-determination, calling for a delicate balance between individual autonomy and communal interests. A similar balance is alluded to in **The State vs Henry Williams & Others** (supra), where the South African Constitutional Court had the occasion to interpret section 11(2) of the pre-1996 South African Constitution, a constitutional provision that is materially similar to Article 24 of the Ugandan Constitution. The court took into account the competing and sometimes conflicting interests of contemporary norms, aspirations, expectations and sensitivities in nation states vis-à-vis emerging consensus of values in the civilised international community. As was quite correctly observed in that case, human rights adjudication ought to be approached on a case by case basis, with due regard for all the circumstances before a court.

229. In any event, the foregoing literature posits that the right to dignity ought not to operate in the abstract but within the social, political, and cultural context of a society, particularly their communal culture, norms and values. This view is in fact reinforced by *General Comment No. 21: Right of Everyone to Take Part in Cultural Life* (supra), to which we were referred by the petitioners, where the UN Committee on Economic, Social and Cultural Rights recognized the correlation between cultural rights, human dignity and positive social interaction, observing that '**cultural rights are essential for the maintenance of human dignity and positive social interaction**,' cultural rights in that context being defined as the manifestations of human existence including by way of life, language, literature, music, religion, traditions and customs.

230. Stated differently, the Committee recognised that cultural rights are the bedrock of human dignity and positive social interaction. So that, human dignity essentially emanates or is derived from a community's way of life, traditions, customs and even religion (where it is tied to culture); and not necessarily vice versa. Indeed, in **MEC for Education: KwaZulu-Natal v Pillay [2008] 1 SA 474 (CC)**, the constitutional court of South Africa approbated the right of a female Hindu learner to wear a nose stud in school as an expression of her South Indian Tamil Hindu culture. Langa, CJ highlighted the nexus between an individual's dignity and identity, on the one hand, and the function of communal cultural identity as the bedrock of one's dignity. He observed that '**dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity** (and) **cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement**.' It follows then that conduct that deviates from the cultural manifestations of way of life, language, literature, music, religion, traditions and customs operates at cross-purposes with the right to human dignity.

231. In Uganda, this contextual approach to the right to human dignity is encapsulated in the Preamble to the Constitution, Objectives I(i) and XXIV of the Constitution's national objectives and directive principles of state policy and Article 8A of the Constitution. The Preamble reveals that the Ugandan Constitution was promulgated against a backdrop of political and constitutional instability, against which and with the full participation of the Ugandan people, the framers of the Constitution ingrained the National Objectives and Directive Principles of State Policy to guide constitutional interpretation. *See Objective 1(i) of the national objectives and directive principles of state policy.* This is echoed more poignantly in Article 8A of the Constitution, which demands the governance of Uganda on the basis of '**principles of national interest and common good enshrined in the national objectives and directive principles of state policy**.' In turn, Objective XXIV of those National Objectives and Directive Principles of State Policy specifically addresses the country's cultural objectives within the context of human dignity. It reads:

Objective XXIV: *Cultural Objectives.*

Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life.

The State shall –

(a) Promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans;

232. The societal considerations alluded to by *Steinmann*[48] find expression in the constitutional prerogative in Article 8A, which ties the governance of the country to the national interest and the common good, as opposed to individualistic considerations. Furthermore, whereas in one sense Objective XXIV subjugates cultural and customary values to the fundamental rights and freedoms, the concept of inherent human dignity and the dictates of the Constitution itself; the same provision obligates the State to promote and preserve such cultural values and practices as enhance (and not diminish) the collective dignity and well-being of Ugandans. Objective XXIV thus illuminates the dual element of human dignity as both an inherent individual right that demands recognition, as well as within the context of the collective right of Ugandans to demand of the State the promotion of such rights as enhance their collective (societal) dignity and well-being. The obligation upon the State in that regard is echoed in Objective XIV(a), which obligates the State to ensure that '**all development efforts are directed at ensuring the maximum social and cultural well-being of the people**.'

233. To that extent, those constitutional provisions are in tandem with the tri-facetted approach to human dignity espoused in **Beyleveld and Brownsword** (supra) that can be summed up as follows. Inherent human dignity is the source of all fundamental rights to which all humans are entitled, hence the notion of '*human dignity as empowerment*'. However, when competing elements of other social values (such as the interests of the individual against that of the community) are weighed against each other, the element of '*human dignity as constraint*' on free

[48] Supra, footnote 45.

choice kicks in to constrain on account of societal interests those rights that flow from individual autonomy. Nonetheless, such constraint would not negate the duty upon states to engender substantial equality that can only be attained through the provision of existentially minimum living conditions, namely the second-generation socio-economic rights.

234. Therefore, in accordance with Objective 1(1) of the Constitution's National Objectives and Directive Principles of State Policy, it is within that construction of Objective XXIV that this Court is required to interpret the Constitution. Given the competing societal interests that underpin the right to human dignity, the Court is required to consider the inherent right to dignity against the communal cultural dignity of the Ugandan society. The duty upon the Court to exercise its judicial power in the name of the Ugandan people and in conformity with '**the law and with the values, norms and aspirations of the people**' simply underscores the emphasis on the socio-cultural interests of the Ugandan society. *See Article 126(1) of the Constitution.*

235. In the matter before us, it is proposed that human beings have a right to self-determination that at a personal level translates into the individual autonomy to pursue whatever lifestyle that satisfies their preferences, regardless of socio-moral norms and values or socio-cultural considerations. The anti-homosexuality law is therefore challenged for criminalising the individual autonomy of persons that identify as homosexuals thus violating their fundamental human rights as enshrined in the Constitution. The counter argument made to the foregoing proposition is that the practice of homosexuality is inimical to the aspirations, values and norms of the Ugandan society, which standard is embodied in the national Constitution.

236. As was insightfully observed by *Weisstub*,[49] the claim of inherent dignity implicitly acknowledges the diversity of human beings and cultures as no two human beings are inherently the same nor do they exercise their individual autonomy or right to human dignity in the same manner. Collectively, this manifests in a diversity of cultures with different cultural values, norms and

[49] Supra, see footnote 48.

aspirations in pursuit of their communal dignity. When the right to individual autonomy conflicts with the communal right to socio-cultural self-determination, the abstract idea of innate human dignity can no longer be applied on its own but, rather, the social, historical and cultural factors that shape a nation will inform the weight to be attached to the competing dignities. In order to give meaning to the principle of human dignity, it would of necessity have to be concretely anchored within a given social, political and cultural context.

237. This approach resonates with Article 22 of the UDHR insofar as that provision acknowledges that an individual's dignity and personal development is anchored in the economic, social and cultural rights that accrue to him/ her by virtue of belonging to a society/ community. Article 22 reads as follows:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

238. In Uganda, the essence of the country's socio-cultural fabric is laid out in Objective XIX of the Constitution's National Objectives and Directive Principles of State Policy, as well as Articles 31(2a) and 37 of the Constitution. Those constitutional provisions are reproduced below.

> *Objective XIX: Protection of the family.*
>
> **The family is the natural and basic unit of society and is entitled to protection by society and the State.**
>
> *Article 31: Rights of the family.*
>
> **(1)** .....
>
> **(2)** .....
>
> **(2a) Marriage between persons of the same sex is prohibited.**

Article 37: *Right to culture and similar rights.*

Every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

239. Article 37 reinforces individuals' right to culture in community with others thereby entrenching the view that individual rights to culture are enjoyed within the communal space and subject to communal interests. Objective XIX provides the foundational basis for the views on the family that are expressed in Article 31(2a), to wit, the family is the basic unit of society that deserves protection by the state and society. This would perhaps have informed the restriction in Article 22(2) against termination of the life of an unborn child and, more pertinently, the prohibition against same-sex marriages in Article 31(2a). The latter prohibition particularly reflects communal aversion to homosexuality and implicitly denies recognition to same-sex relations.

240. As was intimated during our interrogation of *Issue No. 1*, the legislative background to this petition is that in 2014, Parliament had enacted the Anti-Homosexuality Act, 2014, which was materially similar to the anti-homosexuality law that is in issue presently. However, the earlier law was struck down by this Court in its determination of *Prof Joe Oloka Onyango & Others v Attorney General* (supra). That law was struck down for having been enacted without the requisite parliamentary quorum. So clearly this is not the first time that there is an attempt to enact an anti-homosexuality law in Uganda.

241. Both laws were introduced by a private member of the House (as opposed to the State) and they both sought to address gaps in the Penal Code Act, Cap 120 ('the Penal Code') on the issue of homosexuality. The Memorandum of the *Anti-Homosexuality Bill, 2023* states that the Bill was introduced to resolve the absence of comprehensive provisions to deal with the subject of homosexuality in Uganda given that section 145 of the Penal Code, which comes closest to doing so, only addresses the offence of '*unnatural offences.*' The Memorandum further faults the existing law for not addressing the procurement and dissemination of literature and

other pantographic materials concerning the offence of homosexuality. Section 145 of the Penal Code Act reads as follows:

> **Any person who —**
>
> **(a) has carnal knowledge of any person against the order of nature;**
>
> **(b) has carnal knowledge of an animal; or**
>
> **(c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.** *(Our emphasis)*

242. The evidence on record is that the Anti-Homosexuality Act was enacted against the backdrop of the overt super-imposition of homosexuality on Ugandan culture by the recruitment of children into the practice. This is depicted in the Hansard of 21st March 2023,[50] which captures the sentiments of members of Parliament with regard to the public outcry, social and broadcast media discussions and homosexuality victims' '*painful and gruelling stories*' of children and families that were '*dying in silence*' from the psychological trauma of forced recruitment of children into homosexual acts. The Anti-Homosexuality Bill was subsequently overwhelmingly passed on the basis of those views of the Ugandan people's parliamentary representatives, who would know the sentiments of the people that they represent on the subject.

243. Although the Penal Code might undoubtedly be considered to be a relic from the country's colonial past, the dogged, indefatigable commitment of the legislature to the enactment of an anti-homosexuality law would suggest that it captures societal sentiments on the subject of homosexuality. This is reflected in the parliamentary debate during the second reading of the Bill that preceded the now impugned Anti-Homosexuality Act. We cite but a few below.

> *"Uganda enjoys a rich cultural diversity and, although all are richly different, they do not recognise same-sex relations. Whereas some few individuals have existed with such tendencies, these were isolated by society and, in some cases, punished for such unnatural acts. The prohibition against homosexuality is entrenched in the laws of Uganda and our cherished and shared cultural norms and values."*

[50] At p. 7810, paras. 11 – 13.

"On the question of human rights, there are principles that guide human rights and one of them is that it is universal. Therefore, if you are arguing that homosexuality is universal, why are you getting objections from Ugandans? For anything which is universal, like the right to eat, nobody will complain."

"Nobody will complain about rights that are truly universal. When you raise an issue of a human right and it is contested it means it is not universal."

244. Whereas the ninth petitioner does in her affidavit allude to the innateness of homosexuality when she describes homosexuality as naturally arising from a person's attraction to people of the same sex; in our view, that is a position that ought to be supported by scientific or medical evidence and none was forthcoming in this case. On the contrary, there is proof of the luring of gullible Ugandans into homosexuality in the third respondent's affidavit. It is his testimony that in the course of his work with the fourth respondent entity he personally encountered several persons that had been recruited into homosexuality but, with counselling, subsequently abandoned the practice. This would unravel the proposition that homosexuality is an innate predisposition, as opposed to a personal choice in exercise of individual autonomy, as there would scarcely be need to persuade people to adopt an innate existence. Such a recruitment campaign was inevitably bound to attract a clawback as it did by the enactment of the impugned law.

245. As stated earlier in this judgment, the petitioners bear the legal burden of proof of their case against the respondents including all the allegations of fact made by them. The evidential burden would only shift to the respondents where a *prima facie* case has been established by the petitioners. In the present case, not only does the petitioners' evidence fall short on a critical aspect of their case, the third respondent's evidence in rebuttal of that allegation is not controverted by them. To compound matters, an article by the ninth petitioner – *Tamale, Sylvia, 'Exploring the contours of African sexualities: Religion, law and power' (2014) 1 AHRLJ 150 -177* would appear to confirm that sexuality is not entirely innate. The distinguished scholar opines that '**contrary to popular belief, sexuality is not exclusively driven by biology; a very significant part of it is socially constructed through legal, cultural and religious forces driven by a politico-economic agenda**.'

Might this then approbate the view of those that call for rights adjudication to consider the social, political and cultural realities of a society?

246. It is the ninth petitioner's affidavit evidence that homosexuals have historically existed in the Ugandan society. This is indeed acknowledged in one of the MPs' statements in the House as reproduced earlier above. However, without in any way diminishing the Court's recognition of and respect for their humanity; we find no evidence to support the notion that homosexuals' existence in the traditional Ugandan society necessarily translates into the practice of homosexuality having been acceptable or even tolerated culturally, or more importantly that it represents an ideal to which contemporary Ugandan society aspires. Quite to the contrary, the third respondent categorically states that in his culture as a Ugandan Jopadhola, homosexuals were frowned upon and punished. That is a far cry from societal acceptance of homosexuality.

247. In **S. v Makwanyane & Another** (supra), communal considerations are referred to as the African concept of *Ubuntu* and human dignity is contextualised within that concept as follows (per Mokgoro, J):

> Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. ... describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

248. *Ubuntu* (or *obuntu* in Uganda) thus emphasizes both the inherent humanity that underpins the right to dignity and the moral sense of decency that is foundational to the community spirit. However, there is nothing in *obuntu* as conceptualised in the **Makwanyane** case to support the view advanced in the ninth petitioner's affidavit that it meant that homosexual persons in Africa were never persecuted or criminalised. The emphasis on group solidarity on issues central to the survival of communities does not appear to support that notion. As alluded to in that affidavit evidence, some homosexual acts might have been undertaken for ritualistic purposes – targeting wealth generation and maintenance of magical and political

powers[51] but, without the benefit of viewing the artistic carvings observed by the deponent of the San people in Zimbabwe to draw our own deductions therefrom, we would respectfully refrain from finding that persons who identify as homosexual were tolerated in traditional African societies. The petitioners bore the burden of proof of that proposition but fell short on discharging it either on *prima facie* basis or at all, the third respondent taking the initiative to discount that proposition using the example of his own culture.

249. The material on record thus lends credence to Carozza's call for respect for diversity and freedom of human cultures,[52] if not to avoid legalising a practice that is completely devoid of social legitimacy, to forestall unnecessary social disquiet, upheaval and instability in nation states that are not quite amenable to the notion of homosexuality as yet. These are considerations that ought not be entirely ignored. Those conflicting interests are at the heart of the rights' adjudication before this Court presently.

250. We take due cognisance of the fact that the global human rights framework is founded on the universality and inalienability of human rights, meaning that they are inherent to all human beings and ought to apply equally and everywhere to all persons. However, with regard to the so-called sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC), the evidence globally and locally does not support this view. Internationally, the absence of consensus on this is reflected in the fact that to date non-discrimination on the basis of the SOGIESC variables has not explicitly found its way into international human rights treaties. Rather, it has been 'vetoed' by a bloc of resistant (UN) member states that has prevented the adoption of a binding declaration or similar instrument to strengthen protections for LGBTI human rights.[53] This undoubtedly bespeaks significant disquiet and reservation on the universality and/ or innateness of those particular rights that calls for attention. The conflicting interests of nation states' contemporary norms, aspirations, expectations and sensitivities, which inherently

[51] See *Namwase Sylvie & Jjuuko, Adrian (editors), 'Protecting the human rights of sexual minorities in contemporary Africa', 2017, Pretoria University Law Press (PULP), p. 48.*
[52] Carozza, P. G, *Subsidiarity as a structural Principle of International Human Rights Law* (supra).
[53] UNDP, PGA (2022), Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for Parliamentarians.

reflect the diversity and freedom of human cultures, should be conscientiously taken into account, with no culture entirely diminishing the dignities of the other.

251. We are also alive to judicial decisions from sister jurisdictions that have decriminalised consensual homosexuality. In this case, we were extensively referred to the Indian Supreme Court case of **Navtej Singh Johar & Others v Union of India & Another (2018) INSC 790**. The background to that case is as follows. The Delhi High Court had in **Naz Foundation v. Govt of NCT of Delhi (2009) 160, Delhi Law Times 277** repealed section 377 of the Indian Penal Code that in effect criminalized homosexuality. This decision was overturned on appeal in **Suresh Kumar Koushal & Another v NAZ Foundation & Others** (supra) by a 2-judge bench of the Indian Supreme Court. A 5-judge Supreme Court bench subsequently revisited the issue in **Navtej Singh Johar & Others v Union of India & Another** (supra), overturned the decision in **Suresh Kumar Koushal & Another v NAZ Foundation & Others** (supra) and decriminalized homosexuality in India. The court *inter alia* held that '**consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality**.' It thus endorsed the view advanced by the Delhi High Court in **Naz Foundation v Govt of NCT of Delhi** (supra) that '**the criminalization of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable**.'

252. In so deciding, Misra, CJ and Khanwilker, J eschewed so-called *social morality* or homogenous, standardised societal ideology in deference to constitutional morality, to wit, respect for human rights and promotion of societal pluralism and harmony. The Supreme Court approbated the following definition of constitutional morality as advanced in **Naz Foundation v Govt of NCT of Delhi (2009) 160, Delhi Law Times 277** and reproduced in **Suresh Kumar Koushal & Another v NAZ Foundation & Others** (supra) at p. 10.

> Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality.

253. The Indian Supreme Court's decision is additionally premised in its perception of individual autonomy as an individuals' right to behave as they wish, provided that they have the consent of their partner. On his part, Chandrachud, J acknowledged the definition of crime as wrongs against the society or wrongs that concerns the society and would attract societal condemnation; but opined that homosexuality only gives pleasure and is therefore not a crime.

254. With utmost respect, it seems to us that the notion of an individual's unfettered sexual autonomy defies the logic of offences like incest, bestiality and other unnatural offences that are still on our statute books. Furthermore, without in any way purporting to address the criminality of homosexuality at this stage, it will suffice to state here that we respectfully do not share the view that the pleasure derived from an action would negate its criminality, otherwise offences like rape and incest would be devoid of criminality.

255. With specific regard to the alleged absence of harm in private, consensual acts of homosexuality between adults, the health data and evidence on record bespeak the contrary. The *Crane Survey Report: High Risk Group Surveys conducted in 2008/9, Kampala* attached to the affidavit of Nakibuuka Noor Musisi in support of the petition, as well as the amicus brief indicate that men who have sex with men (MSM) and transgender people are particularly at risk of HIV infection. The Crane Survey Report posits that 13.7% of MSM in Kampala (Uganda) were found to be living with HIV. A similar trajectory was reported of India in **Suresh Kumar Koushal & Another v NAZ Foundation & Others** (supra), where the National Sentinel Surveillance Data, 2005 put HIV prevalence in MSM at 8% compared to 1% in the general population.

256. The foregoing data discounts the idea that private homosexual acts do not occasion any harm and therefore their criminalisation is arbitrary and unreasonable. Without even pondering the physical harm occasioned by anal sex which in itself imposes a burden on the health system; we take the view that HIV infection ought not to be trivialised. It does pose serious harm to physical health and (as shall be demonstrated under our determination of the right to health) is included by the World Health Organisation (WHO) among factors that contribute to

mental health problems. Furthermore, Article 12(2)(c) of the ICESCR obliges states parties to formulate initiatives that support the prevention, treatment and control of health pandemics, epidemics or endemic diseases. States are therefore under a duty to allocate related budgetary and other provisions in respect of the HIV pandemic. In that context, HIV infection rates place a worrisome disease burden on national health systems and the finite budgets of lower income countries, impede the productivity of a sizeable section of the workforce and pose a threat to countries' economic outlook.

257. That is a most legitimate and compelling state interest that would negate connotations of arbitrariness in the legislation of anti-homosexuality laws and more specifically, Uganda's Anti-Homosexuality Act. The proportionality of the measures highlighted in that Act vis-à-vis its intended objective shall be interrogated under the ensuing issues for determination. However, it will suffice to state here that considerations of national or state interest such as those illuminated above are a constitutional imperative under Article 8A of the Constitution. To that extent, the socio-economic impact of homosexuality does represent a facet of constitutional morality in Uganda.

258. Further elements of Uganda's constitutional morality are to be found in the Constitution itself. Upon close scrutiny of the Indian Constitution it becomes apparent that it is different from the Ugandan Constitution in fundamental aspects. To begin with, the Indian Constitution does not contain the equivalent of Article 8A of the Ugandan Constitution that constitutionally entrenches governance based on the principles of *national interest* and *common good* as articulated in the national objectives and directive principles of state policy. The national interest in that regard denotes considerations that are broader than individual or group ideals or preferences, while common good entails an intersection of interests that similarly transcend individual or group autonomy.

259. Although the Indian Constitution does under Part IV delineate *Directive Principles of State Policy*, Article 37 thereof denies them justiciability before the courts in the following terms:

> **Application of the principles contained in this Part.**— The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

260. The effect of that constitutional provision is that the Indian state may apply those principles but they are non-justiciable. This is in stark contrast to the Ugandan constitutional framework whereby the State is under the obligation to apply the Constitution in accordance with the National Objectives and Directive Principles of State Policy, the judiciary is obliged to interpret the Constitution on the basis of those Objectives and Directive Principles and they are indeed justiciable before the courts. That is the import of Article 8A of the Constitution read together with Objective I(i).

261. Perhaps more importantly, the Indian Constitution does not impress upon the judiciary the equivalent of the duty upon the Ugandan judiciary under Article 126(1) of the Constitution to take into account both the law and the values, norms and aspirations of the Ugandan people in the exercise of its judicial power. This is a question of both law and fact. The law is codified in the Constitution itself, as well as applicable statutory laws. Without pre-empting our determination of the other rights that have been invoked in this case, we have endeavoured through the extensive literature cited above to illustrate that the right to human dignity does not operate in the abstract but rather, as a source of other rights by which it entrenches the inherent dignity of all persons and as a constraint or limitation to individual autonomy by which it advances the societal interest. In the case of Uganda, not only do the values, norms and aspirations of the people reflect societal interest but they are a substantive consideration for the courts under Article 126(1) of the Constitution as highlighted above. Societal norms and aspirations are thus demarcated as another unique facet of Uganda's constitutional morality.

262. Finally, the Indian Constitution contains no provision that succinctly proscribes marriage between persons of the same sex as is enshrined in Article 31(2) of the Ugandan Constitution. This constitutional provision is instructive of the societal views and aspirations of the Ugandan people.

263. The totality of this constitutional order (alongside other constitutional provisions) would define the Uganda's *constitutional morality*. Consequently, we take the view that individual autonomy or the exercise of sexual autonomy ought not to over-ride the national interest as set out in national laws that are anchored in non-repugnant socio-cultural sensitivities as this would delegitimise any resultant law and give way to unnecessary social unrest and disregard for the letter of the law. We find fortitude for this position in the sociological purpose of criminal law whereby individual and collective choices are grounded in structural forces and cultural forms, and laws and criminal justice systems do not exist outside of the relationships, structures, and ideologies of a society. *See* *Smith, Philip & Natalier, Kristin, 'Understanding Criminal Justice: Sociological Perspectives, 2005*. That position is supported by *Lamont, Grant, 'What is a Crime?', Oxford Journal of Legal Studies, Vol. 27 (2007)* where a crime is defined as follows:

> Actions which constitute a public wrong will be classified as a crime. Public wrongs were characterised as a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity.

264. With specific regard to international human rights, in *Teraya, Koji, Emerging hierarchy in International Human Rights and Beyond: From the perspective of Non-derogable Rights'*,[54] it was observed that '**law is not merely a means of dealing with issues, but concerns the purposive self-ordering of society, each articulation of law carries social and value-related implications**.' This observation does recognize that the function of law as a tool of societal self-regulation ought never to be lost in the haze of human rights adjudication. When due regard is extended to legitimate societal considerations, decisions are clothed in a measure of legitimacy and functionality.

265. Turning to the merits of the issue under consideration, the short and long titles of the Anti-Homosexuality Act, the definition of homosexuality under section 1, as well as sections 2, 3 and 6 would appear to reflect the socio-cultural realities of the Ugandan society. Accordingly, we are disinclined to abide the view that they are inconsistent with the right to human dignity. In fact, insofar as it criminalises acts of homosexuality with children, section 3 specifically addresses the dictates of

[54] European Journal of International Law (EJIL), (2001), Vol. 12, No. 5, 917 at 921.

Article 34(1) of the Constitution that grants prominence to the best interest of children in the drafting of laws. The question of consent in section 6 of the Act would certainly be inapplicable to a child under the age of majority therefore there is no constitutional violation in that regard.

266. As to the question of consenting adults, implicit in which is the right to autonomy, we note that limitations to individual or bodily autonomy are not entirely alien to our constitutional order as demonstrated by the restriction on the terminal of the life of an unborn child in Article 22(2) of the Constitution. Borrowing from foreign jurisdictions, in **Dobbs v Jackson Women's Health Organisation, No. 19-1392, 597 U.S. 215 (2022)**, the US Supreme Court considered the nation's history and traditions, as well as the dictates of democracy and rule of law, to over-rule the broader right to autonomy. The court considered the implications of upholding the right to autonomy under the guise of personal dignity, such as conferring a licence for the right to use illicit drugs, and held that it was time to return the permissibility of abortion and the limitations thereon to the people's elected representatives as demanded by the Constitution and the rule of law.

267. That is precisely what was done with the issue of homosexuality in Uganda. With tremendous respect, therefore, we find that sections 2, 3 and 6 of the Anti-Homosexuality Act are not inconsistent with the right to human dignity or the right to culture within the confines of the Ugandan Constitution. We do not find section 17 to violate the right to culture either given that it simply mandates the responsible public official to make subsidiary legislation for the implementation of the Act.

268. We now turn to a consideration of the freedoms articulated in Article 24 within the context of sections 2(1) – (4), 3(1), 9, 11(1) and (2)(d) and 16 of the Anti-Homosexuality Act. The seventeenth to twenty-first petitioners consider the purportedly likely effect of sections 2(1) – (4) and 6 of the Act to be synonymous with cruel mental and physical suffering comparable to the discrimination highlighted under Article 21(1), (2) and (3) of the Constitution. No attempt whatsoever is made to adduce evidence of the incidence of the anticipated effect thus rendering the allegations of exposure of homosexual individuals to blackmail; police entrapment; violence, and denial of facilities, accommodation and opportunities merely speculative.

269. In any case, we defer to the following observation in **Sushil Kumar Sharma v. Union of India & Others (2005) 6 SCC 281** that '**the mere possibility of abuse of a provision of law does not per se invalidate a legislation. It must be presumed, unless contrary is proved, that administration and application of a particular law would be done "not with an evil eye and unequal hand**.' In equal measure, we find that the mere fact that sections 2(1) – (4) and 6 of the Anti-Homosexuality Act might be susceptible to abuse is not sufficient reason to declare them unconstitutional.

270. Meanwhile, it is argued that section 3(1) of the Anti-Homosexuality Act, by prescribing the death penalty for aggravated homosexuality, violates the right to freedom from torture, cruel and degrading treatment on the premise that execution by hanging is inconsistent with Uganda's obligations under Article 5 of the African Charter on Human and People's Rights ("the African Charter'), Article 15 of the UDHR and Article 3 of the ICCPR; and amounts to inherently degrading treatment. It is further argued that by placing an obligation upon the owners of premises to inquire into the sexual orientation of their occupants, tenants, lessees etc, sections 9 and 11(1) and 2(d) have the effect of diminishing the dignity and worth of individuals in the society that identify with a particular sexual orientation on account of severe mental anguish, which is tantamount to cruel, inhuman and degrading treatment under sections 7(1) and (2) of the Prevention and Prohibition of Torture Act. In relation to the provision for rehabilitation under section 16 of the Act, it is argued that victims of conversion practices suffer significant physical harm that is inconsistent with the right to protection against cruel and inhuman treatment enshrined in Articles 24 and 44(a) of the Constitution, and equivalent rights stipulated in Article 1 of the UDHR, Article 2 of the ICCPR and Articles 1, 2 and 16 of the CAT.

271. As quite correctly proposed by the ninth to sixteenth petitioners, torture, cruel, inhuman and degrading treatment are defined in sections 2, and 7(2) and (3) of the Prevention and Prohibition of Torture Act. Torture is defined as follows in section 2 of that Act:

(1) In this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as—

(a) obtaining information or a confession from the person or any other person;

(b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or

(c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.

(2) For purposes of this Act, "severe pain or suffering" means the prolonged harm caused by or resulting from—

(a) the intentional infliction or threatened infliction of physical pain or suffering;

(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(c) the threat of imminent death; or

(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) Without limiting the effect of subsection (1), the acts constituting torture shall include the acts set out in the Second Schedule.

272. On the other hand, cruel, inhuman and degrading treatment is defined as follows in section 7 of the same Act:

(1) .....

(2) For the purposes of determining what amounts to cruel, inhuman or degrading treatment or punishment, the court or any other body considering the matter shall have regard to the definition of torture as set out in section 2 and the circumstances of the case.

(3) In a trial of a person for the offence of torture the court may, in its discretion, convict the person for cruel, inhuman or degrading treatment or punishment, where the court is of the opinion that the act complained of does not amount to torture.

273. Torture is depicted in the Prevention and Prohibition of Torture Act as severe physical pain or suffering that is intentionally inflicted or threatened; the administration of mind-altering substances, or the threat of imminent death of a person. The offences of cruel, inhuman and degrading treatment or punishment,

on the other hand, are depicted in section 7(3) as minor and cognate offences to torture. We consider them so disjunctively on the authority of the majority decision in **Attorney General v Salvatori Abuki** (supra), which construed them so.

274. It becomes necessary to juxtapose the impugned provisions of the Anti-Homosexuality Act against the foregoing legal foundations to ascertain whether in fact there is a violation.

Section 3(1) *Aggravated homosexuality*

A person who commits the offence of homosexuality in any of the circumstances specified in subsection (2) commits the offence of aggravated homosexuality and is liable, on conviction, to suffer death.

Section 9 *Premises*

A person who knowingly allows any premises to be used by any person for purposes of homosexuality or to commit an offence under this Act, commits an offence and is liable, on conviction, to imprisonment for a period not exceeding seven years.

Section 11 *Promotion of homosexuality*

(1) A person who promotes homosexuality commits an offence and is liable, on conviction, to imprisonment for a period not exceeding twenty years.

(2) A person promotes homosexuality where the person –

(a) .....

(b) .....

(c) .....

(d) Knowingly leases or sub-leases, uses or allows another person to use any house, building or other establishment for the purpose of undertaking activities that encourage homosexuality or any other offence under this Act;

Section 16 *Rehabilitation of homosexual*

(1) The court may, upon convicting a person of the offence of homosexuality, order the provision of social services for purposes of rehabilitating the convicted person.

(2) The services referred to in subsection (1) may be provide by the prisons service or by a probation, social and welfare officer of the area where the convicted person is serving his or her sentence.

275. First and foremost, it must be categorically reaffirmed that the constitutionality of the optional death penalty, which remains on Uganda's statue books, was conclusively settled by the Supreme Court in **Attorney General v Susan Kigula & Others, Constitutional Appeal No. 3 of 2006**. In that case, the court observed that the retention of capital punishment was not by itself illegal, unlawful or a violation of international, before deciding as follows:

> The framers of the Constitution did not regard the death penalty as qualifying for the classification of "cruel, unusual, inhuman or degrading treatment or punishment" for purposes of the Constitution, as long as it was passed by a competent court, in a fair trial and confirmed by the highest court as provided for in article 22(1).

276. In turn, Article 22(1) that recognizes the deprivation of life in the execution of a duly passed death sentence, was adjudged in the same case to pose no conflict with Article 44(a) of the Constitution on the premise that the latter provision was never intended to apply to the former for as long as the dictates of due process stipulated in Article 22(1) were adhered to. No evidence was adduced to demonstrate that the death penalty in Uganda is executed by hanging so as to bring it within the purview of the ACPHR decision in **Rajabu & Others v. The United Republic of Tanzania** (supra). We therefore find that section 3(1) of the Anti-Homosexuality Act does not violate Articles 24 and 44(a) of the Constitution.

277. Turning to sections 9 and 11(1) and (2)(d) of the Anti-Homosexuality Act, we understand the petitioners' complaint to relate to inquiries into the sexual orientation of potential tenants, lessees, sublessees etc by owners of premises that would subjects individuals that identify with homosexuality to severe mental anguish, which in turn diminishes their dignity and worth and is tantamount to cruel, inhuman and degrading treatment. We agree that the impugned statutory provisions do place such a duty of due diligence on home/ premise owners as would raise the expectation of inquiries into their prospective tenants' sexual orientation. As to whether that would amount to cruel, inhuman or degrading treatment, section 7(2) of the Prevention and Prohibition of Torture Act directs the Court to the definition of torture and the circumstances of the case. Going by the definition of torture in section 2 of that Act, as well as the definitions of physical, psychological and pharmacological torture in the Second Schedule to that Act,

inquiries into one's sexual orientation would most certainly not entail severe physical pain or suffering that is intentionally inflicted or threatened so as to amount torture.

278. In **The State vs Henry Williams & Others** (supra), it was (compellingly in our view) proposed that a useful approach in determining the offence to which a set of circumstances or actions relate might be to grade the concepts on a sliding scale of suffering inflicted, with torture occupying the extreme position, followed by cruel, inhuman and degrading treatment in that order. Construing the term *inhuman treatment* to denote treatment that would not ordinarily pertain to humans, it follows that *cruel treatment* would inflict yet more pain and/ or suffering than that. We do not consider inquiries into one's sexual orientation to take on such enormity. On the other hand, the natural and ordinary meaning of the term *degrading* would denote either lowering one's own self-perception or having one's estimation lowered in the perception of other people. Again, we do not think inquiries *per se* would denote such degradation. Accordingly, we find no violation of Articles 24 and 44(a) by sections 9 and 11(1) and (2)(d) of the Anti-Homosexuality Act.

279. Meanwhile, the petitioners' objection to the rehabilitation of persons that are convicted of the offence of homosexuality is premised on the notion that such persons are innately homosexual therefore any purported conversion therapy would amount to cruel, inhuman and degrading treatment. That view is supported by a UN independent expert's report that was referred to by the first to eighth petitioners. No attempt is made by the petitioners to define conversion therapy vis-à-vis the sort of rehabilitation envisaged under the Act. On the contrary, any claims to the innateness of homosexuality are thwarted by the third respondent who in his affidavit evidence attests to having counselled children that had been recruited into homosexuality and they abandoned the practice or were in effect rehabilitated. It is also seemingly discredited in *Tamale, Sylvia, 'Exploring the contours of African sexualities: Religion, law and power'* (supra).

280. As stated in our consideration of the right to human dignity, no scientific evidence was adduced by either party as would put the matter to rest. The burden of proof of the allegations advanced in the petition rests squarely with the petitioners. In the absence of more conclusive evidence on the question of

rehabilitation, we are unable to abide the view that rehabilitation amounts to cruel, inhuman or degrading treatment. In any case, no attempt was made either to distinguish the counselling referred to by the third respondent from conversion therapy. We therefore find that it has not been established to the required standard that rehabilitation of homosexual offenders would amount to cruel, inhuman or degrading treatment.

281. In the result, we find that sections 2(1) – (4), 3(1), (2)(c) – (f), (h) and (j), (3) and (4), 5(2), 6, 9, 11(2)(d) and 16 of the Anti-Homosexuality Act do not violate Articles 24 and 44(a) of the Constitution. No submissions were forthcoming in respect of sections 12 and 13(1) therefore they are deemed to have been abandoned. We accordingly resolve ***Issue No. 8*** in the negative.

Issue No. 7: **Right to equality and non-discrimination**

282. The first to eighth petitioners contend that the Anti-Homosexuality Act in its entirety and by extension the impugned provisions, are expressly and inherently discriminatory against LGBTQI+ people. In their view, the Act's purpose as stated in its title criminalizes homosexuality insofar as it creates new offences that violate the right to equality of LGBTQI+ persons, while introducing new variants of and penalties for pre-existing offences that are equally discriminatory.

283. The petitioners argue that the Act targets homosexuality and LGBTQ+ persons by purporting to address vague and unsubstantiated claims that are rooted in homophobic myths and fear-mongering, such as the alleged threat to family values. It is argued that in so doing, the Act, by its mere existence, legitimizes and fuels stigma, prejudice and violence against LGBTQI+ persons, as seen for example in the increased reports of violent attacks, forced evictions, homelessness, harassment and abuse of LGBTQI+ individuals since its enactment.

284. The petitioners further argue that the right to equality and freedom from discrimination are enshrined in Article 21 of the Constitution, Articles 1, 2 and 7 of the UDHR, Articles 2, 3 and 26 of the ICCPR, Articles 2 and 15(1) of the CEDAW, and Articles 2, 3 and 19 of the ACHPR. Furthermore, that the constitutional guarantee of equality of all persons in Article 21(1) extends to minority groups, such as LGBTQI+ persons. This, in their view, was recognised by domestic courts

in Uganda in the cases of *Kasha Jacqueline, David Kato Kisule & Onziema Patience v Rolling Stone Ltd and Giles Muhame, HCMC No. 163 of 2010* and *Victor Juliet Mukasa & Another v. Attorney General, HCMC No. 247 of 2006*.

285. In addition, the first to eighth petitioners contend that the major human rights treaties to which Uganda has acceded recognise that the prohibition against discrimination on the basis of sex encompasses discrimination on grounds of sexual orientation. The petitioners cite the UN Human Rights Committee (HRC), which in **Toonen v Australia), UNHRC Communication No. 488/1992, 31 March 1994** established that the prohibition on "sex" discrimination in the ICCPR encompasses discrimination on the basis of sexual orientation. A similar approach is purported to have been adopted by treaty bodies set up under the International Convention on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child, and the Convention on the Elimination of Discrimination Against Women (CEDAW), all of which have been ratified by Uganda. Furthermore, that several other international human rights bodies have affirmed this view thus underscoring the unequivocal right of LGBTQI+ persons to equality and protection from discrimination under Uganda's international law obligations.

286. Reference in that regard is made to similar findings of the African Commission on Human Rights in **Zimbabwe Human Rights NGO Forum v Zimbabwe, Communication No. 245/2002, page 169**, where it was observed that the aim of Article 2 of the ACHPR is to ensure equal treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation. Reference is further made to the recent Kenyan Supreme Court decision in **Non-Governmental Organisations (NGOs) Co-ordination Board v Eric Gitari & 4 Others [2023] KESC 17 (KLR) para 17** where it was held that LGBTQI+ persons were entitled to constitutional protection against discrimination, noting that the use of the word 'sex' does not connote the act of sex *per se* but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. Similarly, in **Navtej Singh Johar v Union of India** (supra), the Supreme Court of India took the view that logic demanded that discrimination on the grounds of sexual orientation should be treated as falling

within the meaning of discrimination on the grounds of sex. This Court is urged to follow those decisions.

287. The first to eighth petitioners reiterate their earlier misgivings about section 16 of the Anti-Homosexuality Act, urging that by empowering courts to force a homosexuality convict to undergo rehabilitation, it breaches the right of LGBTQI+ persons to equal treatment and protection against cruel and inhuman treatment. Having extensively interrogated this question under our determination of the preceding issue, we decline the invitation to revisit it and do abide our earlier decision on it.

288. In turn, the ninth to sixteenth petitioners argue that, by criminalising consensual same-sex sexual activity among adults in private, the impugned provisions of the Anti-Homosexuality Act contravene the right to equality before the law without discrimination. It is their contention that the offences introduced by the Act target a specific social group expressly identified as "*homosexual*" and defined as such in section 1 of the Act. They do also question the fact that the impugned offences apply irrespective of the ages of the persons involved, whether the act is committed in public or private and regardless of whether there was or wasn't consent. To that extent, sections 1, 2 and 3 of the Act are opined to afford differential and unequal legal treatment to homosexuals as opposed to heterosexual members of society on the basis of their sexual orientation.

289. The petitioners assert that the right to equality before the law is espoused in Article 21 of the Ugandan Constitution, and Article 26 of the ICCPR, which stipulates that '**all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.**' They reiterate the assertion that 'sex' has been broadly construed by the HRC in **Toonen v Australia** (supra) to include sexual orientation. Similarly cited is the decision in **NGOs Co-ordination Board v Eric Gatari & 4 Others** (supra). A related decision is to be found in the Botswana High Court case of **Letsweletse Motshidiemang v Attorney General MAHGB-000591-61**.

290. The ninth to sixteenth petitioners thus urge this Court to find that sections 1, 2, 3 and 6 of the impugned Act are inconsistent with and in contravention of the right

to equality and freedom from discrimination enshrined in Articles 2(1) and (2), 8A, 20(1) and (2), 21(1) and (2), 23, 24, 27, 44, 45 and 287 of the Constitution, as well as Objective XIV, XX, XXVIII of the National Objectives and Directive Principles of State Policy.

291. In relation to sections 12 and 13 of the Act, the ninth to sixteenth petitioners contend that they are discriminatory given their differential treatment of persons convicted of homosexuality as compared to those convicted of other sexual offences. The petitioners assert that no other penal law bars persons convicted of defilement from employment in a child care institution or subjects them to disclosure of their conviction record when seeking employment in those institutions. It is argued that the right to equality extends to all spheres of life, including the sourcing of employment. They thus invite the Court to find that sections 12 and 13 of the impugned Act are inconsistent with and in contravention of Objectives XXVIII(i)(b) of the National Objectives and Directive Principles of State Policy and Articles 2(1) & (2), 8A, 20, 21(1) & (2), 45 and 287 of the Constitution.

292. The legal arguments of the seventeenth to twenty-first petitioners replicate the foregoing contestations, but are emphatic on section 6 of the Act eroding the right to bodily autonomy in violation of Articles 21 and 43(2)(c) of the Constitution. The petitioners further assert that the criminalisation of sexual acts on the basis of sexual orientation rather than proven harm occasioned by the act contravenes the principle of equality under Article 21(1) & (2) of the Constitution. They cite **Christopher Martin Madrama Izama v Attorney General; Constitutional Appeal No. 01 of 2016** for the proposition that sexual orientation is an analogous ground of discrimination that is protected under Article 21(2) and (3) of the Constitution. Reference is further made to **National Coalition for Gay and Lesbian Equality & Another v The Minister of Justice** (supra) and **The President of the Republic of South Africa & Another v John Philip Peter Hugo; Case No: CCT 11/96** for what is termed as the constitutional test of discrimination.

293. It is opined on the petitioners' behalf that the impugned statutory provisions target homosexual individuals with no legitimate purpose but to entrench existing

prejudice and discrimination against homosexual individuals on the basis of sexual orientation. Furthermore, that the right to equality and freedom from discrimination is not one of the non-derogable rights under Article 43 of the Constitution, but any limitation in respect thereof would shift the legal burden to the respondents for justification in accordance with **Charles Onyango Obbo & Another v Attorney General** (supra). The Court is invited to find sections 2(1) – (4) and 6 of the Anti-Homosexuality Act to be inconsistent with and in contravention of the right to equality and freedom from discrimination embedded in Articles 21(1), (2), (3) and 43 (2)(c) of the Constitution.

294. Conversely, the first respondent contends that the Anti-Homosexuality Act was enacted majorly to protect children and vulnerable persons, and therefore each section of the Act is premised on several corresponding provisions of the Constitution and other laws. It is argued that the Act criminalizes same-sex acts and the promotion of homosexuality in order to protect children and the posterity of the family unit in accordance with Article 31 of the Constitution and Objective XIX of the National Objectives and Directive Principles of State Policy. State Counsel deny any targeting of homosexuals under the Act, arguing that the fact of being a homosexual is not an offence thereunder; rather it is the same-sex sexual acts that are criminalised.

295. It is further argued that allegations of discrimination that invoke Article 21 of the Constitution must be grounded in the parameters delineated thereunder, and homosexuality is not one of them. In State Counsel's view, the accommodation of the petitioners' assertions under Articles 21(3) and 32 of the Constitution would be contrary to the genre of parameters specified in the Constitution and would defeat the *ejusdem generis* rule. It is argued that the framers of the Constitution only envisaged gender in the sense of the male and female gender and not same-sex gender. They propose that *sex* is distinguishable from *sexual orientation*, the former meaning the biological state of a person as either male or female or the dominant trait of an inter-sex person, while the latter (sexual orientation) means a person's identity in relation to the sex to which the person is sexually attracted. It is thus argued that not only are the two terms fundamentally different, the petitioners' definition of sex to include sexual orientation has no basis under

Ugandan law. The first respondent cites Article 3 of the UN Declaration on Protection of Human Rights for the proposition that domestic law is the framework within which human rights are enjoyed and in which human rights promotional activities should be conducted.

296. In addition, the first respondent contends that insofar as Article 31(2a) of the Constitution prohibits same-sex marital relations, non-marital same-sex relations are by implication prohibited as well, and sections 2 and 10 of the Act simply operationalise that constitutional provision. It is argued that states are mandated to enact laws that respect the values, norms and aspirations of the people of a particular society, and since same-sex sexual practices do not reflect the norms and aspirations of the Ugandan people, they are unconstitutional and in contravention of the supremacy of the Constitution.

297. In the first respondent's view, the petitioners have grossly misdirected themselves in their interpretation of Article 21 of the Constitution as an unlawful act cannot be declared constitutionally legitimate on grounds of equality before the law. Particularly, where it is prohibited by the same Constitution and laws enacted thereunder. It is argued that whereas equality before the law and freedom from discrimination are constitutionally guaranteed, the same Constitution does in Article 43(2)(c) permit rights limitations if shown to be '**acceptable and demonstrably justifiable in a free and democratic society**.' *See* ***Madrama v Attorney General*** *(supra).*

298. The first respondent further contends that Article 3 of UDHR ought to be read together with Article 29(2) of the same instrument, which permits '**such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements or morality, public order and the general welfare in a democratic society**.' Furthermore, the first respondent construes Article 16(1) of UDHR, which stipulates that men and women of full age have the right to marry and found a family, to mean that the UDHR recognizes that marriage must be heterosexual rather than homosexual.

299. The first respondent cites Articles 2, 3 and 26 of the ICCPR to argue that the ICCPR restricts the grounds on which discrimination is disallowed to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. So that, any additional grounds not expressly stated must be substantially similar to those that are listed therein. It is thus argued that the petitioners' assertion that private same-sex conduct among consenting adults qualifies as a ground for non-discrimination under the cited international law provisions is misconceived. Rather, consenting to commit a crime would make the participants conspirators under criminal law. Insofar as Articles 2, 3 and 19 of the ACHPR are similarly silent on sexual orientation as a factor of discrimination, the petitioners' claim that they provide for the right of consenting adults to engage in same-sex sexual conduct is equally opined to be misconceived and untenable.

300. In addition, the first respondent contends that Uganda is in full compliance with the CEDAW as demonstrated by the enactment of laws that domesticate the principles enshrined therein, such as Articles 31, 32 and 33 of the Constitution. It is argued that the Anti-Homosexuality Act is not in contravention of either the Ugandan Constitution or CEDAW, and the assertion by the petitioners that Articles 2 and 15(1) of CEDAW delineate the right of consenting adults to engage in consensual same-sex sexual conduct is false and misleading.

301. The first respondent therefore maintains that sections 2(1) – (4), 3(1) and (2)(c) – (f), (h) and (j), 3(3) and (4), 5(2), 6 and 16 of the Anti-Homosexuality Act do not violate the right to equality and freedom from discrimination guaranteed under Articles 21(1) – (4), 32(1), 43(2)(c) and 45 of the Constitution.

302. The second respondent similarly argues that the right to equality and freedom from discrimination as enshrined in the Ugandan Constitution does not envisage freedom from discrimination on grounds of sexual orientation and neither is it absolute. In his view, the drafting history of Article 21 makes it clear that sexual orientation was never intended to be a ground for non-discrimination and therefore this Court cannot read this ground into the Constitution contrary to the clear intention of its framers as this would amount to a judicial amendment of the Constitution. This argument is anchored in the majority decision in **Madrama v**

Attorney General (supra) where the court declined to read '*age*' into the prohibited grounds of discrimination under Article 21 of the Constitution.

303. Additionally, the protection of rights is opined to be the primary objective of the Constitution but limitations to their enjoyment are a recognised exception to rights protection, and is therefore a secondary objective. In the second respondent's view, the primary objective may be dominant but it can be overridden in exceptional circumstances as outlined in the secondary objective. The second respondent contends that Article 43(1) of the Constitution articulates such exceptional circumstances to include conduct prejudicial to or in violation of the protected rights of others and breach of social values categorized as public interest. In his estimation, that constitutional provision highlights homosexuality as one of the exceptional circumstances to the right to equality and freedom from discrimination, and to decide otherwise would gravely endanger the community/public interest of the wider Ugandan society.

304. Similarly, the third and fourth respondents contest the petitioners' attempt to define the word '*sex*' as used in Article 21 of the Constitution to include '*sexual orientation*'. They contend that the decision of the Human Rights Committee in **Tooren v Australia** (supra) has no binding authority on states parties unless it has been debated, adopted by resolution of the UN General Assembly and confirmed by the UN Security Council as stipulated under Article 10 of the UN Charter. It is therefore proposed that the Committee's interpretation of the word *'sex'* to include '*sexual orientation*', as relied upon by the Petitioners, would not bind Court. At any rate, it is argued that Article 51 of the ICCPR lays out the procedure for amending any part of the Convention or its interpretation and there is no evidence that any such amendment has ever been undertaken so as to draw the interpretation that the Petitioners would like this court to make.

305. The third and fourth respondents fault a related interpretation of the terms *sex* and *sexual orientation* in the Kenyan case of **NGOs Co-ordination Board v Eric Gatari & 4 Others** (supra) and Botswana case of **Lestweletse Motshidiemang v Attorney** (supra) for not revealing the basis of that interpretation yet they pertain to a different set of circumstances from those that obtain before this court. The assertion that same-sex attraction is an innate part of personal identity is contested

by the said respondents, who propose that it is a result of character and personal choice. In their view, issues concerning the cultural sensitivities of the Ugandan people should be a preserve of legislative debate and decision.

306. This Court is urged to apply a purposive interpretation to the word sex in Article 21(2) and (3) to deduce what is opined to have been the intention of the framers of the Constitution that *sex* as used in Article 21 pertains to male or female. Reference in that regard is made to this court's usage of that term in **Law and Advocacy for Women in Uganda vs Attorney General [2007] UGSC 71**.

307. In rejoinder, the petitioners maintain that Article 21 of the Constitution has its foundations in a number of international legal instruments and the decisions of treaty bodies created thereunder, which the Court is urged to abide in accordance with Article 287 of the Constitution. They reiterate their view that the HRC decision in **Toonen v. Australia** (supra) is particularly instructive to the interpretation of the word sex to include sexual orientation in order to give Articles 21, 45 and 287 a dynamic, progressive, liberal and flexible interpretation. This is opined to have been the approach adopted by the Kenyan Supreme Court in **NGOs Co-ordination Board v Eric Gatari & 4 others** (supra), which was cited with approval by the Uganda Supreme Court in **Madrama v Attorney General** (supra). The same approach is opined to have been inadvertently adopted in **Lestweletse Motshidiemang v Attorney General** (supra).

308. In response to the view by the first respondent that international law treaties and principles cannot be enforced by a domestic court unless the treaties have been domesticated through an Act of Parliament, the petitioners contend that the correct position of the law regarding recognition, enforcement and applicability of international human rights instruments, treaties and conventions to which Uganda is a state party was stated by the Supreme Court in **Uganda v Thomas Kwoyelo Constitutional Appeal No. 1 of 2012**.

309. In the petitioners' estimation, it is immaterial whether or not sexual orientation is or isn't an innate state of personal identity given that a number of the prohibited grounds of discrimination that are listed under Article 21(2) of the Constitution are not innate attributes either. These include the parameters of creed, religion, social

or economic standing, and political opinion, which are influenced by a myriad of factors and are susceptible to change. In conclusion, the petitioners fault the respondents for not applying a rights limitation analysis to support their reliance on Article 43(2)(c) of the Constitution. Reference in that regard is made to **Charles Onyango Obbo & Another v Attorney General** (supra).

310. Given its vitality to the determination of this issue, we deem it necessary to establish a common understanding of the term '*sexual orientation*.' Homosexuality has been defined in section 1 of the Anti-Homosexuality Act to mean '**the performance of a sexual act by a person on another person of the same sex**,' while a '*homosexual*' is '**a person who engages in an act of homosexuality**.' Being homosexual is a facet of personal sexual orientation which, according to the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006*, means '**each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individual of a different gender or the same gender or more than one gender**.' The Anti-Homosexuality Act itself defines sexual orientation as '**a person's identity in relation to the sex to which the person is sexually attracted**.'

311. As to whether the right to equality and freedom against discrimination guaranteed by Article 21 of the Constitution includes sexual orientation, we advert to the Constitution itself. Article 21 of the Ugandan Constitution sets out the right to equality and freedom against discrimination in the terms below:

> *Equality and freedom from discrimination*
>
> **(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.**
>
> **(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.**
>
> **(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.**

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

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

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

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

(5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution. *[Emphasis added]*

312. We defer to the principle of constitutional interpretation that has been termed *'the rule of harmony'*, *'the rule of completeness and exhaustiveness'*. It advances the proposition that the entire Constitution ought to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. *See:* ***Paul Kawanga Ssemwogere & Another v Attorney General Constitution Appeal No 1 of 2002*** *(SC) and* ***Attorney General of Tanzania v Rev Christopher Mtikila [2010] EA 13***. Accordingly, we are obliged to identify all the provisions of the Constitution that have a bearing on the issue of "homosexuality", "sex" and "sexual orientation" and harmonise them. These are as follows:

31. Rights of the family.

(1) A man and woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age—

(a) to found a family; and

(b) to equal rights at and in marriage, during marriage, and at its dissolution.

(2) Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.

(2a) Marriage between persons of the same sex is prohibited.

(3) Marriage shall be entered into with the free consent of the man and woman intending to marry.

(4) It is the right and duty of parents to care for and bring up their children.

(5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law. *(Added emphasis)*

45. Human rights and freedoms additional to other rights

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.

313. It thus becomes apparent that the interpretation of the term "*sex*" in Article 21 to include "*sexual orientation*" would cause a conflict with Article 31(2a) of the Constitution which expressly prohibits same sex relationships. This would be inconsistent with the rule of harmony in constitutional interpretation. As far as relevant to the matter before us, the protection against discrimination as set out in Article 21 of the Uganda Constitution would appear to have been limited to *sex* in the sense of gender. Indeed, even if that term was not defined by the Constitution itself, its ordinary meaning has been given by *Black's Law Dictionary, Eighth Edition, 2007 Reprint,* to be '**the sum total of the peculiarities of structure and function that distinguish a male from a female organism**.' It is therefore our finding that in the context of the Ugandan Constitution, the term *sex* does not include sexual orientation.

314. We are alive to the fact that not all same-sex relations result in marriage but, as shall be demonstrated, the drafting history of Articles 21 and 31 of the Constitution supports the view that Article 31 sought to outlaw same-sex relations. As stated earlier in this judgment, the legislative history of the Constitution and the history of the country are a relevant and useful guide to constitutional interpretation. *See:* ***David Welsey Tusingwire v The Attorney General*** *(supra) and* ***Okello Okello John Livingstone & 6 Others v The Attorney General & Another*** *(supra).*

315. In an article *Mujuzi, Jamil Ddamulira, 'The drafting history of the provision on the right to freedom from discrimination in the Ugandan Constitution with a focus on the grounds of sex, disability and sexual orientation, International Journal of Discrimination and the Law, pp. 63, 64*, the drafting history of Articles 21 and 31 of the Ugandan Constitution were summed up thus:

Gay men and lesbians

The Odoki Commission Report is silent on the views that people expressed on the right to freedom from discrimination on the ground of sexual orientation. The report does not include any statement

on whether people opposed or supported discrimination against others on the ground of sexual orientation. As has been illustrated above, the draft provision on equality and freedom from discrimination did not prohibit discrimination on the ground of sexual orientation. However, during the proceedings in the Constituent Assembly one delegate declared that the people he represented had instructed him to ensure that the Constitution which the delegates

> *'shall come up with at the end of the day will include a provision that no person shall be unfairly discriminated against, directly or indirectly on grounds of race ... tribes, clans, gender, sex, ethnic social, colour ... sexual orientations. At the moment we are fine here but in future as we know there will be people of different sexual orientations. So they too should be protected (interruption) – Yes, lesbians and homosexuals ..., etc.'*

The delegate's statement seemed to suggest that in July 1994 there were no lesbians and homosexuals in Uganda. That is why he submitted that at the moment they were 'fine' but that as everybody knew 'in the future there will be people of different sexual orientations.' The submission that in 1994 there were no people in same-sex relationships in Uganda is not supported by any evidence. It has to be remembered that as early as 1950 the penal code criminalized sexual intercourse between people of the same sex.

It is evident that the suggestion that the Constitution should prohibit discrimination on the ground of sexual orientation was not welcomed or supported by most of the delegates, and that explains why the delegate who made the submission was interrupted. Consequently, when the provision on equality was enacted, it expressly excluded the prohibition of discrimination on the ground of sexual orientation. When it came to the issue of marriage, the [Constituent Assembly] delegates made it very clear that marriage should be entered into between men and women and, as one of the delegate expressly put it, 'to avoid homosexual and lesbian marriages creeping into our society, we need to say "the man and woman intending to marry" ... Let us be specific and say the man and the woman to avoid Sodom and Gomorah coming in our society.' (Applause).

It is evident that the [Constituent Assembly] delegates were strongly opposed to same-sex marriages. It would have been too optimistic to expect the delegates to support same -sex marriages when they had clearly opposed the inclusion of sexual orientation as one of the grounds upon which a person may not be discriminated against. Thus, when the provision on marriage was included in the Constitution it provided that '[m]en and women of the age of eighteen years and above have the right to marry and to found a family.

316. From the above summation of the drafting history of Articles 21 and 31 of the Constitution, it is crystal clear that there was a deliberate omission of sexual orientation as a parameter on the basis of which discrimination could be inferred. Although the issue of sexual orientation had arisen in the Constituent Assembly, it

was debated and overwhelmingly rejected by the framers of the Constitution. Article 31 of the Constitution was the subject of review by the Ugandan Parliament ten years later after the promulgation of the 1995 Constitution. Even then, the wording of the original Constitutional Amendment Bill was considered to be directive on marriage generally, rather than prohibitive of same-sex marriage. Members of Parliament were of the view that this approach did not effectively capture the views of the people they represent on the subject of homosexuality. The parliamentary debate eventually yielded the ***Constitution (Amendment) (No. 3) Act, 2005*** that included the current Article 31(2a), which restricts the legality of marriage to heterosexual unions. That prohibitive clause received overwhelming support of over two thirds of the MPs.

317. In the event, given the express prohibition of same-sex marriages in the Constitution, constitutional harmony would dictate that discrimination on the basis of sexual orientation cannot be read into Article 21 of the Ugandan Constitution. Article 21(5) underscores this point when it forestalls such an eventuality in the following terms:

> **Nothing shall be taken to be inconsistent with this article (21) which is allowed to be done under any provision of this Constitution.**

318. Consequently, the legislative history of Articles 21 and 31 of the Constitution leaves no doubt in our minds that sexual orientation was never intended by the framers of our Constitution to be one of the grounds upon which special protection against differential treatment is prohibited by the Constitution of Uganda. The rights guaranteed for the LGBTQ+ persons under Article 21 are those which accrue to them as human beings and not any different from those conferred upon any other human beings by the Constitution.

319. We are aware that society's views of the subject of same-sex relationships has been changing with passage of time the world over. However, as was observed in our determination of *Issue No. 8* above, the evidence before this court indicates that the view reflected in the 2005 Constitutional Review exercise that the heterosexual Ugandan family demands protection, had not fundamentally changed as at the enactment of the Anti-Homosexuality Act. The overwhelming support with

which it was passed by Parliament suggests that the Ugandan society still views marriage and sexual relationships in the "traditional" sense of heterosexual relationships. The values, norms and aspirations of the Ugandan people cannot be entirely ignored in constitutional adjudication. *See Article 126 of the Constitution.*

320. We have carefully considered the authorities cited by the parties in support of their respective legal arguments, for which we are extremely grateful. In **NGOs Coordination Board v E. Gatari & Others; Katiba Institute (Amicus Curiae)** (supra), the Supreme Court of Kenya had occasion to consider whether *'sexual orientation'* is one of the parameters of non-discrimination contemplated under Article 27(4) of the Kenyan Constitution. That provision stipulates:

> ***The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*** *[emphasis ours]*

321. In a split decision (of 3/2 majority), the court held:

> It is our opinion that the use of the word 'sex' under article 27(4) [of the Constitution of the Republic of Kenya, 2010] does not connote the act of sex per se but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. Further we find that the word 'including' under the same article is not exhaustive, but only illustrative and would also comprise 'freedom from discrimination based on a person's sexual orientation'. We, therefore, agree with the finding of the High Court, to wit, an interpretation of non-discrimination which excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination. To put it another way, to allow discrimination based on sexual orientation would be counter to these constitutional principles.

322. We note that the term *'including'* which is part of the wording of Article 27(4) of the Kenyan Constitution was a key determinant of the holding above. As quite correctly observed by the court in that case, the phrase '*on any ground, including…*' suggests that the enlisted grounds are merely illustrative rather than exhaustive and could include several other parameters that are not expressly listed like sexual orientation. However, Article 21 of the Ugandan Constitution (the equivalent of section 27(4) of the Kenyan Constitution) does not have the word '*including'* or any other similar or synonymous term. Furthermore, it is observed that there is no express prohibition of same-sex marriages in the Kenyan Constitution as is the

case with the Ugandan Constitution. On account of those distinguishing features, we are unable to abide the majority decision in that case.

323. On the contrary, we find persuasion in the dissenting opinion in that case, which highlights different countries' legal approach to sexual orientation as the basis for the proposition that there is a distinction between sex and sexual orientation. It was observed (per Ouko, JSC):

> In Angola, a new Penal Code, which replaced their 1886 Code, came into effect in January 2021 and has decriminalised same-sex conduct. It has a non-discrimination provision that includes 'sexual orientation' as a protected ground. In 2015, Mozambique which is regarded as one of the most tolerant countries in Africa towards gays and lesbians repealed colonial-era clause from its Penal Code which outlawed same sex relationships as "vices against nature". Mozambique Labour Law, (law nr. 23/2007) provides for "non-discrimination on grounds of sexual orientation, race or HIV/AIDS status" in addition to granting to "all employees, whether nationals or foreigners, without distinction based on sex, sexual orientation, the right to receive a wage and to enjoy equal benefits for equal work. **What emerges from this analysis is that there is a clear distinction between sex and sexual orientation**. *(Our emphasis)*

324. We similarly refrain from following the South African cases on sexual orientation given that, unlike the Ugandan Constitution that is silent on the term, section 9(3) of the South African Constitution explicitly provides for sexual orientation as a determinant of discrimination. That provision states:

> ***The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, <u>including</u> race, gender, <u>sex</u>, pregnancy, marital status, ethnic or social origin, colour, <u>sexual orientation</u>, age, disability, religion, conscience, belief, culture, language and birth***. [Emphasis ours]

325. Earlier in this judgment we did distinguish the Indian and Ugandan constitutional dispensations, and find no reason to revisit that position. We would only reiterate that to the extent that Article 31(2a) prohibits same-sex marriages, the spirit and letter of the Ugandan Constitution elevates the subject of homosexuality from the ambit of purely *social morality* to the realm of *constitutional morality*.

326. With specific regard to the treatment of sexual orientation in the case of **<u>Navtej Singh Johar v. Union of India</u>** (supra), we note that the court's observation that

sexual orientation is a facet of a person's privacy that in itself is a fundamental right was grounded in a 'non-majoritarian' concept whereby majoritarianism was adjudged not to apply to constitutional rights. Nariman, J, put it thus:

> The very purpose of the fundamental rights chapter of the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such a subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this court to give effect to the rights, among others, of 'discrete and insular' minorities. One such minority [the LGBTQ community] has knocked on the doors of this court as this court is the custodian of the fundamental rights of citizens. These fundamental rights do not depend upon the outcome of elections. And it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism in India. Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes.

327. Given the constitutional prerogative upon Ugandan courts (unlike the Indian courts) to take into account societal values and aspirations in the determination of disputes, we are unable to follow **Navtej Singh Johar v Union of India** (supra) in the resolution of this issue.

328. Consequently, we would disallow the petitioners' claim that the criminalization of the homosexual conduct set out in sections 1, 2(1) – (4), 3(1) and 3(2)(c) – (f), (h), (j), 3(3) and (4) of the Anti-Homosexuality Act violates the right to equality and freedom from discrimination guaranteed under Articles 21(1)(2)(3)(4), 32(1), 43(2)(c), and 45 of the Ugandan Constitution.

329. An additional aspect of the petitioners' contestations with regard to the right to equality and freedom from discrimination relates to the penalties prescribed for breaches of the Anti-Homosexuality Act. These include disqualification from employment in child care institutions under sections 12 and 13 of the Act, the reporting obligations under section 14 and possible rehabilitation under section 16 of the Act. However, submissions on this question were only forthcoming with regard to sections 12 and 13 of the Act. In any event, this Court having pronounced itself on sections 14 and 16 earlier in this judgment, we do not find it necessary to re-open those issues. Furthermore, whereas the first to eighth petitioners plead the alleged inconsistency of sections 12 and 13 of the Act under paragraphs 17 (XX) of their Amended Petition, their legal arguments in respect thereof are advanced

under *Issue No. 12*. Accordingly, they are presumed to have abandoned their claims under this *Issue*.

330. Be that as it may, the ninth to sixteenth petitioners contend that sections 12 and 13 of the Act infringe the right to equality and freedom from discrimination guaranteed by Article 21(1) of the Constitution. They argue that the cumulative effect of sections 12 and 13 of the Act is to extend differential treatment to persons convicted of homosexuality as compared to persons convicted for other sexual offences. For illustration purposes, it is opined that there is no provision in the Penal Code Act or any other law that bars defilement convicts from being employed in a child care institution or being required to disclose their defilement record when seeking employment in a child care institution. The petitioners argue that the right to equality applies to all spheres of life, including when seeking and obtaining employment, and the effect of sections 12 and 13 of the Act is to entrench unequal legal treatment upon conviction for the offence of homosexuality. They therefore urge this Court to find that sections 12 and 13 of the Act are inconsistent with the right to equality and freedom from discrimination guaranteed by the Constitution and International Instruments to which Uganda is a signatory.

331. Conversely, the first respondent contends that section 12 does not bar a convict from seeking employment, the only restriction therein being in relation to employment in an institution that is charged with the care of children and vulnerable persons, which is solely for their safety. In relation to section 13, it argued that the duty upon a homosexuality convict to disclose his or her conviction when applying for employment in a child care institution or any other institution which places him or her in a position of authority or care of a child or other vulnerable person, is intended to protect children and vulnerable people. This is opined to be consistent with the welfare principle embedded in section 3 of the Children Act, Cap 59 and Articles 17(1)(c) and 34(7) of the Constitution. The first respondent anchors his arguments in the authority of **United States v Cardenas, 2007 WL 4249513, Fn. 3 (S.D. FL 2007)** where the purpose of a sexual offenders' register was espoused as follows:

> SORNA's stated purpose is "to protect the public from sex offenders and offenders against children" and to establish "a comprehensive national system for the registration of those offenders.

332. The first respondent asserts that the protection of children and other vulnerable persons is the duty of the State under Article 34(7) of the Constitution, and the impugned provisions of the Anti-Homosexuality Act achieve exactly that.

333. For the avoidance of doubt, sections 12 and 13 of the Anti-Homosexuality Act are reproduced below.

> *12. Disqualification from employment upon conviction*
>
> **A person who is convicted of the offence of homosexuality or aggravated homosexuality shall be disqualified from employment in a child care institution or in any other institution which places him or her in a position of authority or care of a child or a vulnerable person until such time as a probation, social and welfare officer determines that the person is fully rehabilitated and no longer poses a danger to a child or a vulnerable person.**
>
> *13. Disclosure of sexual offences record*
>
> **A person convicted of an offence under this Act shall disclose the conviction when applying for employment in a child care institution or any other institution which places him or her in a position of authority or care of a child or other vulnerable person.**

334. Under Article 17(1)(c) of the Ugandan Constitution, it is the duty of every Ugandan citizen '**to protect children and vulnerable persons against any form of abuse, harassment or ill treatment**.' On the other hand, Article 34 provides for the rights of children, the pertinent aspects of which stipulate as follows:

> *Rights of children*
>
> **(1)** .....
> **(2)** .....
> **(3)** .....
> **(4)** **Children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development.**
> **(5)** **For the purposes of clause (4) of this article, children shall be persons under the age of sixteen years.**
> **(6)** .....
> **(7)** **The law shall accord special protection to orphans and other vulnerable children.**

335. There is no doubt that laws on sexual offences interfere with the right to equality under Article 21 but this right is not absolute. The Anti-Homosexuality Act that limits that right serves a legitimate public interest. The *Siracusa Principles on the Derogation from the International Covenant on Civil and Political Rights* ('the Siracusa Principles') were formulated to clarify when and to what extent a State can limit a human right affirmed by the ICCPR, and how to measure whether the restriction of the right is proportionate to the public safety concern.[55] The Siracusa Principles emphasize that limitations on individual rights are to be narrowly construed, and interference with an ICCPR freedom must not jeopardize the essence of the right concerned; must further a legitimate aim in a manner proportionate with that aim; must be subject to the possibility of challenge to and remedy against its abusive application, and must not be imposed in an arbitrary manner.

336. In our considered view, the child welfare principle articulated in Article 17(1)(c) and 34(7) of the Constitution and the gravity of child-recruitment into homosexuality are unquestionably legitimate objectives. The registration of sex offenders to prevent them from working in child institutions is proportional to and necessary for the furtherance of that goal.

337. We find fortitude for this view in the approach adopted by the European Court of Human Rights (ECtHR) in **Adamson v United Kingdom, Application 4223/98, Decision of January 26, 1999**. In that case, the court considered a challenge to the requirement in the UK Sex Offenders Act, 1997 that persons convicted of sex offenses register information with the police that included their name, date of birth, home address, and any changes of name or home address. Although the ECtHR agreed that the requirement amounted to an interference with private life, it held that the contested measures were tantamount to legal obligations in pursuit of legitimate aims, namely the prevention of crime and the protection of the rights and freedoms of others.

[55] See UN Doc. E/CN.4/1985/4, Annex (1985); 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,' Human Rights Quarterly, Vol. 7, No. 1 (February 1985).

338. With regard to whether the measures were necessary in a democratic society, that is, proportionate to the aims pursued, the court took the view that insofar as the interference with private life only extended to the requirement to register with the police, the interference was proportionate. In so deciding, the court took cognisance of the gravity of the harm that could be caused to the victims of sexual offenses and the absence of evidence presented to it that the individuals under the obligation to register were at risk of public humiliation or attack as a result of this form of registration. The court left open the possibility that if evidence was presented that suggested attacks on registered individuals were connected in any way with the registration process in question, that individuals were at risk of public humiliation or attack, or that the requirement to register would lead to information that is not already publicly available becoming known to the media or the general public, its assessment as to its proportionality or interference with other rights would be different.

339. Similarly, in the matter before us, not only is the protection of children and vulnerable groups of the society a legitimate objective, the intrusions on the right to non-discrimination embedded in sections 12 and 13 of the Act are in our view proportional to that objective of the Act. We therefore find no unconstitutionality.

340. In the result, it is our finding that sexual orientation was never intended by the framers of our Constitution to be one of the parameters in respect of which differential treatment is constitutionally prohibited. Consequently, we do not find sections 1, 2(1) – (4), 3(1) and 3(2)(c) – (f), (h), (j), 3(3) and (4), and 6 of the Anti-Homosexuality Act to contravene the right to equality and freedom from discrimination guaranteed under Articles 21(1)(2)(3)(4), 32(1), 43(2)(c), and 45 of the Ugandan Constitution. On the other hand, the limitation to the right to equality and non-discrimination embedded in sections 12 and 13 of the Act to abide Article 17(1)(c) of the Constitution, and are demonstrably justifiable in a free and democratic society as envisaged under Article 43(2) of the Constitution. ***Issue No. 7*** is accordingly resolved in the negative.

Issue No. 9: **Right to privacy**

341. The first to eighth petitioners propose that a person's sexual orientation and sexual life fall squarely within the constitutional provisions on the right to privacy, which includes a negative aspect – the right to occupy private space free from intrusion by the State, as well as the more positive right to express one's personality and make fundamental decisions about one's intimate relationships. This argument is buttressed by the decision in **Navtej Singh Johar & Others v Union of India & Another** (supra), where Misra, CJ reportedly enjoined constitutional courts to construe constitutions progressively and pragmatically to combat the evils of inequality and injustice and espouse a pluralistic and inclusive society, particularly where the rights of minorities are being restricted. The learned Chief Justice further urged the protection of the dignity and autonomy of every individual, including their choice of partner given the natural and inherent nature of sexual orientation.

342. Suggesting that there is no plausible way that the Anti-Homosexuality Act can be enforced without infringing on the right to privacy of person, home, correspondence and property, the first to eighth petitioners argue that the reporting requirements under the Act have the effect of turning Ugandans into '*key-hole peepers and intruders*' of people's most private spheres in violation of the right to privacy. Reference in that regard is made to **Kasha Jacqueline & Others v Rolling Stone Ltd & Another, Miscellaneous Cause No. 163 of 2010** (HC) where the exposure of the identities and homes of supposedly homosexual persons was adjudged to threaten the right to privacy of person and home. It is thus opined that, given the innately private nature of sexual relations (and not merely the private space in which they ensue), the right to privacy prohibits the State from intruding into the life of the individual by proscribing what consensual sexual activities they may engage in and with whom, unless there is a legitimate reason for proportionate interference.

343. With specific regard to sections 2 and 3 of the impugned Act, it is argued that their arbitrary and unwarranted criminalization of homosexuality interferes with the right to privacy. The petitioners seek to anchor this argument in the Botswana case of **Attorney General . Letsweletse Motshidiemang, CACGB-157-19** (Court of

Appeal), where Penal Code provisions that criminalized homosexuality were adjudged to be out of touch with the changed times; the constitutional right to privacy extending to '*protection of the right to make personal choices about one's lifestyle*', supposedly including one's sexual orientation and sexual relations. Reference is additionally made to the US Supreme Court decision in **Lawrence v. Texas** (supra), where the right to privacy was adjudged to protect same-sex consensual intercourse because of the innately private nature of that act, not simply where it took place. Furthermore, section 14(2) of the impugned law is considered to violate the right to privacy insofar as it expressly negates professional privilege and/ or confidentiality, section 14(5) particularly discriminating against other professions to the extent that it restricts such professional privilege to advocates.

344. It is the petitioners' contention that the impugned statutory provisions violate Uganda's treaty obligations under Article 12 of the UDHR, Articles 1 and 17(1) and (2) of the ICCPR, and Article 22 of the ACHPR. Counsel for the Petitioners assert that the right to privacy affords every individual (including LGBTQI+ persons) a realm of freedom for individual decision-making and activity free from interference, whether from the State or any other person. Deference is made to the decision of the UN Human Rights Committee in **Toonen v Australia** (supra), where it was observed that adult consensual sexual activity in private is covered by the concept of privacy and therefore provisions to the contrary interfere with the right to privacy in violation of Article 17 of the ICCPR.

345. The ninth to sixteenth petitioners substantially echo the foregoing arguments therefore only their additional positions shall be highlighted here. They argue that although the right to privacy in the context of LGBQT persons was upheld in **Victor Juliet Mukasa & Another v Attorney General, Miscellaneous Cause No. 247 of 2006** (HC), sections 1, 2 and 3 of the Anti-Homosexuality Act seek to intrude, with criminal sanctions, into the most private of human conduct, namely sexual behaviour, and in the most private of places – the home. It is suggested that the State has no right to legislate the private sexual conduct of consenting adults.

346. The petitioners contend that sections 9, 11(l) and (2) (d) of the Anti-Homosexuality Act are an unjustifiable interference with the right to property (in

terms of premises offered for use, or let or sub-let) and the right to privacy of property. It is argued that the protection from deprivation of property under Article 26(1) of the Constitution should be construed to extend to interference with the legitimate use of property. Reference in this regard is made to the case of **Abbinett v Fox, 103 N.M. 80 (N.M. Ct. App 1985)** where it was held that a landowner is entitled to use his/her property in a manner that maximizes his/her enjoyment, the only restriction in relation thereto being that the enjoyment must not unreasonably interfere with the rights of adjoining landholders or create a private nuisance. It is opined that consensual same sex relations in private cannot be said to be a nuisance and so limiting ownership and enjoyment of property is unjustifiable.

347. Similarly, insofar as the seventeenth to twenty-first petitioners re-echo all the foregoing arguments, we propose to restrict our highlights to such of their arguments as have not been canvassed by the other petitioners. These petitioners revert to the definition of the term *privacy* in the *Oxford English law Dictionary* to argue that Article 27 of the Constitution protects, secures and guarantees individuals' diverse modes of privacy including the privacy of the individual's bodily autonomy, behaviour, and action, communication, personal data, thoughts and feelings, location and space, as well as the privacy of association and property. Privacy is defined in that dictionary as '***the state of being alone and not watched or interrupted by other persons***.'

348. The seventeenth to twenty-first petitioners argue that the right to privacy is recognized in numerous international human rights instruments to which Uganda is a signatory, is central to the protection of human dignity, pivotal to any democratic society and reinforces other rights such as freedom of expression, information and association. Furthermore, the definition of key terms in the Anti-Homosexuality Act, as well as the provisions of section 2(1) – (4) of the Act are alleged to offend the constitutionally enshrined human rights and freedoms of privacy, equality and non-discrimination. They further argue that the impugned Act should only address non-consensual sexual relations whether in public or private and sexual acts involving minors. In Counsel's view, the perception that sexual orientation is not one of the parameters of discrimination under Ugandan law is misconceived. On the contrary, the enforcement of Section 2 (1) - (4) of the Anti-

Homosexuality Act is opined to expose sexual minorities to blackmail, police entrapment, violence, refusal of facilities, accommodation and opportunities.

349. In their opinion, to the extent that sexual behaviour ensues in private it cannot be said to undermine the purpose of the Anti-Homosexuality Act, which supposedly is to preserve public order and decency, protect the citizen from what is offensive or injurious and provide sufficient safeguards against exploitation and corruption of others. The petitioners further argue that private consensual sex acts do not violate any law, inconvenience any member of the public or offend public order. In any event, it is posited that it is practically impossible to monitor what consenting adults are doing in private without infringing on their rights to privacy, dignity, decency as well as freedom from inhuman and degrading treatment and liberty. This in itself is opined to render the impugned anti-homosexuality law unenforceable and thus unconstitutional.

350. Conversely, the first respondent contends that the right to privacy is not absolute and one cannot invoke privacy to commit an offence. In State Counsel's view, the assertion that the impugned law cannot be enforced without violating the right to privacy is both speculative and unfounded. Reference is made to **Zachary Olum & Another v Attorney General, Constitutional Petition No.6 of 1996** for the proposition that the import of Articles 41 and 43 of the Constitution is that rights are enjoyed subject to the law and the limitations imposed thereunder. Deference is further made to **Paulo Baguma Mugarama v Uganda Revenue Authority, Civil Suit No. 93 of 2014** for the proposition that the right to privacy should be considered on a case-by-case basis without unduly broadening or limiting its scope.

351. The first respondent further contends that to allow the petitioners' interpretation of privacy would be to create a precedent that has a ripple effect on other unlawful acts that ensue in private, such as terrorism, treason, rape, murder and defilement. It is opined that the right to privacy does not translate into immunity from state intervention on commission or reasonable suspicion of having committed an offence. Rather, there are permissible constitutional limitations under Article 43 of the Constitution. The first respondent cites **Andrew Karamagi & Another v Attorney General** (supra) in support of this position. In that case, expounding the

'*limitation on a limitation*' principle, it was held that the limitation on the enjoyment of a protected right in the public interest is in turn restricted to the yardstick that the limitation should be acceptable and demonstrably justifiable in a free and democratic society.

352. The first respondent argues that the duty to report crime that is addressed under section 14 of the impugned law is an established principle of the law and the Act makes no provisions for unlawful entry onto private property; but there is neither a proscription against the use of premises for lawful purposes nor a prohibition against lawful searches under Article 27 of the Constitution. In specific response to the seventeenth to twenty-first petitioners, the first respondent contends that the Act restricts the right to privacy in the public interest and there is nothing whatsoever to suggest that the right to privacy is a non-derogable right. It is argued that in the absence of a right to consensual, same-sex relations in Uganda, there cannot be a violation of any right to privacy under the Act. State Counsel implores the interpretation of Article 27 in a manner that does not ignore the socio-cultural values and ideals of the Ugandan people.

353. The second respondent reinforces the first respondent's arguments above with the contention that in safeguarding the privacy rights of the petitioners, the Court is under a duty to protect the values of Ugandans which do not support the practice of homosexuality and ensure that it does not endorse the infringement of the privacy rights of those that are not aligned with the LGBTQI movement. The second respondent is emphatic that the right to privacy ought not to shield criminal behaviour as by law established.

354. The right to privacy is encapsulated in Article 27 of the Constitution as follows:

> *Right to privacy of person, home and other property*
>
> **(1) No person shall be subjected to—**
>
> **(a) unlawful search of the person, home or other property of that person; or**
>
> **(b) unlawful entry by others of the premises of that person.**
>
> **(2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.**

355. That constitutional provision proscribes unlawful or unauthorised searches of a person, home or property, as well as unlawful entry onto another person's property; and confers freedom from interference with the privacy of one's home or other property or the confidentiality of one's correspondence or communication. We do not find the impugned sections of the Anti-Homosexuality Act to authorise unlawful entry onto, search or interference with a person's body, home or other property, correspondence or communication. The insinuation by the petitioners that such violations are inevitable in the enforcement of the Act descends into the realm of speculation that is unsupported by evidence and therefore untenable.

356. However, the petitioners do also invoke the violation of the right to privacy in its more generic sense to portend that the impugned statutory provisions violate Uganda's treaty obligations under Article 12 of the UDHR, Articles 1 and 17(1) and (2) of the ICCPR, and Article 22 of the ACHPR. Those treaty provisions are reproduced below.

> Article 12, UDHR
>
> **No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.**
>
> Articles 1 and 17, ICCPR
>
> *Article 1:*
>
> **(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.**
>
> **(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.**
>
> **(3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.**

Article 17:

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

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

Article 22, ACHPR

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

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

357. We find Article 1 of the ICCPR and Article 22 of the ACHPR inapplicable to the right to privacy and thus find no violation of those provisions within the concept of privacy. Article 12 of the UDHR and Article 17 of the ICCPR do, however, directly address the right to privacy, *inter alia* proscribing arbitrary interference with a person's privacy or home. Objective XXVIII(i)(b) of the National Objectives and Directive Principles of State Policy obligates the State to respect its treaty obligations. That provision is justiciable within the confines of Article 8A of the Constitution and Objective I(i) of those National Objectives.

358. Having held as we have under *Issue No. 8* that the offence of homosexuality reflects the socio-cultural realities of the Ugandan society, we would defer to the dictates of Article 29(2) of the UDHR which recognises that human rights may be subjected to such limitations as are by law determined solely for the purpose of '**securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society**.' *See also* ***Mr. X v Hospital Z (1998) 8 SCC 296***. We therefore find no violation of the right to privacy in sections 1, 2 and 3 of the Constitution.

359. Meanwhile, the ninth to sixteenth petitioners seek to have the Court read the right to property into the right to privacy of property, but we take the view that these are two separate issues. Section 9 of the impugned Act prohibits property owners

from letting their properties to be used for homosexuality. Similarly, the prohibition in section 11(2)(d) of the Act is directed at property owners that lease their properties in the full knowledge that the lessees intend to use the property for homosexuality or '**for the purpose of undertaking activities that encourage homosexuality or any other offence under this Act**.' The effect of the two provisions is to impose a duty upon the property owners to '*know their lessees*' through due diligence or otherwise so as to refrain from letting their properties to intending offenders. The due diligence checks that would come with such a duty (which in any case are quite commonplace in relation to dealings in property) do not necessarily translate into a breach of the right to privacy of property since they would have been undertaken prior to the acquisition of a proprietary interest in the property due to be leased.

360. However, the same cannot be said of section 14 of the impugned law, which imposes an obligation to report the commission of a crime under the Act or reasonable suspicion thereof, or the intention to commit such a crime. It is agreed in principle that the right to privacy is not absolute but is subject to the law, the human rights and freedoms of others and the public interest, and it certainly would not operate as a shield to crime, protection of health or morals. In fact, Article 17(f) of the Constitution places a duty upon every Ugandan citizen to '**cooperate with lawful agencies in the maintenance of law and order**.' Nonetheless, where professional privilege is eroded in the manner it is under section 14 of the impugned law it would have a ripple effect on other basic human rights.

361. The erosion of professional privilege is undoubtedly inimical to doctor/ patient confidentiality with potentially chilling repercussions for the right to health as underscored in Objectives XIV and XX of the National Objectives and Directive Principles of State Policy that underpin the Constitution. This is appositely demonstrated in **Mr. X v Hospital Z (1998) 8 SCC 296** where the nexus between the right to privacy and the right to health was espoused as follows:

> (The) Doctor/ patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of

> privacy which may sometimes lead to the clash of a person's "right to be let alone" with another person's right to be informed.

362. Admittedly, the right to privacy may be restricted on public health grounds most especially in the wake of health pandemics. The amicus curiae states as much in its amicus brief, recognising that there are exceptions to the confidentiality rule, such as when the safety of the patient or others is at risk or when required by law. An example is given of the mandatory reporting requirements at the height of the COVID-19 pandemic. It is proposed that in such situations, healthcare providers would be expected to balance the duty of confidentiality with the duty to protect patients' well-being, as well as public health.

363. Nevertheless, that would not extinguish the duty upon courts to approach privacy claims that are steeped in the right to health with due regard to those competing interests. Thus, in **Gobind v State of Madhya Pradesh & Others (1975 2 SCC 148** it was observed:

> Privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right.

364. In this case, citing the affidavit of Professor Vinand Nantulya, the amicus brief proposes that doctor/patient confidentiality is recognised as a fundamental medical ethical principle that prohibits disclosure of confidential information to third parties without patients' informed consent. This is intended to retain the privacy of information shared within that professional relationship and maintain trust between the doctor and patient, with better overall health outcomes. Reference in that regard is made to the World Medical Association's Geneva Declaration that includes a commitment to maintaining patient confidentiality as a fundamental ethical duty and has been widely adopted and endorsed; related provisions in the Uganda Medical and Dental Practitioners' Code of Conduct, and the Uganda Nurses and Midwives Council Code of Ethics.

365. Additionally, the Uganda Government did within the confines of Objective XX of the Constitution's National Objectives and Directive Principles of State Policy, and in partnership with civil society organizations led by the Uganda National Health Consumers Organization (UNHCO), formulate a *Patient Rights and Responsibilities Charter,* 2019 ('the Patients Charter'). The Patients Charter is a health sector performance enhancement tool that promotes the rights of patients and empowers health consumers to demand high quality health care.

366. Clause 15 of the Patients Charter stipulates:

> ***Confidentiality and privacy***
>
> *Patients have the right to privacy in the course of consultation and treatment. Information concerning one's health, including information regarding treatment may only be disclosed with informed consent, except when required by law or on court order. Facility management shall make arrangements to ensure that health workers under their direction shall not disclose any matters brought to their knowledge in the course of their duties or their work. Health facility or health worker may however pass on medical information to a third person in any of the following cases:*
>
> *i. That the disclosure is for the purpose of the patient's treatment by another health worker.*
>
> *ii. That disclosure of the information is vital for the protection of the health of others or the public, and that the need for disclosure overrides the interest in the information's non-disclosure.*
>
> *iii. That the disclosure is for the purpose of publication in a medical journal or for research or teaching purposes if all details identifying the patient have been suppressed.*

367. It seems to us, therefore, that any law enforcement considerations that supposedly underlie section 14 would be over-ridden by the need to preserve medical ethics as a vital component of the right to health but, equally importantly, in the interests of positive national health outcomes. Without necessarily forestalling court orders in respect of health-related disclosures, which in any case would be approached on a case-by-case basis, section 14 of the Anti-Homosexuality Act compromises the spirit and letter of this performance enhancement tool that underpins the State's obligation to progressively engender Ugandans' right to quality health services.

368. With specific regard to the general reporting obligation under section 14 of the Act, it is well recognized that the requirement for members of a community to participate in crime control dates fairly back in time. Indeed, English law historically recognized the crime of misprision that made it the duty of every citizen to disclose any treason or felony of which he had knowledge. Nonetheless, the evidential standard that should trigger a reporting duty warrants further interrogation. The standard of reasonable suspicion in a society with a marked aversion to homosexuality is neither just nor pragmatic. It has been most compellingly proposed that the objectives of reporting statutes would be even better served and the harm to professional relationships minimized by changing the evidentiary trigger from '*reasonable suspicion*' to '*clear and convincing*' or, at a minimum, '*more likely than not*'.[56] This perhaps ought to have been the evidential standard that the Ugandan legislature incorporated in the reporting obligations under the impugned law.

369. In any event, it is debatable whether a reporting obligation that seeks to countermand the right to privacy represents a legitimate interest. As is most elaborately demonstrated in the twenty-second petitioner's affidavit, professional privilege aside, the reporting obligation is an affront to the sacrament of penance in the Catholic faith, which depends on a priest's most solemn oath of confidentiality. That petitioner attests to having received persons that identify with homosexuality come for confession before him and is averse to finding himself under a duty to report their confessions. This does appear to be in direct contradiction with the principle of confidentiality that is embedded within the right to practice the Catholic faith as enshrined in Article 29(1)(c) of the Constitution.

370. Furthermore, far from depicting a countervailing public interest, the same petitioner proposes that the reporting obligation in section 14 threatens family cohesion insofar as it urges family members to report homosexual relatives. It is

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[56] See *Thompson, Sandra Guerra, The White-Collar Police Force: "Duty to Report" Statutes in Criminal law Theory, 11 William & Mary Bill of Rights Journal, 3 (2002), p. 58* also found at https://scholarship.law.wm.edu/wmborj/vol11/ iss1/3

not entirely inconceivable, therefore, that a spouse would be obliged to report a bisexual spouse or a parent be obligated to report a homosexual child or vice versa, in direct contravention of the constitutional duty upon society and the State to protect the family. *See Objective XIX of the Constitution.* In any event, section 14 of the Anti-Homosexuality Act is superfluous given the explicit obligation upon citizens in section 17(f) of the Constitution to cooperate with lawful agencies in the maintenance of law and order.

371. In the result, we find no violation whatsoever of Article 27 of the Constitution, neither do we find any inconsistency between sections 1, 2, 3, 9 and 11(2)(d) of the Anti-Homosexuality Act and the right to privacy enshrined in Article 12 of the UDHR and Article 17(1) of the ICCPR. However, we find section 14 of the Act inconsistent with the right to privacy encapsulated in Article 12 of the UDHR and Article 17 of the ICCPR; the right to health as enshrined in Objectives XIV(b) and XX of the National Objectives and Directive Principles of State Policy, and Article 12(1) of the ICESCR; the protection of the family as envisaged in Objective XIX of the National Objectives, and freedom to practice any religion as encapsulated in Article 29(1)(c) of the Constitution. Consequently, ***Issue No. 9*** partially succeeds.

Issues 10 & 11: **Right to freedom of expression, thought and association**

372. We propose to address *Issues 10* and *11* concurrently given that they both invoke the right to freedom of thought, conscience and belief and freedom of association as enshrined in Article 29(1)(b) and (e) of the Constitution. In addition, the right to freedom of speech and expression and the freedom to practice any religion are separately contested under *Issue No. 10.* Having disposed of the twenty-second petitioner's challenge to the right to freedom of belief and religion under our determination of *Issue No. 9* above, we find no reason to reconsider that issue here. We abide our decision that section 14 is inconsistent with Article 29(1)(c) of the Constitution.

373. With regard to the outstanding contestations, the first to eighth petitioners propose that sections 2, 3, 11 and 13 of the Anti-Homosexuality Act violate the rights to freedom of expression, assembly and association as guaranteed under the Constitution, and various human rights instruments like the ACHPR, UDHR

and ICCPR. Sections 2 and 3 of the impugned Act are criticized for violating the right to freedom of expression, which is opined to include the freedom to express same-sex love and sexual intimacy.

374. It is argued that the scope of the right to freedom of expression under Article 19(2) of the ACHPR extends to the right to receive and express opinions within the confines of the law; hence the proposition of the African Commission on Human and Peoples' Rights that the right to freedom of expression **'shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice**.'[57] Therefore, it is opined, section 11(2)(b) of the Act infringes on the right to freedom of expression insofar as it prohibits people from sharing any information that depicts homosexuality and LGBTQ+ people in a positive light. Counsel contend that the tangible effect of the impugned provision is already being felt by people like the fourth petitioner who at paragraphs 66 to 68 of her affidavit avers that her research, studies and publications in the field of sexual and gender minorities, feminism and homophobia have been criminalized by virtue of the impugned provisions.

375. The petitioners further argue that the criminalization of the promotion of homosexuality under section 11 of the Act, particularly the criminalization of knowingly advertising, publishing, printing and broadcasting any material that promotes or encourages homosexuality, contravenes the right to freedom of speech, expression and thought that is protected under Article 29(1)(a) and (b) of the Constitution. Counsel cite **Charles Onyango Obbo & Another v Attorney General** (supra) for the proposition that the expression of ideas however '*unpleasant and distasteful*' enjoys constitutional protection. Reference is also made to the European Court of Human Rights case of **Bayev & Others v Russia** (supra) and the Belize Supreme Court case of **Caleb Orozco v Attorney General of Belize, Claim No. 688 of 2010**, both of which observe that criminalization of the expression of views that the majority deem to be immoral is contrary to the right to freedom of expression.

[57] Resolution No. ACHPR/RES.275 (LV) 2014

376. The first to eighth petitioners contend that by criminalizing the operation of any organisation that promotes, encourages or seeks to normalise homosexuality, section 11(2)(e) of the impugned Act contravenes the right to freedom of association and assembly enshrined under Article 29(1)(d) and (e) of the Constitution and thus prevents LGBTQ+ people and their allies from forming associations to advocate for their interests. It is argued that the right to freedom of assembly and association should be extended to members of the LGBTQ+ community even where homosexuality is criminalized. Reference in that regard is made to a resolution of the UN Human Rights Council; a report of the African Commission on Human and People's Rights; **Non-Governmental Organisations (NGOs) Coordination Board v Eric Gitari & Others** (supra) and **Rammoge v Attorney General of Botswana, No. 0175 of 2013**.

377. Without quite elaborating how, the petitioners further argue that by prohibiting property owners from allowing their property to be used for homosexual activities or activities so perceived, section 11(2)(d) of the Act is an unconstitutional restriction on the right to freedom of assembly.

378. Similarly, the ninth to sixteenth petitioners argue that section 11 of the impugned Act has the effect of criminalizing the receipt and dissemination of views deemed to be favourable to or promoting homosexuality or the LGBTQ+ community, which impedes the right to freedom of expression, conscience and belief. The petitioners rely upon the fifth petitioner's averment that there is a risk that the impugned provisions of the Act create an environment where only those averse to homosexuality would have unlimited access to public and private platforms to broadcast, publish, distribute and disseminate their views as absolute dogma while those who express opposite view points are subjected to criminal sanctions.[58] The petitioners additionally argue that section 11(1) and (2)(b) and (e) of the Act also violate the right of freedom of thought, conscience, belief and expression as guaranteed under Article 29(1)(a) and (d) of the Constitution.

379. The first to eighth petitioners' contestations with regard to the inconsistency of section 11(2)(e) of the impugned Act with the right to freedom of association and

[58] See paragraphs 12 – 15 of Andrew Mwenda's affidavit in support of the petition.

assembly enshrined under Article 29(1)(d) and (e) of the Constitution is echoed by the ninth to sixteenth petitioners. We do not find it useful to repeat them at length, save to reiterate some key points. On the authority of **Rammoge v Attorney General of Botswana** (supra), it is proposed that LGBTQ+ associations seek to advocate changes in the existing laws so as to ensure legal protection for LGBTQ+ persons and therefore the criminalisation of such organisations is unconstitutional. The twenty-second petitioner similarly argues that section 11(2)(e) of the Act has the effect of preventing religious leaders from forming or joining associations that advocate for LGBTQ+ rights.

380. The ninth to sixteenth petitioners further argue that the criminalization of LGBTQ+ associations also contravenes Article 36 of the Constitution which grants minorities the right to participate in decision-making processes and have their views and interests taken into account in the making of national plans and programmes. It is opined that LGBTQ+ persons are sexual minorities but were never afforded an opportunity to be heard before enacting the impugned provisions. We did address the question of sexual minorities participation in the enactment of the impugned law under our interrogation of *Issue No. 3* and do not consider it necessary to reconsider it here. We abide our earlier decision.

381. No legal arguments were forthcoming from the seventeenth to twenty-first petitioners on this *Issue*, or from any of the petitioners in relation to sections 5, 6, 7 and 13 of the impugned Act. The challenge to those statutory provisions is therefore presumed to have been abandoned by the petitioners.

382. Conversely, the first respondent contends that the right to freedom of expression or freedom of association does not extend to views or opinions that contravene the law or aid and abet crime. It is argued that homosexuality was already criminalized under section 145 of the Penal Code Act and therefore it is unlawful to propagate views or engage in activities that promote a criminal offence. However, on account of the funding and promotion of homosexuality by some non-governmental organisations (NGOs), the annual police crime reports continually reported increased cases of conduct prohibited under section 145 of the Penal

Code Act, such as sodomy, lesbianism and bestiality.[59] This, in State Counsel's view, necessitated the legislation of provisions against homosexuality.

383. In the same vein, it is the first respondent's contention that the right to freedom of association, assembly or civic participation delineated in Article 29(1)(d) and (e) of the Constitution may only be exercised for a lawful purpose and therefore the impugned provisions are justifiable to the extent that they proscribe the work of associations engaged in unlawful conduct.

384. This approach is opined to be consistent with other laws that regulate the promotion of homosexuality, such as section 31 of the Uganda Communications Act, 2013 which establishes minimum broadcasting standards; section 14 of the Anti-Pornography Act, 2014. which prohibits child pornography; section 23 of the Computer Misuse Act, 2011. which prohibits child pornography; section 30 of the Non-Governmental Organisations Act, 2016 that prohibits registration of an organization whose objectives contravene Ugandan laws; section 14 of the Landlord and Tenant Act, 2022 that bars use of rented premises for unlawful purposes, and section 19(1)(b) and (c) of the Penal Code Act that criminalises the aiding and abetting of offense, placing them at the same pedestal as commission of the offence, as well as section 21 of the same Act, which prohibits incitement.

385. State Counsel further argue that the rights limitations that the impugned provisions impose on the LGBQT+ community are permissible in the public interest under Article 43 of the Constitution to avert the offence of aiding and abetting crime; as well as protect children's rights and the family structure, and Ugandan values and norms as outlined in Objective XXIV (I) of the National Objectives and Directive Principles of State Policy. This position is repeated by the second respondent, who additionally underscores the need to preserve public morality.

386. In any event, State Counsel contend that the right to freedom of expression, thought, conscience, belief and religion may be subject to constitutional limitations where the enjoyment of those rights is contrary to the law or public interest. In this case, it is argued that the rights that the petitioners seek to advance are contrary to section 41 of the Penal Code Act and societal morals. Further, that the limitation

[59] See report of the parliamentary committee on legal and parliamentary affairs, p. 8.

on rights for the protection of morals is recognized under Article 29(2) of the UDHR and has also been alluded to in the case of **National Coalition for Gay & Lesbian Equality v Minister of Justice** (supra). It is the contention, therefore, that the limitations imposed by the impugned statutory provisions are acceptable and demonstrably justifiable in a free and democratic society.

387. Similarly, the second respondent contends that the impugned provisions constitute a permissible limitation under Article 43 of the Constitution, proposing that a rights limitation is permissible if it is necessary and demonstrably justifiable in a free and democratic society or if the limitation is permitted under the Constitution. It is argued that in the matter before us the limitation against expressing views that promote homosexuality is rooted in Article 31(1) of the Constitution, which prohibits same-sex marriages and by extension same sex relationships. The second respondent further argues that the limitations are necessary in the public interest to ensure the protection of children's and societal morals from being attacked by the LGBTQ+ community.

388. We have carefully considered the parties' pleadings and rival submissions . The right to freedom of speech and expression; freedom of thought, conscience and belief, and freedom of association are enshrined under Article 29(1) of the Constitution as follows:

> **Every person shall have the right to –**
>
> **(a) freedom of speech and expression which shall include freedom of the press and other media.**
>
> **(b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning.**
>
> **(c) .....**
>
> **(d) .....**
>
> **(e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.**

389. Meanwhile, Article 38 of the Constitution stipulates as follows:

> **(1) Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.**

(2) Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.

390. The nature of the dispute before the Court presently invokes the recognized scope of those rights, as well as the permissible limitations thereto. Although the first to eighth petitioners challenge sections 2 and 3 of the anti-homosexuality law which create the offences of homosexuality and aggravated homosexuality, it would appear that the main bone of contention between the parties is section 11 of that law, which proscribes the promotion of homosexuality. The petitioners' misgivings with section 11 of the Act are that it is an impermissible restriction to the right to freedom of speech and expression and the right to freedom of thought, conscience and belief, the latter right including the right to academic freedom at institutions of higher learning. For ease of reference, section 11 of the Anti-Homosexuality Act is set out below.

Section 11 *Promotion of homosexuality*

(1) A person who promotes homosexuality commits an offence and is liable, on conviction, to imprisonment for a period not exceeding twenty years.

(2) A person promotes homosexuality where the person –

(a) encourages or persuades another person to perform a sexual act or to do any other act that constitutes an offence under this Act.

(b) knowingly advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcasting or distribution by any means, including the use of a computer, information system or the internet, of any material promoting or encouraging homosexuality or the commission of an offence under this act.

(c) provides financial support, whether in kind or cash to facilitate activities that encourage homosexuality or the observance or normalization of conduct prohibited under this Act.

(d) knowingly leases or subleases, uses or allows another person to use any house, building or establishment for the purpose of undertaking activities that encourage homosexuality or any other offence under this Act; or

(e) operates an organization which promotes or encourages homosexuality or the observance or normalization of conduct prohibited under this Act.

(3) Where an offence prescribed under this section is committed by a legal entity, the court may –

(a) Impose a fine not exceeding fifty thousand currency points for breach of any of the provisions of this section;

(b) Suspend the licence of the entity for a period of ten years, or

(c) Cancel the licence granted to the entity.

391. Section 11(1), 2(c) and (e) and (3) of the Anti-Homosexuality Act is considered by the petitioners to have the effect of impeding the rights of the LGBTQ+ community to freedom of speech and expression, freedom of association and the right to civic participation. This is considered an affront to the right of media practitioners and academics to freedom of expression and academic thought, including expressing opinions and thoughts that supposedly promote or encourage homosexuality.

392. We do recognise that the rights to freedom of speech and expression; freedom of thought, conscience and belief, and freedom of association are derived from international human rights law as *inter alia* codified in the ICCPR, as well as the General Comments of the Human Rights Committee (HRC) which, while not legally binding are presumptively correct on the interpretation of treaty provisions. Article 19 of the ICCPR stipulates as follows with regard to freedom of expression.

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

393. With regard to freedom of expression, the HRC has observed as follows in its *General Comment No. 34*:

> Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.
>
> Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

394. In the same *General Comment No. 34, paragraphs 11 and 12*, the HRC observes as follows in relation to freedom of expression as articulated in Article 19(2) of the ICCPR.

> 11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.
>
> 12. Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.

395. The emphasis in *General Comment No. 34* on the right to seek, receive and impart information and ideas of all kinds regardless of frontiers as a vital component of the right to freedom of expression is approbated in **Charles Onyango Obbo & Another v Attorney General** (supra). In that case, the right to freedom of expression was defined as the **'freedom to hold opinions and to**

receive and impart ideas and information without interference.' Therefore to the extent that the Anti-Homosexuality Act criminalizes the receipt and impartation of ideas and information that are deemed to promote and encourage homosexuality, it imposes a limitation on the right to freedom of speech and expression.

396. Be that as it may, we do not consider the nature of expression contemplated under Article 29(1)(a) of the Constitution, as buffered by the foregoing definition, to extend to the expression of sexual intimacy, as proposed by the first to eighth petitioners. In our view, freedom of expression in the sense it accrues under the Constitution and the ICCPR entails mental thought that is expressed verbally, in writing or by sign language and not necessarily physically.

397. In relation to the violation of freedom of thought, conscience and belief, it is the evidence of the ninth petitioner (an accomplished and prolific academic in her own right) that by criminalizing the publication, communication or distribution of any material that promotes or encourages homosexuality, section 11(1) and (2)(b) of the impugned Act infringes upon the right to academic freedom of thought, conscience and belief that underpins effective tertiary education. It thus stifles the right to disseminate information in favour of homosexuality so as to '*address issues pertaining to rights and freedoms of people in society, social transformation and development as well as human emancipation.*'

398. Given the position of the HRC in *General Comment No. 22* that freedom of thought, conscience and belief is far-reaching and profound, encompassing freedom of thoughts on all matters, we take the view that academic thought on the subject of homosexuality falls within the scope of that right as encapsulated in Article 29(1)(b) of the Constitution. To the extent that section 11(1) and 2(b) proscribes the dissemination of academic views that seemingly promote or encourage homosexuality, it constitutes a limitation on the right to freedom of thought, conscience and belief the merits of which shall be considered shortly.

399. On the other hand, the right to freedom of association is encapsulated in Article 22 of the ICCPR as follows:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

400. Given the broad provisions of Article 22(1) of the ICCPR, we accept the petitioners' assertion that the right to freedom of association would extend to the right to belong to associations that engage in activities that amount to financing, encouraging or promoting homosexuality. Therefore, the criminalisation of such association, as we understand to be the effect of section 11(2)(c) and (e) of the Anti-Homosexuality Act, constitutes a limitation to this right.

401. Before reverting to a rights limitation analysis of the foregoing statutory provisions, we shall quickly dispose of the twenty-second petitioner's challenge to section 11(1) and 2(c) for their alleged contravention of the right to freedom of religion. The petitioner avers as follows in paragraphs 4(f) and (i) of *Constitutional Petition No. 85 of 2023*:

> *(f)* *That section 11(1) and (2)(c) of the Anti-Homosexuality Act, 2023 by criminalizing any form of financial support to facilitate activities that encourage homosexuality is inconsistent with and in contravention of Article 29 (1) (c) of the Constitution which guarantees the right to freedom of religion.*
>
> *(i)* *That sections 9 and 11(1) and (2)(d) of the Anti-Homosexuality Act, 2023, by making it an offence to any person to allow and/or lease or sub-lease premises to be used for purposes of homosexuality or activities that encourage homosexuality is inconsistent with and in contravention of religious leaders and organisation's obligation to host and cater for needy persons which is protected under Article 29 (1) (c) of the Constitution which guarantees the right to freedom of religion and the right to carry on any lawful occupation, trade or business guaranteed under Articles 20 and 40 (2) of the Constitution.*

402. None of these elements is attested to in his affidavit in support of the petition. Rather, the twenty-second petitioner advances his views on the enactment of the Anti-Homosexuality Act, contesting its propagation of Christian beliefs yet Uganda is a secular state, and proposing that biblical views do not support hostility to homosexuality. There being no nexus between those averments and the pleadings reproduced above, the allegations of breach of Article 29(1)(c) of the Constitution remain unproven. They are accordingly dismissed.

403. For purposes of the rights limitation analysis, Article 43 of the Constitution is reproduced below.

> **(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.**
>
> **(2) Public interest under this article shall not permit—**
>
> **(a) political persecution;**
>
> **(b) detention without trial;**
>
> **(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.**

404. In the **Charles Onyango Obbo** case, addressing the nature of limitations that are permissible under Article 43(1), it was held (per Mulenga, JSC):

> The provision in clause (1) is couched as a prohibition of expressions that prejudice rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment of others, of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right to freedom "prejudices" the human rights of another person; and (b) where such exercise "prejudices the public interest. However, the limitation provided for in clause (1) is qualified by clause (2) which in effect introduces a limitation upon limitation. It is apparent from the wording of clause 2, that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of the defence of public interest. For avoidance of that danger, they enacted clause (2) which expressly prohibits the use of political persecution and detention without trial, as means of preventing, or measures to remove prejudice to public interest.

> **In addition, they provided in that clause a yardstick by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society.** *(our emphasis)*

405. Any limitation analysis ought to consider various principles as severally laid down by the courts. The onus of proof that a limit on a constitutional right or freedom is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. *See* ***R v Oakes (1986) ISCR 103***. In this case, therefore, the respondents bear the onus of proof that the limitations that the impugned provisions impose on the enjoyment of rights are permissible and justifiable under the Article 43 of the Constitution. *See* ***Charles Onyango Obbo & Another v Attorney General*** *(supra).*

406. The case of **Coalition for Reform and Democracy (CORD) & 2 Others v Attorney General of the Republic of Kenya & 10 Others, Consolidated Petitions No. 628 & 630 of 2014 & 12 of 2015,** which was cited with approval by this Court in **CEPIL & Others v Attorney General** (supra), proposed additional principles to guide limitation analysis. Although advanced in relation to Article 24(1) of the Kenyan Constitution, that provision being materially similar to Article 43(2) of the Uganda Constitution would render the principles proposed in that case applicable to a rights limitation analysis in the Ugandan context. It was observed:

> We are also guided by the test for determining the justifiability of a rights limitation enunciated by the Supreme Court of Canada in the case of **R vs Oakes (1986) ISCR 103** to which CIC has referred the Court. The first test requires that the limitation be one that is prescribed by law. It must be part of a statute, and must be clear and accessible to citizens so that they are clear on what is prohibited. Secondly, the objective of the law must be pressing and substantial, that is it must be important to society: see **R vs Big Drug Mart Ltd (1985) ISCR 295**. The third principle is the principle of proportionality. It asks the question whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. Put another way, whether the legislation meets the test of proportionality relative to the objects or purpose it seeks to achieve: see **R vs Chaulk (1990) 3SCR 1303**. If a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test. They must be rationally connected to the objective sought to be achieved, and must not be arbitrary, unfair or based on irrational considerations. Secondly, they must limit the right or freedom as little as possible, and their effects on the limitation of rights and freedoms are proportional to the objectives.

407. In **R v Oakes** (supra), the court was faced with a challenge to the constitutionality of a Canadian statutory provision that necessitated a rights limitation analysis provided for under section 1 of the Canadian Charter of Rights and Freedom, which is also materially similar to Article 43(2) of the Ugandan Constitution. It was held (per Dickson, CJ):

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": (**R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 352**). The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": (**R. v. Big M Drug Mart Ltd., supra, at p. 352**). Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.

408. It was further held:

> There are, in my view three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objectives in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Secondly, the means even if rationally connected to the objective in the first sense should impact as little as possible the right or freedom in question. Thirdly there must be a proportionality between the effects of the measures which are responsible for limiting the charter, right or freedom and the objective which has been identified as of sufficient importance.

409. **R v Oakes** (supra) thus hinges the permissibility of a rights limitation on two broad criteria. First, the objective or purpose of the restriction must be sufficiently important, pressing or substantial as not to give traction to triviality. In **CORD & 2 Others v Attorney General of Kenya & 10 Others** (supra), it is proposed that the purpose of the restriction must be important to society. This bespeaks the legitimacy of the restriction. Secondly, the means chosen for the attainment of the

limitation's objective ought to balance societal interest with the interests of individuals or groups. This balance should be assessed on the basis of a proportionality test that has the following elements: first, the measures adopted should be rationally linked to the objective sought to be achieved; secondly, even if so rationally linked to the objective, the measures should impact as little as possible on the restricted right or freedom, and thirdly, the effect of the measures should not be so severe as to discredit the objective or purpose of the restriction.

410. That proportionality test was adopted by the Uganda Supreme Court in **Dimanche Sharon & Others v Makerere University (2006) UGSC 210**. The court observed that it was always necessary to determine whether a statute's legislative objective was sufficiently important to justify limiting a fundamental right, proposing that '**the courts have to strike a balance between the interest of** (the) **freedom and social interest** (and) **fundamental rights should not be suppressed unless there are pressing community interests, which may be endangered**.'

411. We have also considered the approach of the HRC, which assesses the propriety of limitations on the following basis; first, whether the limitation was provided for by law; secondly, whether the limitation addresses one of the aims recognized under the ICCPR, namely respect of the rights or reputations of others, the protection of national security, public order (ordre public) or the protection of public health or morals; and thirdly, whether the limitation was necessary for achieving one of the aims recognized under the ICCPR. *See also* ***Robert Faurisson v France, Communication No. 550/1993***.

412. With specific regard to the right to freedom of association, we defer to the principles articulated by the HRC in **Vladimir Romanovsky v Belarus, Communication No. 2011/2010** where it was observed:

> The Committee recalls that, in accordance with article 22 (2) of the Covenant, any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be prescribed by law; (b) it may only be imposed for one of the purposes set out in article 22 (2); and (c) it must be "necessary in a democratic society" in the interest of one of those purposes and proportionate in nature. Reference to "democratic society" in the context of article 22 indicates, in the

> Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas that are not necessarily favourably viewed by the Government or the majority of the population, is a cornerstone of any democratic society.

413. We draw apposite inspiration from all the foregoing principles. Further direction is based on our own understanding of the permissible limitations envisaged under Article 43, which we deduce to be such limitations as are necessary to protect the fundamental rights of others or the public interest; provided that '*public interest*' shall not permit any limitation beyond that which is acceptable and demonstrably justifiable in a free and democratic society or as permitted under the Constitution.

414. In terms of the impugned law's legitimacy, the first respondent contends in paragraph 22 of his Answer to *Petition No. 14 of 2023* that the Act is intended '*to protect the traditional family by protecting the culture of the people of Uganda against the acts of same sex rights activists*.' We understand this aim to relate to the protection of public morals and societal values. With specific regard to the right to freedom of expression and freedom of association, the first respondent additionally contends that section 11 of the impugned Act seeks to prevent the incidence of the prohibited conduct, whether by direct commission or by aiding and abetting crime.

415. The succinct provisions of Article 19(3)(b) of the ICCPR undoubtedly entrench the principle that the right to freedom of expression carries with it special duties and responsibilities, and may be restricted by law and for the protection of public morals. Similarly, Article 22(2) of the ICCPR permits the limitation of the right to association on the basis of public morals. A common thread throughout this petition is the extensive societal aversion to what is deemed an affront to public morals and socio-cultural sensitivities. The petitioners allude to this as well in their depiction of LGBQT+ persons as sexual minorities. Section 11 of the impugned Act reflects that societal interest and thus abides the permissible limitations under Article 19(3) of the ICCPR. In our judgment, therefore, the objective of the Anti-Homosexuality Act is of such critical importance to the Ugandan society that its claim to legitimacy is unassailable.

416. We do also find a direct and rational nexus between the proscriptions against the promotion of homosexuality embedded in section 11 of the Act and the objective of the impugned law. As was observed earlier in this judgment, the evidence on record is that the Anti-homosexuality Act was enacted against the backdrop of the recruitment of children into the practice of homosexuality. That sponsorship of homosexuality in Uganda ensued despite the provisions of section 145 of the Penal Code Act that outlawed unnatural offences, including sodomy, bestiality etc. That is the mischief that section 11 of the anti-homosexuality law sought to address.

417. We do not think the provisions of section 11(2)(c) and (e) are so severe as to distort that objective nor does that statutory provision unduly annihilate the right to freedom of expression and association. Rather, as observed above, it is intended to thwart the luring of gullible persons into homosexuality either through direct offers of financial support or through such support being routed through LGBQT-advocacy organisations. In relatively poorer countries, such as Uganda, the threat of either eventuality is neither far-fetched nor inconceivable. Therefore, section 11(2)(c) and (e) of the impugned law represent measured limitations to the right to freedom of expression and association that balance individual rights with the socio-cultural sensitivities and public morality concerns of the larger Ugandan society.

418. In terms of their severity vis-à-vis the objective of the impugned law, we advert to the view of the first respondent that the right to freedom of independent thought, expression and association ought to operate within the confines of the law. It cannot have been the intention of the framers of the Constitution to promote a lawless society that has no regard for the laws in place to regulate it. This is appositely encapsulated in Article 8A of the Constitution. It reads:

> (1) **Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.**
>
> **(2) Parliament shall make relevant laws for purposes of giving full effect to clause (1) of this Article.**

419. The import of that constitutional provision is that Uganda shall be governed in accordance with the national objectives and directive principles of state policy, as

well as laws enacted by Parliament. The national objectives and directive principles of state policy reflect the guiding principles of national interest and common good that form the basis of the country's governance, but those guiding principles (of national interest and common good) derive full effect from statutory laws.

420. In this case, the corelation between the nature of organisations envisaged under the Anti-Homosexuality Act and non-governmental organisations (NGOs) that are registered and regulated under the Non-Governmental Organisations Act is instructive on the effect of section 11(2)(e) of the Anti-Homosexuality Act. The pertinent provisions of both statutes are reproduced below.

> *Section 1, Anti-Homosexuality Act*
>
> **"Organisation" means a legally constituted non-governmental organisation registered under the Non-Governmental Organisations Act, 2016 and includes a private voluntary grouping of individuals or associations established to provide voluntary services to a community or any part of a community, but not for profit or commercial purposes;**
>
> **(a) where the objectives of the organisation as specified in its constitution are in contravention of the laws of Uganda;**
>
> *Section 30(1)(a), NGO Act*
>
> **An organisation shall not be registered under this Act –**
>
> **(a) where the objectives of the organisation as specified in its constitution are in contravention of the laws of Uganda;**

421. The equating of the term '*organisation*' in section 11(1) and (2)(c) and (e) of the Anti-Homosexuality Act to NGOs attributes to them the legislative intent of section 30(1)(a) of the Non-Governmental Organisations Act, which is, to engender institutional compliance with the law. We do not think that those provisions of the impugned law are so severe as to undermine the delicate balance between societal and individual/ group interest; rather, they simply represent the composite position of the law to ensure the operation of NGOs with due regard to prevailing laws. Consequently, we are satisfied that section 11(2)(c) and (e) of the Anti-

Homosexuality Act are demonstrably justifiable in a free and democratic society. We therefore find no violation of Articles 29(1)(e) or 38 of the Constitution.

422. Similarly, section 14 of the Landlord and Tenant Act, 2022 proscribes the use of premises by a tenant for an unlawful purpose.[60] Thus, both this provision and section 11(2)(d) of the impugned Act abide the general provision in Article 242 of the Constitution that '**Government may, under laws made by Parliament and policies made from time to time, regulate the use of land**.' The Anti-Homosexuality Act having criminalised homosexuality, it follows that any usage of property that is contrary to that law would run afoul of Articles 8A and 242 of the Constitution. In any case, contrary to the petitioners' views, we find no violation of the right to assembly by section 11(2)(d) of the Act.

423. Relatedly, section 11(2)(b) of the Anti-Homosexuality Act resonates with section 31 of the Uganda Communications Act, both of which seek to preserve public morals and engender compliance with existing law. Under section 11(2)(b) of the Anti-Homosexuality Act, a person unlawfully promotes homosexuality where s/he or it intentionally '**advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcasting or distribution by any means, including the use of a computer, information system or the internet, of any material promoting or encouraging homosexuality or the commission of an offence under this act**.' The thrust of the proscription in that statutory provision relates to media communication that is defined under the Uganda Communications Act as '**telecommunications, data communication, radio communications, postal communications and includes broadcasting**.' In that context, the broadcasting of material that is contrary to public morals is proscribed under section 31 and schedule 4 to the Uganda Communications Act as follows:

> *31. Minimum broadcasting standards*
>
> **A person shall not broadcast any programme unless the broadcast or programme complies with Schedule 4.**

[60] Section 14 of the Landlord and Tenant Act stipulates that '**a tenant shall not use the premises or permit the use of the rented premises for any unlawful purpose.**'

Schedule 4 (Section 31)

Minimum broadcasting standards

A broadcaster or video operator shall ensure that—

(a)any programme which is broadcast—

(i)is not contrary to public morality;

(ii).....

(iii).....

(iv).....

(v)is in compliance with the existing law;

424. Those statutory provisions are supported by section 13(1) of the Anti-Pornography Act which prohibits the production, publication and distribution of offensive material as follows: '**a person shall not produce, traffic in, publish, broadcast, import, export, sell or abet any form of pornography**.' Pornography in that sense is broadly defined to include the relaying of a person engaged in real or stimulated explicit sexual activities by **'publication, exhibition, cinematography, indecent show, information technology or by whatever means**.' It seems to us that the purpose of section 11(2)(b) of the Anti-Homosexuality is realised in full measure by the aggregate import of all the foregoing statutory provisions. They all seek to preserve societal morals by restraining the use of media communications to publish, broadcast and/ or disseminate offensive material. These limitations to freedom of expression are legally permissible within the confines of Article 19(3) of the ICCPR.

425. With the greatest respect, we are unable to abide the view of the fifth petitioner that the impugned law stifles the propagation by the media of alternative dogma to the heterosexual view. To begin with, we find nothing in the Act that calls for a media campaign in respect of heterosexuality. More importantly, having been criminalised by the impugned Act, a media campaign that promotes homosexuality would be as contrary to public policy as a related campaign in the promotion of any other criminal offence or illegal act. This is legally untenable.

426. On the other hand, the ninth and twelfth petitioners particularly express concern over the constitutionality of section 11(2)(b) of the Act in relation to academic freedom as expressly recognised in Article 29(1)(b) of the Constitution. The right to academic freedom has 3 facets to it. They are articulated in *Vrielink, J, Lemmens, P, Parmentier, S and LERU Working Group on Human Rights, Academic Freedom as a Fundamental Right*,[61] as follows:

> The first is to conceive it as an individual right, combining in particular the expressive freedoms that members of the academic community (both staff and students) have as individuals: e.g. freedom of opinion and expression and freedom of association. A second way to understand academic freedom is to look at it as a right with more collective dimensions, i.e. as an institutional right of autonomy for the academy in general or subsections thereof (faculties, research units, etc.). The other side of this freedom is the obligation for the public authorities to respect academic freedom and to take measures in order to ensure an effective enjoyment of that right and to protect it.

427. In this case, only the individual right to academic freedom has been invoked by the petitioners. In an article *Obalowose, Ojo, Right to academic freedom: its place under the Uganda Constitution*,[62] citing the Committee on Economic, Social and Cultural Rights, the individual right to academic freedom is defined as '**the right of individual academics to do research, publish and disseminate knowledge through teaching**.'

428. The freedom to teach entails the determination by individual teachers of what is taught and how it is taught. This freedom, however, is not absolute and can be limited in two instances. First, it may be constrained by the right of students (and other staff members) not to be subjected to stigmatising, derogatory and discriminatory statements or indoctrination that leave no room for the students to determine their own positions vis-à-vis what is taught. The second category of limitations accrues to the inherent tension between the individual freedom to teach and the collective or institutional aspects of that freedom, whereby individual teachers' freedom is limited to and partially determined by the institutional policy of the university, department or faculty in which academics works.[63]

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[61] League of European Research Universities (LERU) Publications, Advice Paper No. 6, 2020, pp. 8, 9.
[62] KIUJ Vol. 1, Issue 1, 2017
[63] See clause 28 of the UNESCO Recommendation and *Vrielink, J, Lemmens, P, Parmentier, S and LERU Working Group on Human Rights, Academic Freedom as a Fundamental Right*, Ibid. at pp. 8, 9.

429. Meanwhile, freedom in research includes the element of research autonomy or the independent choice of topic, method of research, mode of analysis and the right to draw conclusions from one's findings. Again, this freedom can be limited by institutional considerations and circumstances. Indeed, Article 15 of the ICESCR has been generally interpreted in such a way that the freedom of individual researchers is conditioned by the limits of the specific academic or research setting they work in.[64]

430. Nonetheless, the vitality to academic freedom of the publication and dissemination of research was succinctly articulated by the League of European Research Universities (LERU) Working Group on Human Rights[65] in the following terms:

> Freedom of research and academic freedom in general are meaningless unless they entail the right for the researcher to publicly express and publish his or her opinions and conclusions. This should be possible both within the scientific community and to the larger public, and should involve the avenues and methods one sees fit. Such requirement entails at the very least that researchers are free to dispose of their research, and that they enjoy (academic) freedom of expression.

431. Stated differently, academic freedom of expression is essentially underpinned by '**the freedom to hold and express any belief, opinion or theoretical position and to espouse it in an appropriately academic manner**.'[66]

432. Against that background, the overly broad and unqualified prohibition in section 11(1) and (2)(b) of the Anti-Homosexuality Act does lend credence to the view that teaching, publication and dissemination of research on the subject of homosexuality could run afoul of the proscription against the promotion of homosexuality under the Act. We state as much in the knowledge that overbreadth and vagueness, though related, are two distinct concepts that can be applied separately. See **R. v. Zundel** (supra). Hence, although the intended meaning of a statute or statutory provision may be perfectly clear and thus not vague, as was our finding of section 11(1) and (2) of the Act under *Issue No. 6*, their application may be so broad as to occasion an excessive impairment or unjustified rights

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[64] KARRAN, T, "Academic freedom in Europe: time for a Magna Charta?", Higher Education Policy 2009, 174.
[65] Supra, footnote 62 at p. 13.
[66] BARROW, R, "Academic Freedom: Its Nature, Extent and Value", British Journal of Educational Studies 2009, 180-181.

limitation under the proportionality test set out in **R. v. Oakes** (supra). *See also* ***R v Nova Scotia Pharmaceutical*** *(supra).* That precisely is the effect of section 11(1) and (2)(b) of the Anti-Homosexuality Act on the right to academic freedom in educational facilities. The question is whether the limitation on the right to academic freedom is justifiable under Article 43 of the Constitution.

433. Under the international human rights framework, the right to academic freedom is deduced primarily from the right to freedom of expression under Article 19(2) of the ICCPR. The legally recognised scope of academic freedom of expression was in *Vrielink, J, Lemmens, P, Parmentier, S and LERU Working Group on Human Rights, Academic Freedom as a Fundamental Right*,[67] defined as follows:

> Academic freedom of expression of course firstly and most importantly covers 'intra-mural speech' or 'pure academic speech', i.e. expert utterances within the university or academic context in pursuit of teaching and research excellence. **It can be both the context or the individual(s) involved that determine whether someone's utterances or writings enjoy the high level of 'pure academic speech' protection**. It follows from the foregoing that courts should be generally reluctant to award civil claims (e.g. in tort actions) or to come to criminal convictions (e.g. for insults or libel) in strictly 'internal' academic matters. *(emphasis added)*

434. In terms of context, on-campus utterances by external speakers (including non-academics) as part of the process of scholarly debate also enjoy the high-level protection of academic freedom: attempts to restrict the discourse – however controversial – of invited speakers should therefore be met with a staunch commitment to free speech principles. Equally included in academic freedom is the fact of being an academic that is entitled to academic writing even outside the academic setting. Hence, in **T. v UK, 12 October 1983**, the European Commission on Human Rights upheld the right of an incarcerated academic to send academic writings while in custody.

435. The scope of academic freedom of expression does also, albeit to a lesser degree, cover interventions by academics in their areas of expertise but outside the strict academic context. This has been expressed as follows.[68]

[67] Supra, footnote 62, at pp. 14, 15.
[68] Ibid. at p.16.

> Academic freedom of speech covers, apart from 'internal' utterances, extra-mural interventions by academics in their areas of expertise (e.g. in the media or during debates with the general public), albeit to a slightly lesser degree. Again, this is not a freedom without limits. However, content limits should in principle apply only to speech and expressions that are likely to lead to violent or disruptive results.

436. The foregoing discourse compellingly defines the scope of academic freedom that is protected by Article 29(1)(b) of the Constitution. It is restricted to intra-mural expression and/ or publications within a university or academic context and, to a lesser degree (subject to determination on case-by-case basis), extra-mural expression that ensues outside the academic context. Extra-mural expression may, in any event, be subjected to such restrictions and limitations as are recognised under Article 19(3) of the ICCPR, as well as Article 43 of the Uganda Constitution.

437. On the other hand, speech or publications that fall outside of an academic's field of expertise is not covered by academic freedom of expression. So that, academic freedom should not include the right to use the authority of a university or related tertiary institution to promote one's private views on matters that are outside of one's academic speciality area. Such expression may of course, seek the protection of regular freedom of expression subject to necessary limitations in respect thereof. However, to be clear, '**academics should be careful to avoid a controversial matter that is unrelated to their subject or – when doing so – they should make it clear that they are not speaking in their professional capacity**.'[69]

438. In the matter before us, we find the provisions of section 11(2)(b) to be neither so severe as to distort that objective of the Anti-Homosexuality Act to avert the superimposition of a culture of homosexuality in Uganda; nor unduly debilitative of the right to freedom of expression. On the contrary, given the extensively demonstrated societal misgivings to the practice of homosexuality, that statutory provision is intended to confine academic freedom to the academic setting so as to avert public disquiet and undue social upheaval. This is in stride with the recognised limitation to extra-mural expression as spelt out above. Section 11(2)(b)

[69] Supra, footnote 62 at pp. 16, 18.

of the impugned law thus balances individual rights with the socio-cultural sensitivities and public morality concerns of the larger Ugandan society.

439. Given the latitude retained by academics to engage in intra-mural and restrained extra-mural expression, we find the limitation in the impugned statutory provision to be commensurate with the objective of the Anti-Homosexuality Act. In the event, we do not find section 11(2)(b) to impede the right to academic freedom embedded within Article 29(1)(b), but rather to entail a necessary limitation under Article 43 of the Constitution and Article 19(3) of the ICCPR.

440. Before we take leave of these issues, we are constrained to emphasize here that the right to academic freedom (individual or institution) is conceived under the *UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, 1997* ('UNESCO Recommendation') to pertain to university and tertiary (and post university/ tertiary) academic activity. It does not extend to lower levels of education, but they too would do well to abide the tone of the Anti-Homosexuality Act with regard to their institutional policies and curricula.

441. Furthermore, we shall briefly address the decision in **Thuto Rammoge & Others v The Attorney General of Botswana** (supra), to which we were referred by learned Counsel for the petitioners. That case entails a challenge to the refusal by a minister to reverse the decision of a registrar not to register an organisation on the premise that it violated a statutory prohibition against registering an organisation that **'is, or is likely to be used for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare or good order in Botswana**.' On appeal to the High Court, it was observed that lobbying and advocacy was common in democratic states for purposes of securing legislative reforms, and was neither a crime nor incompatible with peace, welfare and good order.

442. We do not find it necessary to appraise the correctness of that decision. It will suffice to observe that whereas the challenge in that case pertained to the fairness of an administrative decision, the petition before us contests the constitutionality of a statutory law that essentially outlaws the promotion of homosexuality, by

advocacy or otherwise. The parameters that would inform a decision in either case are markedly different.

443. In the result, we find that sections 2 and 3 of the Anti-Homosexuality Act are not inconsistent with the right to freedom of speech and expression embedded in Article 29(1)(a) of the Constitution, and section 11(1) and (2)(c) of the Act does not violate the right to freedom of religion encapsulated in Article 29(1)(c) of the Constitution. Furthermore, we find section 11(1) and (2)(b), (c) and (e) of the Act to represent permissible rights limitations within the confines of Articles 8A and 43(2)(c) of the Constitution, and are therefore constitutional. Accordingly, ***Issues 10*** and ***11*** fail.

Issue No. 12: **Right to profession, occupation and business**

444. The first to eighth petitioners contend that the criminalisation of homosexuality for consenting adults under sections 2 and 3 of the Anti-Homosexuality Act, their disqualification from employment upon conviction under section 12, the duty to disclose a conviction of homosexuality to certain employers under section 13, and the duty to report acts of homosexuality under section 14 of the Act all violate the economic and development rights of Ugandans that are protected under Article 40(2) of the Constitution, and Article 22 of the UDHR, Article 1 of the ICCPR, Article 1 of the ICESCR, and Article 22 of the ACHPR. The first to eighth petitioners argue that sections 12 and 13 of the Act violate the right to fair employment on the basis of sexual orientation. They opine that the disqualification of prospective employees on the basis of their sexual history discriminates against the LGBTQI+ community and prevents individuals from working under equitable conditions. This, in their view, contravenes Article 40(2) of the Constitution and international and regional human rights instruments that obligate Uganda to protect the right to fair employment.

445. Reference in that regard is made to Article 23(1) of the UDHR which articulates the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Counsel additionally cites to Article 6(1) of the ICESCR, which recognizes the right to work, including the right to the opportunity to gain a living by work that is freely chosen or accepted. Also cited is Article 7 of the same instrument that protects the right to fair remuneration,

safe and healthy working conditions, equal opportunity for promotion, and the right to rest, leisure and holidays with pay; as well as Article 8, which protects the right to form trade unions and strike.

446. At the regional level, the first to eighth petitioners invoke Article 15 of the ACHPR, which recognises the right to work under equitable and satisfactory conditions, and Article 13 of the Maputo Protocol, which guarantees equal access to employment, fair remuneration, transparency in the recruitment, promotion, and hiring of women; freedom to choose an occupation; conditions that support economic activities of women; and protection from exploitation. Counsel additionally cite **Malawi African Association & Others v Mauritania, 210/98 (2000), May 11, 2000, para 135**, where the African Commission on Human and Peoples' Rights observed that under Article 23(3) of the UDHR and Article 7 of the ICESCR, everyone who works has the right to just and favourable remuneration that ensures for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection.

447. On their part, the ninth to sixteenth petitioners argue that section 11(1) and (2)(e) of the Anti-Homosexuality Act are an unjustifiable interference with the right to carry on a lawful occupation, trade or business, in contravention of Article 40(2) of the Constitution. Furthermore, that the effect of section 11(1) and (2)(e) of the Act is to criminalize operations of any organisation that allegedly "promotes" or "encourages" homosexuality or "observance or normalization" of homosexuality. In their view, the criminalisation of operations of organisations is inconsistent with the right to practice one's profession, occupation, trade or business for persons working in such organisations, and section 11(1) and (2)(e) impairs the work of organizations that are in most instances a workforce of like-minded individuals or persons with a shared vision, values, and passion for advocacy on specific issues. They rely on the affidavit of Dr. Adrian Jjuuko in support of this submission.

448. With regard to sections 12 and 13 of the impugned Act, the petitioners are of the view that insofar as the cited provisions prohibit and disqualify persons convicted of an offence of homosexuality from employment, they constitute an unjustifiable interference with the right to carry on a lawful occupation, trade or business which is inconsistent with and in contravention of Article 40(1) and (2) of

the Constitution. The petitioners question the logic of denying employment to persons in the child care business upon their conviction for any of the different facets of homosexuality that are criminalised in the Anti-Homosexuality Act, including those that do not involve children at all. It is opined that to that extent, sections 12 and 13 amount to an unwarranted restriction of the right to exercise one's profession. They cite the case of ***Pavez Pavez v Chile***, where reference was made to *General Comment No.18 of the Committee on Economic Social and Cultural Rights* on the right to work as guaranteed under Article 6 of the ICESCR. The court found the Republic of Chile in violation of the right to work insofar as it disqualified the applicant from teaching the subject of 'Catholic religion' on account of her sexual orientation.

449. The ninth to sixteenth petitioners contend that Article 6 of the ICESCR enjoins states parties to recognize the right to work, including the right to earn a living by work is freely chosen or accepted. It further obliges states parties to take appropriate steps to safeguard the right to work, through policies and techniques to achieve full and productive employment under conditions that safeguard an individual's fundamental political and economic freedoms. The petitioners further argue that Resolution 275 of the African Commission on Human and People's Rights obliges AU states parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities.

450. Reference is made to **Narendra Kumar & Others V Union of India & Others, Petition 85/1958** where the Supreme Court of India, in determining an alleged breach of the right to freedom of profession, occupation, trade or business, held that a determination of the reasonableness of the restriction in the order issued by the Government on the right to freedom or trade or business, had to be made. The test of reasonableness was adjudged to depend on the nature of the mischief that was sought to be remedied by the law, the harm caused to individuals by the proposed remedy vis-à-vis the beneficial effect to the public, and whether the restraint caused by the law is more than what was necessary in the interest of the general public.

451. It is therefore argued that the restrictions imposed by sections 11(1) and (2)(e) of the Act adversely affect professionals by creating a harsh work environment, yet they are of no direct benefit to the public. Those provisions thus supposedly violate the right to practice one's profession and to carry on any lawful occupation, which is guaranteed under Article 40 (2) of the Constitution. Similarly, sections 9, 11(1) and (2)(d) of the Act are opined to amount to an unreasonable restriction on the right to carry on any lawful trade or business, guaranteed under Article 40(2) of the Constitution.

452. The ninth to sixteenth petitioner further argue that the reporting obligations under section 14(1) and (2) of the impugned Act present serious ramifications for professionals such as the health and legal professionals, as well as religious or community leaders insofar as they obliterate professional privilege and professional ethics. These provisions are thus considered to amount to unreasonable and unjustified restrictions on the right to practice one's profession or carry on any lawful occupation, as guaranteed under Article 40(2) of the Constitution. This position is supported by the twenty-second petitioner, who asserts that the reporting obligation under section 14 of the impugned Act poses a threat to the right of both the priests and religious leaders and their followers to practice their profession as enshrined under Article 42(2) of the Constitution. Reference is made to the case of **Baksey Vs. Board of Regents, 347 M.D. 442 (1954)** where it was observed that the right to work is the most precious liberty that man possesses.

453. The twenty-second petitioner additionally takes issue with sections 9 and 11(1) and (2)(d) of the Anti-Homosexuality Act, arguing that by making it an offence for any person to allow and/or lease or sub-lease premises to be used for purposes of homosexuality or activities that encourage homosexuality, those provisions are inconsistent with the obligation upon religious leaders and organizations to house and cater for needy persons. The right to do so is alleged to find protection under Article 29(1)(c) of the Constitution, which guarantees the right to freedom of religion, as well as the right to carry on any lawful occupation, trade or business as guaranteed under Article 40(2) of the Constitution. It is further argued that sections

9 and 11(1) and (2)(d) impede the operation of places of worship where preaching, counselling, care and encouragement is extended to homosexual persons.

454. Conversely, the first respondent contends that the purpose of the contested statutory provisions is to protect vulnerable persons, such as children and disabled persons, from potential harm as similarly articulated in section 46(c) of the Children Act and section 57(1) of the Mental Health Act, 2018. It is argued that the purpose of section 12 of the Anti-Homosexuality Act is to protect children and other vulnerable people from abuse.The first respondent further argues that the disclosure regime outlined in section 13 of the Act was similarly introduced in order to protect children and vulnerable adults. In State Counsel's view, that statutory provision enables child care and related institutions to make an informed determination of the suitability of a prospective employee for employment therein. It is opined that the rationale behind a sex offender registry is to allow people in the community to be aware of convicted sex offenders as a measure of public protection. It is therefore argued that sections 12 and 13 of the Anti-Homosexuality Act were enacted in pursuit of the duty of the state under Article 34(7) of the Constitution to enact laws which accord special protection to children, orphans and other vulnerable children. In terms of the reporting obligation under section 14 of the Act, it is the first respondent's contention that this is a crime prevention measure that does not violate any of the rights guaranteed under the Bill of Rights.

455. Meanwhile, the second respondent contends that the right to carry on a lawful occupation is not absolute and is subject to limitations. In any case, it is argued, the recruitment of homosexuals is not an occupation that can be gladly recognized in Uganda so as to be protected by the provisions of Article 40 of the Constitution, otherwise prostitutes and incestuous persons would want to be protected under the law for the right to practice their own freely chosen occupation. In his view, the right to practice one's profession does not extend to the right to recruit members of the public to commit conduct that is prohibited by the law. He reiterates the view that the Anti-Homosexuality Act essentially protects our culture and heritage as Africans, safeguarding the family and society and ensuring that the values held dear are kept intact. In his view, far from denying health workers the right to practice

their profession, the law merely introduces some restrictions that should be observed by such professionals.

456. In a bid to distinguish ***Pavez Pavez v Chile*** (supra) from the circumstances of this case, the second respondent contends that the impugned legislation pertains to a contextual background where the right to practice one's profession is not absolute and can be subjected to limitations. The Court is thus urged to be circumspect about following decisions from other countries without due regard to the unique aspects of the Ugandan Constitution.

457. To begin with, this Court having under its interrogation of the right to privacy pronounced itself on the unconstitutionality of section 14 of the Anti-Homosexuality Act, moreover for the very reasons advanced by the ninth to sixteenth petitioners under this *Issue*, we abide our earlier decision and do not find it necessary to reconsider the same arguments here. It is to the residual statutory provisions that we now turn. They are summed up below.

458. Sections 2 and 3 of the Anti-Homosexuality Act create the offences of homosexuality and aggravated homosexuality; section 9 makes it an offence for a person who knowingly permits his premises to be used for purposes of homosexuality; section 11(2)(d) and (e) prohibit the promotion of homosexuality by NGOs and the lease of property for conduct that is proscribed under the Act; section 12 prohibits the employment in an institution charged with the care of children or vulnerable persons of a person who has been convicted of the offence of homosexuality or aggravated homosexuality, and section 13 places an obligation on a person convicted of any offence under the Anti-Homosexuality Act to disclose such conviction when applying for employment in an institution that places him or her in a position of authority or care of a child or other vulnerable person.

459. Those statutory provisions have been alleged to violate the economic and development rights of Ugandans as enshrined under Article 40(2) of the Constitution, and related rights under Article 22 of the UDHR, Articles 1 of the ICCPR and ICESCR, and Article 22 of the ACHPR.

460. Article 40(2) of the Constitution stipulates:

Economic rights

(1) .....

(2) Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.

461. We note that the economic rights guaranteed under Article 40 are not part of the non-derogable rights set out in Article 44. They are therefore subject to the general limitations set out in Article 43 of the Constitution. This reflects the tenor of permissible limitations under regional and international human rights instruments. Thus, whereas Article 22 of the ACPHR confers the right to economic, social and cultural development with due regard to identity; Article 27(2) of the same Charter places a duty upon on all persons to exercise their rights with due regard to the rights of others, collective security, morality and common interest. Similarly, Articles 1 of the ICCPR and ICESCR recognise the right to economic, social and cultural development embedded within the right to self-determination. However, Article 4 of the ICESCR recognises that states parties may subject socio-economic rights to such limitations as are determined by law (only) in so far as this may be compatible with the nature of these rights and solely for the purposes of promoting the general welfare in a democratic society.

462. In the matter before us, the nature of economic rights invoked is the individual right to practice one's profession and carry on any lawful occupation, trade or business. *See Article 40(2) of the Constitution.* The right to practice one's profession is invoked in relation to the effect of the mandatory reporting obligation under section 14(1) and (2) of the Act on health and legal professionals, and religious or community leaders. Clause (5) of that section exempts advocates from the provisions of section 14, while the effect of that statutory provision on health professionals and religious leaders was resolved under our determination of the right to privacy under *Issue No. 9.* We abide our decision thereunder.

463. With regard to the right to carry on any occupation, trade or business, Article 40(2) expressly subjugates the enjoyment of that right to the legality of the preferred occupation, trade or business. So that, an NGO that engages in the promotion of a practice that has been de-legalized under section 11(1) and (2)(e) of the Anti-Homosexuality Act would not benefit from that economic right. With the

greatest respect, we do not abide the view of the twenty-second petitioner that the right of religious leaders or organisations to enjoy the uninterrupted use of their (leased) premises to house and cater for disadvantaged persons necessarily mandates them to constitutional protection for persons so housed that are engaged in unlawful activities. We therefore find no violation of Article 40(2) of the Constitution by sections 11(1) and (2)(d) and (e) of the Anti-Homosexuality Act.

464. On the other hand, we respectfully find no nexus between sections 2, 3 and 9 of the Anti-Homosexuality Act and Article 40(2) of the Constitution. Sections 2 and 3 of the Anti-Homosexuality Act create the offences of homosexuality and aggravated homosexuality. These are not occupations, trades or businesses, neither for that matter is the use of premises for homosexuality that is proscribed under section 9 of the Act tantamount to an occupation, trade or business. Section 9 would appear to place a duty upon property owners to be abreast with what goes on in their properties/ homes. This may be an additional dimension to the due diligence expected of property owners but, for present purposes, it does not obliterate anyone's right to their profession, occupation, trade or business.

465. With regard to sections 12 and 13 of the impugned Act, however, we do agree that they embody restrictions to the economic rights guaranteed under Article 40(2) of the Constitution. This would shift the evidential burden to the respondents to prove that the rights limitations delineated in those statutory provisions are permissible under Article 43 of the Constitution. The justification advanced by the respondents is the duty imposed on the State under Article 34(7) of the Constitution to protect children and other vulnerable persons, the duty upon society to protect children and other vulnerable persons under Article 17(1)(c) of the Constitution, the protection of the heterosexual nature of the Ugandan family as prescribed by Article 31 of the Constitution, and the protection of the socio-cultural sensitivities of the Ugandan society which this court is enjoined to consider pursuant to Article 126(1) of the Constitution.

466. Article 43(2)(c) of the Constitution recognises limitations to constitutional rights that are permitted by the Constitution itself. This is in tandem with an established rule of constitutional interpretation that the entire Constitution should be construed together as an integral whole with no particular provision destroying the other but

each sustaining the other in order to deduce the intention of its framers. This is the rule of harmony, the rule of completeness and exhaustiveness. *See* ***Paul Kawanga Ssemwogerere & Another v Attorney General*** *(supra) and* ***The Attorney General of Tanzania v Rev. Christopher Mtikila (2010) EA 13***.

467. We therefore find that sections 2, 3, 9 and 11(1) and (2)(d) and (e) of the Anti-Homosexuality Act are neither inconsistent with nor in contravention of Article 40(2) of the Constitution or Article 22 of the UDHR, Articles 1 of the ICCPR and ICESCR, and Article 22 of the ACHPR. Furthermore, insofar as they seek to protect children and other vulnerable members of the society as provided for in Article 17(1)(c) and 34(7) of the Constitution, the rights limitations enshrined in sections 12 and 13 of the Act are constitutionally permissible. We accordingly answer ***Issue No. 12*** in the negative.

Issue No. 13: **Right to health and property**

468. The first to eighth petitioners contend that sections 9, 11(1) and (2)(d), 14(1) and (2) of the Anti-Homosexuality Act have a discriminatory effect on LGBQTI+ persons' right to property and health in violation of Objectives XIV and XX of the National Objectives and Directive Principles of State Policy, Article 26 of the Constitution, Article 10 of the ICCPR, Article 12 of the ICESCR and Article 16 of the ACHPR. The violation of the right to health is alleged to manifest in the deterrent effect of section 14 to access to healthcare for fear of legal consequences, discrimination and stigma or their identities being revealed. The petitioners rely on the affidavit of Mr. Robert Spano, a former President of the European Court of Human Rights to illustrate how regional and international courts have addressed the issue of criminalization of consensual same-sex relationships. That affidavit evidence is summed up as follows:

(1) The incompatibility of the Anti-Homosexuality Act with international human rights law.

(2) The introduction of the death penalty for the offence of aggravated homosexuality violates the right to life under several international human rights instruments.

(3) The Act creates statutory discrimination against LGBTQI+ persons on the basis of sexual orientation.

(4) Regional human rights courts and comparative national courts have found against the criminalization of same-sex relationships.

(5) The provisions of the Anti-Homosexuality Act are overly broad, vague and uncertain, and as such contravene international law.

469. With specific reference to section 3(2)(c) of the Act, which criminalizes the transmission of a terminal illness through same-sex sexual activity, the petitioners reiterate their earlier view that the death penalty as prescribed for this violates the right to life, while the criminalization of the transmission of HIV is opined to violate the right to health. Reference is made to the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,[70] in which it was observed that the criminalization of the unintentional transmission of HIV/ AIDS infringes the right to health.

470. Sections 2, 3, 12, 13, 14 and 17 of the Act are considered to constrain the principles of self-determination and free development of one's personality, thus hindering the right of LGBTQI+ Ugandans to freely pursue their social and cultural development as guaranteed by Article 22 of the UDHR, Article 22(1) of the ACHPR and Article 1(1) of the ICESCR. The importance of the right to self-determination and self-development is underscored by reference to *Fact Sheet No. 16 (Rev. 1): The Committee on Economic, Social and Cultural Rights*,[71] in which the Committee observes that self-determination, as similarly reflected in Article 1 of the ICCPR, is '**a fundamental pre-requisite for the effective guarantee and observance of individual human rights and is pivotal in securing and strengthening human rights protection measures**.'

471. Reference is further made to *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights*,[72] in which the same Committee reportedly recognizes people's right to participate in cultural life, calling on states to ensure that a person's sexual orientation is not a barrier to the realization of this right. Furthermore, in *General Comment No. 21: Right of Everyone to Take Part in Cultural Life*,[73] the Committee reportedly clarifies that '**cultural rights are**

[70] Cited as *Arnand Grover, A/HRC/14/2, p. 61.*
[71] Cited as *UN document A/CONF. 157/ 24 (Part 1), chap. III, 25 June 1993, p. 4. 11 and 13.*
[72] E/C.12/GC/20 (2009), paragraphs 3, 32.
[73] E/ C.12/GC/21 (2009).

essential for the maintenance of human dignity and positive social interaction,' cultural rights in that context being defined as the manifestations of human existence including one's way of life, language, literature, music, religion, traditions and customs.[74]

472. The petitioners contend that the foregoing literature and Articles 3(2) and 17 of the Maputo Protocol (which upholds women right to self-development and cultural rights) notwithstanding; following the enactment of the Anti-Homosexuality Act, Ms. Daisy Mwanamisi Nanfuka did face mob violence on account of perceptions that she was a lesbian. Her testimony to that effect is contained in paragraphs 10 – 19 of her affidavit in support of the petition. Additional evidence of the Act's violation of LGBQTI+ persons' cultural rights is purportedly demonstrated in paragraphs 8 – 14 and 18 of the eighth petitioner's affidavit insofar as she and her transgender child were ostracized from their community thus impairing their participation in cultural activities; her child being particularly subjected to threats of violence that impeded the development of his/ her identity and personality. The impugned Act's criminalisation of homosexuality is therefore opined to violate the LGBTQI+ community's right to social and cultural development by impeding their way of life, free development of identity and personality, and participation in the common heritage of mankind.

473. On their part, the ninth to sixteenth petitioners argue that the right to the highest attainable standard of physical and mental health, including access to health facilities and services, is not only guaranteed under the Constitution but is also clearly justiciable following this Court's decision in **Centre for Human Rights and Development (CEHURD) & Others v Attorney General, Constitutional Petition No. 15 of 2011**. In that case, this Court found a violation of the right to health on account of the government's failure to provide adequate basic maternal healthcare in public health facilities, and entrenched the position that the rights to health, life and human dignity are inextricably bound.

474. It is thus argued that the enactment of a legislation that restricts a specific group of people from accessing healthcare services retrogresses the state's obligations

[74] Ibid.

to respect, protect and promote the right to health for all. Citing a *Crane Survey Report: High Risk Group Surveys conducted in 2008/9, Kampala* (attached to the affidavit of Nakibuuka Noor Musisi), the petitioners propose that studies have shown that men who have sex with men (MSM) and transgender people are particularly at risk of HIV infection. For instance 13.7% of MSM in Kampala (Uganda) were found to be living with HIV therefore restricting access to health services for such a group by the enactment of the Anti-Homosexuality Act is likely to further impede access to health for the LGBT community.

475. The petitioners rely on the *International Guidelines on HIV/ AIDS, 2006* (also attached to the affidavit of Nakibuuka Noor Musisi) to argue that the government is under a duty to promote health for all, with special emphasis on those who are vulnerable to threats to their physical, mental or social well-being, including the LGBT community. In their view, by criminalizing consensual same-sex activity among adults, sections 1, 2 and 3 of the Anti-Homosexuality Act effectively bar and/ or deter access to healthcare and related services owing to threats of arrest, prosecution and detention. Indeed, the possible impact of the Act is opined to have been envisioned by the Ministry of Health hence its circular to all stakeholders advising them to continue extending healthcare services to all members of the population without discrimination on the basis of sexual orientation. *See circular dated 5th June 2023.* The petitioners thus urge the Court to find that sections 1, 2, 3 and 6 of the impugned Act violate the right to health that is guaranteed under Objective XIV(iii), XX, XXVIII of the National Objectives and Directive Principles of State Policy and Articles 8A, 45 and 287 of the Constitution.

476. On the basis of the averments in paragraphs 29 – 35 of the affidavit of Dr. Adrian Jjuuko, it is further argued that the criminalization of financial assistance for sexual minorities that accrues from section 11(1) and (2)(c) of the Act adversely impacts access to healthcare insofar as it is likely to deter healthcare professionals, government and non-governmental agencies that support this work from extending necessary healthcare and related services for fear of prosecution. This, it is opined, would have grave implications for the right to health and therefore renders the cited statutory provisions similarly in violation of the right to health guaranteed

under Objective XIV(ii), XX, XXVIII of the National Objectives and Directive Principles of State Policy and Articles 8A, 45 and 287 of the Constitution.

477. Furthermore, sections 11(1) and (2)(e) of the impugned Act, which criminalize the operation of any organization that promotes or encourages homosexuality or otherwise normalizes prohibited conduct, is opined to violate the right to health in Objective XIV(b) and XX of the National Objectives and Directive Principles of State Policy and Articles 2(1) and (2), 8A, 20, 45 and 287 of the Constitution to the extent that it criminalizes all work by these organizations on issues of sexual orientation and gender identity. This, in the petitioners' estimation, would have a huge impact on health service provision, as well as research and information dissemination by both government and non-governmental agencies. The Court is thus invited to find a violation of Objective XIV(ii), XX, XXVIII of the National Objectives and Directive Principles of State Policy and Articles 8A, 45 and 287 of the Constitution.

478. In response, the first respondent contends that sections 11(1) and (2)(c) do not expressly or impliedly hinder any category or persons from accessing health facilities and, indeed, the Ministry of Health has reiterated its commitment to treating all persons without discrimination as demonstrated by the Statement of the Director General of Health Services dated 8th August 2023. It is the first respondent's contention that no evidence has been adduced by the petitioners to show that persons that identify as homosexuals are denied medical care. With regard to section 3(2) of the impugned Act, which criminalises the transmission of HIV, it is argued that the intention of that statutory provision is to protect victims of aggravated homosexuality by preventing the spread of the disease.

479. It is further argued that the Ugandan Government is committed to fulfilling its obligation under Objective XX of the National Objectives and Directive State Policies under the Constitution to ensure provision of basic medical services. This commitment is supposedly demonstrated by the Ministry of Health's Patient Charter, 2019, which demands that healthcare be accessible to all without discrimination on the basis of health status, age, sex, sexuality etc; and medical

workers are additionally bound by their hypocritic oath and code of conduct to provide healthcare without any discrimination.

480. This Court is urged to find that the measures and penalties prescribed under the Anti-Homosexuality Act are grounded in the Penal Code Act, which criminalised same sex relationships and are therefore justified. It is further urged to be cautious in following foreign judicial precedents given the possible disparity in their basic constitutional structure. Thus, in **EG v Attorney General of Kenya** (supra), reference was made to **Kenya Ports Authority v Mitu-Bell Welfare Society Limited, Civil Appeal 216 of 2014** and **Jasbir Singh v Estate of Tarochan Singh Rai, Criminal Appeal 4 of 2012**, and the observation made that when developing constitutional law, courts must exercise caution in applying foreign jurisprudence to ensure that they '**develop our common law in a manner that promotes the values and principles enshrined in our Constitution**.' See also **Supriya Chakaraborty & Another v the Union of India, Petition No1011 of 2022**. It is the first respondent's contention therefore that sections 9, 11 and 14 of the Anti-Homosexuality Act are consistent with Article 287 of the Constitution.

481. On the other hand, in response to the petitioners' assertion that MSM and Transgenders have the highest incidence of HIV, the second respondent reiterates that homosexuality is a threat to the Uganda government's progress in the fight against HIV. It is argued that homosexuality not only increases the spread of HIV but also has worse side effects such as rectal damage, including haemorrhoids (bleeding) and incontinence (inability to hold one's stool), which renders MSM susceptible to chronic intestinal infections that could turn cancerous. Whereas it is conceded that the State is under a duty to provide healthcare to all persons and facilitate easy access to it, it is nonetheless argued that the citizenry is under a corresponding duty to support the State in the attainment of development. The second respondent thus supports the restriction of LGBTQI persons' right to access medical services as a preventive measure against further spread of HIV.

482. In response to the petitioners' claim that sections 9 and 11(1) and (2) are inconsistent with Articles 24 and 44(a) of the Constitution, the second respondent contends that the right to property does not include the right to use property to

commit an offence. It is argued that to the extent that Article 31(2a) of the Constitution criminalises homosexuality, no constitutional violation is occasioned by a statute that criminalises it as well. He thus supports the punishment prescribed by the Act. In the second respondent's view, section 11 of the Act reflects the legislative intent to maintain public order and protect societal values, particularly protecting the family, culture and Uganda's heritage as envisaged under Objectives XIX, XXIV and XXV respectively.

483. On its part, the amicus curiae largely concentrates on the right to health, highlighting its initial focus in the WHO (World Health Organisation) Constitution, through to general provision therefor in the UDHR and the more specific articulation of the right to health in Article 12(1) of the ICESCR. The amicus brief highlights the observation in *General Comment 14 of the Committee on Economic, Social and Cultural Rights* that '**the adoption of retrogressive measures incompatible with the core obligations under the right to health constitutes a violation of the right**.' It illuminates Uganda's commitment to achieving SDG 3 of the UN Sustainable Development Goals – ending the AIDS pandemic by 2030; and the country's regional commitment to '**take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick**' in accordance with Article 16 of the ACHPR. This is reinforced by the country's endorsement of *The African Common Position on HIV/ AIDS (2001)*.

484. Uganda is commended for delivering on its international commitments on HIV/ AIDS through its national policies including the *National HIV and AIDS Policy (2016)*, which underscores the integration of HIV/ AIDS services into the broader healthcare system to ensure that individuals have access to testing, treatment and care and the *National HIV and AIDS Priority Action Plan (2023/2024 – 2024/ 2025)* that prioritises a community-led approach to the fight against HIV/ AIDS. Furthermore, the right to health is constitutionally entrenched in clauses XIV(b) and XX of National Objectives and Directive Principles of State Policy, which provide for access to health services and provision of basic medical services. Reference is made to **Centre for Human Rights and Development (CEHURD) & Others v Attorney General, Constitutional Petition No. 15 of 2011** (supra), where the court held the Ugandan government accountable for its failure to provide adequate

maternal health services and facilities, adjudging it to violate Articles 8A, 39, and 45, as well as Directive Principles XIV and XX of the Constitution.

485. The brief highlights various research studies the findings of which suggest that the criminalisation of homosexuality significantly contributed to persistently high infection rates amongst LGBT persons; HIV prevalence was markedly higher in countries that criminalised homosexuality, and punitive anti-homosexuality laws adversely affected HIV prevention, testing, treatment and overall health outcomes. With specific regard to Uganda, reference is made to a September 2023 statement by the International AIDS Society that LGBT persons are less likely than the general public to access HIV treatment, prevention and care services and that would be further threatened by the current anti-homosexuality law.

486. On the basis of the foregoing research, it is opined that HIV criminalisation is not in line with public health objectives and anti-homosexuality laws tend to compromise the ability of healthcare providers to provide healthcare services and dissuade people from HIV testing and treatment for fear of criminal sanctions associated with the promotion of homosexuality. It is proposed that whereas the National HIV and AIDS Priority Action Plan (2023/24 – 2024/ 25) prioritises a community-led approach, organisations that offer HIV prevention and care services could similarly run afoul of the anti-homosexuality law if they serve homosexuals on account of the vague language as to what amounts to *promotion of homosexuality*.

487. For the avoidance of doubt, given the intermittent reference in the amicus brief to *HIV criminalisation laws*, we pause to clarify forthwith that the law in contention presently is a law that criminalises homosexuality and not HIV. Otherwise, the amicus curiae additionally defers to a UNAIDS Report, <u>*The Path That Ends AIDS: UNAIDS Global Update 2023*</u> that identifies effective interventions in the fight against HIV/ AIDS and highlights the specific measures that are impeded by anti-homosexuality laws. The affected measures include:

> *(a) Special interventions aimed at encouraging key populations to adopt health seeking behaviour, including frequent HIV Testing and adherence to HIV treatment.*

(b) *Adopting a people-first approach to combating HIV/AIDS by prioritizing approaches that realize and protect human rights (including LGBT rights).*

(c) *Collection and use of timely data.*

(d) *Adapting innovative approaches based on guidelines, the latest science and technology developments.*

(e) *Ensuring equitable access to medicines and other health technologies.*

(f) *Engaging affected communities.*

(g) *Removing the societal and structural inequalities to HIV-related services, resources and tools.*

488. Before interrogating the issue under consideration on its merits, we note that the matters in contention thereunder are: *Whether sections 9, 11(1), (2)(d) & 14(1)(2) of the Anti-Homosexuality Act, 2023 are inconsistent with the right to access health services, decent shelter, right to property and other general social justice and economic development guaranteed under Objectives XIV & XX of the National Objectives and Directive Principles of State Policy & Articles 8A, 26, 45 & 287 of the Constitution.* However, save for section 14 of the Act that is contested under this *Issue*, the first to sixteenth petitioners opt to address the Court on an entirely different set of statutory provisions. The first to eighth petitioners address the additional sections 2, 3, 12, 13 and 17, while the ninth to sixteenth petitioners canvass sections 1, 2, 3 and 6 of the Act. On the other hand, the first and second respondents restrict themselves to the statutory provisions framed in the present *Issue*, save for the section 3(2)(c) which is briefly addressed by the first respondent. No submissions are forthcoming from either the seventeenth to twenty-second petitioners, or the third and fourth respondents.

489. The framing of issues in constitutional petitions is governed by rule 8(2) of the Constitutional Court (Petitions and References) Rules, 2005 ('the Constitutional Court Rules'), which stipulates that;

> **Where the petition and answer have been duly served, and any application for further and better particulars has been determined, or, as the case may be, where notice of intention not to oppose has been served, the Court shall set a date to hold a scheduling conference to sort out points of agreement and disagreement.**

490. A protracted scheduling conference was undertaken in this case and resulted in the parties' agreement to the issues for determination as framed. We do abide the reasoning in **Male H. Mabirizi & Others v Attorney General of Uganda, EACJ Reference No. 4 of 2012** that once the parties' input was secured, they owned the issues as framed and, we might add, would have been bound by them.

491. Nonetheless, upon closer scrutiny of the parties' pleadings, it becomes apparent that the contestations raised in respect of the additional statutory provisions were in fact pleaded by the above petitioners and were never conceded by the first respondent. Sections 2, 3, 12, 13, 14 and 17 of the Anti-Homosexuality Act are in paragraph 18(V)(zz) and (aaa) of *Constitutional Petition No. 14 of 2023* alleged to violate the right to economic development, while section 3(2)(c) of the same Act is in contested in paragraph 18(V)(eee) of the same petition. Similarly, sections 1, 2, 3 and 6 of the impugned Act are in paragraph 12(c)(v) of *Constitutional Petition No. 15 of 2023* averred to violate the right to health guaranteed under the Constitution. The contestations in those pleadings are not captured in any of the other issues that were consensually framed by the parties.

492. The Constitutional Court Rules are silent on the detailed practice on the framing of issues before the Court but do provide for the application of the Civil Procedure Rules (CPR) with necessary adaptation. *See rule 23(1) of the Constitutional Court Rules*. Order 15 rule 5(1) of the CPR grants courts the discretionary power to amend issues for determination. It reads:

> **The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.**

493. In the matter before this Court presently, it is clear that the respondents were, courtesy of the pleadings cited above, put on notice on the nature of the petitioners' claims as against them and did have the opportunity to respond to the petitioners' assertions. It cannot be suggested, therefore, that recourse to those pleadings by the petitioners in any way derogates on the dictates of a fair trial. Rather, in order to determine the real controversy between the parties, it becomes necessary to amend this issue as framed to accommodate the petitioners' pleadings. We do

therefore exercise our discretionary power under Order 15 rule 5(1) of the CPR to do so. The additional statutory provisions invoked by the petitioners are hereby encapsulated within the issue to yield an amended issue that reads as follows:

> *Whether sections 1, 2, 3, 6, 9, 11(1), (2)(d), 12, 13, 14(1) & (2) and 17 of the Anti-Homosexuality Act, 2023 are inconsistent with the right to access health services, decent shelter, right to property and other general social justice and economic development guaranteed under Objectives XIV & XX of the National Objectives and Directive Principles of State Policy & Articles 8A, 26, 45 & 287 of the Constitution.*

494. It is on that basis that this *Issue* shall be determined. The petitioners question the consistency of sections 1, 2, 3, 6, 9, 11(1), (2)(d), 12, 13, 14(1) & (2) and 17 of the Anti-Homosexuality Act with the right to access health services, decent shelter, right to property, other general social justice and economic development guaranteed under Objectives XIV & XX of the National Objectives and Directive Principles of State Policy, and Articles 8A, 26, 45 and 287 of the Constitution. The contested statutory provisions are similarly reproduced below, save for sections 1, 2, 3 and 6 that were reproduced earlier.

> *Section 9* *Premises*
>
> **A person who knowingly allows any premises to be used by any person for purposes of homosexuality or to commit an offence under this Act, commits an offence and is liable, on conviction, to imprisonment for a period not exceeding seven years.**
>
> *Section 11* *Promotion of homosexuality*
>
> **(1) A person who promotes homosexuality commits an offence and is liable, on conviction, to a period not exceeding twenty years.**
>
> **(2) A person promotes homosexuality where the person –**
>
> **(a) .....**
> **(b) .....**
> **(c) .....**
> **(d) Knowingly leases or sub-leases, uses or allows another person to use any house, building or other establishment for the purpose of undertaking activities that encourage homosexuality or any other offence under this Act;**

Section 12 *Disqualification from employment upon conviction*

A person who is convicted of the offence of homosexuality or aggravated homosexuality shall be disqualified from employment in a child care institution or in any other institution which places him or her in a position of authority or care of a child or a vulnerable person until such time as a probation, social and welfare officer determines that the person is fully rehabilitated and no longer poses a danger to a child or a vulnerable person.

Section 13(1) *Disclosure of sexual offences record*

A person convicted of an offence under this Act shall disclose the conviction when applying for employment in a child care institution or any other institution which places him or her in a position of authority or care of a child or other vulnerable person.

495. We are constrained to restate here that we do not find any inconsistency between section 17 of the Act and the socio-economic rights highlighted above given that it simply mandates the responsible public official to make subsidiary legislation for the implementation of the Act. It is therefore not in contention. In the same vein, having held as we have under our determination of *Issue No. 9* above, we reiterate our finding that section 14 of the Act is inconsistent with the right to health that is guaranteed under Objectives XIV(b) and XX of the of the National Objectives and Directive Principles of State Policy under the Constitution. It will suffice to observe here that had we not pronounced ourselves on its unconstitutionality, the reporting obligation under section 14 would indeed have had a chilling deterrent effect on access to healthcare by homosexual patients afraid of being subjected to criminal prosecution.

496. Meanwhile, the right to social and cultural development is invoked in the context of the right of self-determination and development of personality. The first to eighth petitioners argue that sections 2, 3, 12 and 13 of the Act hinder the right of LGBTQI+ Ugandans to pursue their social and cultural development as guaranteed under Article 22 of the UDHR, Article 22(1) of the ACHPR and Article 1(1) of the ICESCR insofar as they constrain the principles of self-determination and free development of one's personality.

497. The constitutionality of sections 2 and 3 of the anti-homosexuality law vis-à-vis the right to self-determination and personal self-development were interrogated

alongside the right to dignity and socio-cultural considerations under *Issue No. 8* above. We abide our conclusions therein and find no reason to re-consider the same question here.

498. In relation to sections 12 and 13 of the Act, we reiterate our earlier observation that Article 22 of the UDHR anchors an individual's personal and self-development in the fact of his/ her belonging to a society or community. In turn, Article 29(1) of the UDHR categorically recognises that full personal development can only ensue within the confines of a community, and all persons have a duty to their communities. The latter provision stipulates:

> **Everyone has duties to the community in which alone the free and full development of his personality is possible.**

499. Sections 12 and 13 of the impugned Act place a duty upon persons that identify with homosexuality to disclose any conviction for the offence of homosexuality or aggravated homosexuality, pursuant to which they would be disqualified from employment in a child care institution or in any other institution which places them in a position of authority or care of a child or a vulnerable person until they are fully rehabilitated and no longer pose a danger. The first respondent contends that such a limitation to homosexuals right to self-determination and personal development are necessary within the precincts of Article 17(1)(c) of the Constitution. That provision imposes a duty upon every Ugandan citizen to '**protect children and vulnerable persons against any form of abuse, harassment or ill-treatment**.'

500. It seems to us that the limitations to the full enjoyment of the right to self-determination and personal development are not only constitutional within the precincts of Article 17(1)(c) of the Constitution, they are in tandem with the provisions of Article 29(2) of the UDHR, which endorses the limitation of rights that are prescribed by law and are intended to protect the rights and freedoms of others for the general welfare of the society. Article 29(2) reads:

> **In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.**

501. On that premise, we are unable to fault the constitutionality of sections 12 and 13 of the anti-homosexuality law. We now turn to the more specific rights to property and health.

502. The first to eighth petitioners argue that sections 9, 11(1) and (2)(d) of the Anti-Homosexuality Act contravene the right to property enshrined in Article 26 of the Constitution, Article 10 of the ICCPR, Article 12 of the ICESCR and Article 16 of the ACHPR. In a nutshell, sections 9 and 11(1) and (2)(d) of the impugned anti-homosexuality law prohibit anyone from permitting the use of premises for homosexuality or any other offence under the Act. In addition, those statutory provisions prohibit the promotion of homosexuality by leasing/ subleasing, using or permitting the use of property for activities that encourage homosexuality or any other offence under the Act. For ease of reference, the constitutional and international law provisions that the impugned provisions supposedly offend are reproduced below.

Article 26, Uganda Constitution: *Protection from deprivation of property.*

(1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for —

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property.

Article 10, ICCPR

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 12, ICESCR

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 16, ACHPR

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

503. Having interrogated the issue of human dignity under *Issue No. 8*, we find no reason to revisit that question within the context of Article 10 of the ICCPR. We do abide our earlier position on the right to human dignity.

504. Article 26 of the Ugandan Constitution, on the other hand, essentially prohibits the deprivation of property. Such prohibition is echoed in Article 17 of the UDHR, which confers a right to own property and not be deprived of it arbitrarily. The impugned provisions of the Anti-Homosexuality Act do not deprive a defaulting property owner of his property. Rather, they delineate prohibitions in respect of property use, lease or licensing, the penalties for which are custodial sentences for natural persons and the suspension of organisations' operational licences. To the extent that the deprivation of property does not arise thereunder, we find no violation of Article 26 of the Constitution.

505. Nonetheless, Article 12 of the ICESCR and Article 16 of the ACHPR recognise the right to physical and mental health. The petitioners would appear to have invoked those provisions with regard to the right to mental health. In its *Comprehensive Mental Health Action Plan, 2013–2030*,[75] the World Health Organization (WHO) conceptualizes determinants of mental health to include social, cultural, economic, political and environmental factors such as national policies, social protection, living standards, working conditions, and community social support systems. The WHO proposes the following vulnerable groups that may be at a significantly higher risk of mental health problems.

> **These vulnerable groups may (but do not necessarily) include members of households living in poverty, people with chronic health conditions, infants and children exposed to maltreatment and neglect, adolescents first exposed to substance use, minority groups, indigenous populations, older people, people experiencing discrimination and human rights violations, lesbian, gay, bisexual, and transgender persons, prisoners, and people exposed to conflict, natural disasters or other humanitarian emergencies.**

[75] Geneva: World Health Organization; 2021.

506. It is against that background that we interrogate the import and effect of sections 3(2)(c), 9 and 11(2)(d) of the Anti-Homosexuality Act with regard to mental health and wellbeing.

507. We construe section 9 of the Anti-Homosexuality Act to prohibit property owners from knowingly permitting the use of premises for homosexuality or any other offence under the Act. In the same vein, section 11(2)(d) of the Act prohibits the promotion of homosexuality by knowingly leasing, using or permitting the use of property for activities that encourage homosexuality or any other offence under the Act. Unlike section 14 of the Landlord and Tenant Act which quite correctly albeit in general terms prohibits the use of premises by a tenant for an unlawful purpose, the foregoing provisions have the effect of placing a duty upon property owners to interest themselves in what ensues or is intended to ensue in properties within their domain. We are aware that a degree of due diligence is expected of land/ property owners in land transactions. We do also recognize that, subject to such due diligence, the bona fide lack of knowledge of unlawful use or intentions would translate into absence of *mens rea* and therefore no criminal culpability upon property owners.

508. However, Article 25(1) of the UDHR acknowledges the right to an adequate standard of living for everyone to include housing and medical care. This was subsequently concretised under Article 11(1) of the ICESCR as follows:

> **The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.**

509. In this case, applying the proportionality test advanced in **R v Oakes** (supra), we think that legal provisions that have the effect of not simply restricting the right to housing but totally denying homosexuals access to housing is unduly debilitative and unjustifiable in a free and democratic society. Given the established vulnerabilities of homosexual persons with regard to mental health (as deduced from the WHO Action Plan), it seems to us that the impugned statutory provisions have the additional effect of compounding their susceptibility to mental health problems. We are satisfied, therefore, that sections 9 and 11(2)(d) of the impugned Act infringe the right to an adequate standard of living enshrined in Article 25(1) of

the UDHR, and the right to mental health delineated in Article 12 of the ICESCR and Article 16 of the ACHPR.

510. On the other hand, section 3(2)(c) of the Act criminalizes the unintentional transmission of HIV. In our considered view, this would also add stress to a section of the society that suffers from a chronic health condition and is thus, per the WHO report, already susceptible to mental health problems. Furthermore, the criminalisation of unintentional HIV transmission finds no justification in criminal law. We abide the position advanced in the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, to which we were referred by learned Counsel for the first to eighth petitioners. In that report it was observed that '**where States deliberately impose criminal sanctions on individuals who do not intend to transmit HIV, or inadvertently do so through broadly drafted legislation that fails to achieve its legitimate aims, the right to health is infringed with little justification in terms of criminal law or public health**.'

511. Similarly, in a 2013 UNAIDS report,[76] it was opined as follows on criminal culpability for unintentional HIV transmission:

> The application of general criminal law should be limited to cases of intentional HIV transmission (e.g. where a person knows their HIV status, acts with the intention to transmit HIV, and does in fact transmit the virus), informed by the best available scientific and medical evidence about HIV and modes of transmission, prevention and treatment. The harm of HIV non-disclosure or potential or perceived exposure, without actual transmission, is not sufficient to warrant prosecution and should not be criminalized.

512. We agree with that view insofar as it aptly addresses the element of criminal intent or *mens rea*, which is a vital component of the concept of crime. This indeed is the approach that was adopted in section 43 of the HIV and AIDS Prevention and Control Act, 2015, which criminalizes the intentional transmission of HIV as follows: '**a person who *wilfully and intentionally* transmits HIV to another person commits an offence**.' Finding no justification for the criminalization of the unintentional transmission of HIV under section 3(2)(c) of the Anti-Homosexuality,

[76] UNAIDS, *Ending overly broad Criminalization of HIV nondisclosure, exposure and transmission: critical scientific, medical and legal considerations*, Geneva: 2013.

we take the view that it compounds the susceptibility of persons that are HIV+ to mental health issues and thus impedes their right to enjoy the highest attainable standard of mental health, with potential ramifications to their physical health as well. This is a violation of the right to health as envisaged under Article 12(1) of the ICESCR and is inconsistent with Articles 45 and 287 of the Uganda Constitution.

513. The ninth to sixteenth petitioners additionally question the consistency of sections 1, 2, 3 and 6 of the Act with the right to health enshrined in Objectives XIV, XX, XXVIII of the National Objectives and Directive Principles of State Policy and Articles 8A, 45 and 287 of the Constitution. The same petitioners challenge section 11(1) and (2)(c) and (e) for its alleged inconsistency with Objective XIV(b), XX, XXVIII of the National Objectives and Directive Principles of State Policy and Articles 8A, 20, 45 and 287 of the Constitution.

514. Sections 1, 2, 3 and 6 essentially create the offences of homosexuality and aggravated homosexuality, section 3(2)(c) specifically defining aggravated homosexuality to include circumstances where the victim of a homosexual act contracts a terminal illness as a result of the act. Under those statutory provisions, consent is inconsequential to adult homosexual activity.

515. Meanwhile, the invoked constitutional provisions stipulate as follows:

> *Objective XIV:* *General social and economic objectives*
>
> **The State shall** endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that—
>
> **(a) all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and**
>
> **(b) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.**
>
> *Objective XX:* *Medical services.*
>
> **The State shall take all practical measures to ensure the provision of basic medical services to the population.**

Article 8A: *National interest.*

(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

(2) Parliament shall make laws for purposes of giving full effect to clause (10 of this article.

Article 45: *Human rights and freedoms additional to other rights.*

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.

Article 287: *International agreements, treaties and conventions.*

Where—

(a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or

(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention,

the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it.

516. Internationally, the right to health has its roots in a 1948 WHO definition of the term to mean a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The right to health has since been formally articulated in Article 12 of the ICESCR. We reproduce the pertinent parts of that provision below.

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) .....

(b) .....

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

517. Clause (1) of that Article broadly defines the right to health as '**the right to enjoy the highest attainable standard of physical and mental health**.' It is recognized that the right to health includes a wide range of other factors that have been referred to by the Committee on Economic, Social and Cultural Rights as the underlying determinants of health. They include access to health infrastructure such as hospitals and other medical facilities; safe drinking water and adequate sanitation; safe food; adequate nutrition and housing; healthy working and environmental conditions; health-related education and information, and gender equality. Related factors are encapsulated in Objective XIV(b) of the National Objectives and Directive Principles of State Policy in the Ugandan Constitution.

518. In this petition, however, the right to health has been invoked in relation to access to healthcare. Although not specifically articulated under the Constitution, the right to health is addressed in the provision for access to health and/ or medical services under Objectives XIV(b) and XX. It is also covered by the general recognition in Article 45 of rights that are not specifically mentioned. Indeed, the justiciability of the right to health in Uganda was acknowledged in **Centre for Human Rights and Development (CEHURD) & Others v Attorney General** (supra) where it was observed that international and regional human rights instruments on the right to health obligate states parties to take positive action to ensure access to healthcare for all, as well as a negative duty not to do anything that would impede such access to healthcare.[77]

519. Clause (2) of Article 12, on the other hand, imposes specific obligations on states parties that are directed at the full realization of the right to health. In the

[77] *Patricia Asero Achieng & Others v Attorney General (Kenya), Petition No. 409 of 2009* cited with approval.

context of this petition, states parties are required to initiate measures that engender the prevention, treatment and control of epidemics, and endemic, occupational and other diseases[78] and create conditions that would assure medical care for all in the event of sickness.[79] Consequently, states are under the obligation to prohibit and eliminate discrimination on all grounds (including on the basis of health status and sexual orientation) and ensure equality to all in access to health care. Hence, the clarification by the Committee on Economic, Social and Cultural Rights that there is no justification for the lack of protection of vulnerable members of society from health-related discrimination. *See General Comment No. 14, para. 18*. Stated differently, states ought to take positive measures to ensure that vulnerable individuals and groups are not discriminated against.

520. The health sector in Uganda is regulated by a National Health Policy and a National eHealth Policy, 2016. As astutely explained in the amicus brief, with specific regard to HIV/ AIDS (which is the focal issue here), the country operates the *National HIV and AIDS Policy (2016)*, which underscores the integration of HIV/ AIDS services into the broader healthcare system to ensure that individuals have access to testing, treatment and care, and the *National HIV and AIDS Priority Action Plan (2023/2024 – 2024/ 2025)* that prioritises a community-led approach to the fight against HIV/ AIDS.

521. The national health policies enumerated above are additionally supported by a performance enhancement tool that was coined as the *Patients' Rights and Responsibilities Charter, 2019* ('the Patients Charter'), and spells out the various rights and responsibilities available to service consumers in the national health care system. It is specifically intended to '**enable health users' to contribute to the development and contribution of the overall health care system, guide and improve the capacity of health providers in provision of high-quality care. The implementation of the Patient Rights and Responsibilities Charter will enhance community participation and empower individuals to take responsibility for their health**.'

[78] Article 12(2)(c), ICESCR
[79] Article 12(2)(d), ICESCR

522. This broad institutional framework is supported by routine oversight and supervision by the country's Ministry of Health. Hence, following the enactment of the Anti-Homosexuality Act, the Ministry of Health took positive steps to stem any possible shunning of or discrimination against homosexual persons by health professionals. It issued a statement that enjoined all health stakeholders to continue extending healthcare services to all members of the population without discrimination on the basis of sexual orientation. That policy statement was made against the backdrop of clause 2 of the Patients Charter that similarly forestalls discrimination against patients. It states:

> *No health facility or health provider shall discriminate between patients on grounds of disease, religion, tribe, clan, political affiliation, disability, race, sex, age, social status, ethnicity, nationality, country of birth, sexual orientation, or other such ground.*

523. We are therefore inclined to agree with the first respondent that the above health policies demonstrate measures taken by the Uganda government do entrench equal access to healthcare in fulfilment of the state's constitutional and international obligations. They constitute significant policy interventions directed at a particularly vulnerable section of the society at the time – the LGBQT community, resource constraints notwithstanding, and represent significant steps undertaken to ensure non-discrimination of LGBQT+ persons in the provision of health services. This is in accordance with the obligation upon states parties under Article 2(2) of the ICESCR to ensure equitable access to the right to health. Indeed, there is no evidence on record that any member of that community has been denied any healthcare services in Uganda.

524. With specific regard to HIV/ AIDS interventions, the amicus brief indicates that UNAIDS set a *'95-95-95'* percentile target in respect of HIV diagnosis, treatment and viral load suppression. The aim of that target was that by 2025 national statistics would reflect that 95% of all people living with HIV will know their HIV status; 95% of all people with diagnosed HIV infection will receive sustained ART; and 95% of all people receiving antiretroviral drugs (ARVs) will have viral load suppression. As at 2023, Uganda is reported to have made positive progress towards the realization of that target, reporting a 91-94-95/91 result as highlighted below.

For diagnosis, 91% of adults living with HIV (aged 15 years and older) were aware of their HIV-positive status. This is based on whether the individual had reported their HIV- positive status or had a detectable level of ARVs in their blood. For treatment, 94% of the adults living with HIV who were aware of their status were on ART: 95% of women and 91% of men. Individuals were classified as being on ART if they reported current ART use or had a detectable ARV in their blood. With respect to viral load suppression, 94% of adults on ART had viral load suppression: 94% of women and 94% of men.[80]

525. We are aware that attempts to legislate against homosexuality date back to 2014, when the first anti-homosexuality Bill was passed. Before that, the country had historically included on its statute books the crime of unnatural offences that would have included anal sex.[81] There is no evidence to support the view that the apparent aversion to homosexuality was any less then than it is today but, that notwithstanding, Uganda made significant progress in the right to health with specific regard to HIV/ AIDS. It is inconceivable, therefore, that the enactment of the current anti-homosexuality law would so impact the trajectory of HIV prevention, treatment and control in Uganda as to amount to demonstrable retrogression. On the contrary, the data highlighted earlier in this judgment points to an increased likelihood of retrogression in HIV prevention and control where bisexual persons engage in both homosexual (MSM) activity – that reportedly registers a comparatively higher incidence of HIV infection, and heterosexual activity with a comparatively less affected segment of the society.

526. Consequently, aside from section 3(2)(c) which falls short on constitutional muster, we do not find sections 1, 2, (the rest of section) 3 or 6 of the Act to impede the provision of HIV prevention and care services as proscribed under Guideline 4 of the *International Guidelines on HIV/AIDS and Human Rights, 2006*. This Court having adjudged section 14 of the Anti-homosexuality Act to be unconstitutional and given the all-inclusive national health policies delineated hereinabove, we find no other impediment to the treatment of persons that identify as homosexuality and any limitation to their access to healthcare is greatly diminished or minimized.

[80] See paragraphs 48 – 53 of the amicus brief.

[81] See **Mubiru Kisingiri vs Uganda [2016] UGHCCRD 6** where anal sex was prosecuted as an unnatural offence under section 145 of the Penal Code Act.

527. The interventions made in the national health sector take on particular poignancy given the indisputable recognition in Article 2(1) of the ICESCR that low- and middle-income countries (such as Uganda) operate within finite budgets and resource constraints. They nonetheless work progressively towards the full realization of the right to health within those limitations. Without necessarily obliterating the domestic obligation upon the poorer states, who bear the primary responsibility to their people, richer nations are under a corresponding obligation under Article 2(1) of the ICESCR to extend economic and technical assistance to poorer nations as a measure of their own commitment to socio-economic rights. See *Committee on Economic, Social and Cultural Rights, General Comment N° 3 (1990) on the nature of states parties' obligations and General Comment N° 14, paras. 38 – 42.* In that regard, the richer nations would do well to extend support in the areas proposed by the UNAIDS Report to combat HIV/ AIDS (which apparently are not affected by any anti-homosexuality laws). These include:

(1) Accelerating and intensifying HIV/AIDS prevention and treatment research, including research into drug discovery and development. Investing in evidence-based HIV prevention and treatment programmes.

(2) Building and maintaining strong political commitment to ending HIV/AIDS.

(3) Fully funding resilient, integrated and accessible public and community health systems.

(4) Provide accessible HIV prevention and treatment services to protect people's health and well-being.

528. The petitioners and the amicus curiae additionally question the constitutionality of initiatives that have under section 11(1) and (2)(c) and (e) of the impugned law been defined to amount to the promotion of homosexuality. The amicus curiae takes particular issue with the possibility of organisations that offer HIV prevention and care services running afoul of the impugned law should they serve homosexuals, yet civil society intervention is contemplated under the community-led approach espoused in the National HIV and AIDS Priority Action Plan (2023/24 – 2024/ 25).

529. With respect, we are unable to appreciate how the extension of HIV prevention and care services to an entire community that includes persons that identify with homosexuality would run afoul of the impugned statutory provisions. The Committee on Economic, Social and Cultural Rights did in *General Comment No. 14* highlight the four elements of availability, accessibility, acceptability and quality (AAAQ), which are considered essential to the enjoyment of the right to health by all as enshrined under Article 12(2)(d) of the ICESCR. Acceptability in that context requires that health facilities, goods and services are respectful of medical ethics, culturally appropriate, and age- and gender-sensitive. In the words of the *Human Rights Factsheet No. 31 on the Right to Health*,[82] '**they should be medically and culturally acceptable**.' We construe this to mean that all persons and organisations that serve in the health sector, including community-led and community-based NGOs, should be mindful of the law, policies and cultural sensitivities of the communities within which they operate and refrain from conduct or activities that defy them. Communities affected by HIV, as well as any lingering societal or structural contradictions in respect of HIV-related services, resources and tools ought to be approached accordingly.

530. Furthermore, the policy statement by the Ministry of Health following the enactment of the Act ought to have erased all doubt in the mind of any health worker or health service provider that they may freely attend to homosexuals that access the full range of health services. Together with the national health policies highlighted above, this would address the petitioners' concerns that the criminalisation of financial assistance to homosexuals and the operations of organizations that encourage homosexuality or otherwise seek to normalize prohibited conduct under section 11(1) and (2)(c) would adversely impact access to healthcare by deterring healthcare professionals, government and non-governmental agencies that support this work from extending necessary healthcare and related services for fear of prosecution. Our understanding of those polices is that they in fact oblige healthcare professionals and extension workers to attend to all patients and/ or affected communities, including communities that have homosexual persons in their midst.

[82] At p. 4

531. Moreover, we find to be speculative and far-fetched the petitioners' contention that the criminalization of the promotion, encouragement and normalization of homosexuality necessarily criminalizes all the operations of organizations whose focal areas are sexual orientation and gender identity, including research and information dissemination by both government and non-governmental agencies. NGOs that operate in those focal areas are obliged to abide the law. As to how mitigation measures against the promotion of homosexuality translate into a blanket prohibition against research and the dissemination of information by governmental agencies, we find no material on record to support this assertion.

532. In the result, we find that section 3(2)(c) violates the right to health enshrined in Article 12(1) of the ICESCR and recognized under Articles 45 and 287 of the Uganda Constitution, while sections 9 and 11(2)(d) of the Anti-Homosexuality Act are inconsistent with the right to an adequate standard of living enshrined in Article 25(1) of the UDHR and the right to health enshrined in Article 12(1) of the ICESCR, both of which are similarly recognized under Articles 45 and 287 of the Constitution. However, we do not find sections 1, 2, the rest of section 3, or sections 6, 11(1) and (2)(c) and (e) of the impugned Act to be inconsistent with or in contravention of Objectives XIV(b) and XX of the National Objectives and Directive Principles of State Policy, or Articles 45 and 287 of the Constitution. Consequently, ***Issue No. 13*** partially succeeds.

Issue No. 14: **Remedies available to the parties**

533. The petitioners seek a myriad of remedies that are both convoluted and repetitive, but essentially call for the nullification of the entire Ant-Homosexuality Act, 2023. The remedies sought are summed up in the following declarations and orders sought by the petitioners, which are reproduced verbatim:

> (1) The Anti-Homosexuality Act, 2023 institutionalizes a culture of hatred and creates a class of social misfits in contravention of Articles 2(1) and (2), 20, 24 and 44(a) of the Constitution and is therefore null and void in its entirety.
>
> (2) The Anti-Homosexuality Act, 2023 promotes and encourages discrimination and stigmatization against a specific group of people in contravention of Articles 2(1) and (2), 20, 21(1) and (2) and 32(1) and (2) of the Constitution and is therefore null and void in its entirety.

(3) The Anti-Homosexuality Act, 2023 criminalizes consensual same sex sexual activity among adults in contravention of Objective V(II) of the National Objectives and Directive Principles of State Policy and Articles 2(1) and (2), 8A, 20, 45 and 287 of the Constitution and is therefore null and void in its entirety.

(4) A permanent injunction restraining the first respondent and any of its agents from enforcing the Anti-Homosexuality Act, 2023.

(5) Costs.

(6) Any other relief as the court may deem fit.

534. Having held as we have in the body of this judgment, we respectfully decline to nullify the Anti-Homosexuality Act, 2023 in its entirety as has been sought by the petitioners under paragraphs (a), (b) and (c) above, neither would we grant a permanent injunction against its enforcement as invited to do under paragraph (d).

535. The Court has nonetheless adjudged section 3(2)(c) of the Anti-Homosexuality Act to violate the right to health enshrined in Article 12(1) of the ICESCR. Relatedly, sections 9 and 11(2)(d) of the impugned Act have been found to be inconsistent with the right to health, as well as right to an adequate standard of living delineated in Article 25(1) of the UDHR and Article 11(1) of the ICESCR. Furthermore, section 14 in its entirety has been adjudged to infringe the right to health, privacy and freedom of religion. The right to privacy in this context is recognized under Article 12 of the UDHR and Article 17(1) of the ICCPR, while the right to freedom of religion is encapsulated in Article 29(1)(c) of the Uganda Constitution.

536. It will suffice to observe here that provisions of international instruments to which Uganda is a party gain recognition in Uganda's constitutional dispensation on account of Objective XXVIII(b) of the National Objectives and Directive Principles of State Policy, and Articles 45 and 287 of the Constitution. Furthermore, in **Male H. Mabirizi & Others v Attorney General** (supra), the Uganda Supreme Court approbated the severance from the body of a law of any provisions thereof that are adjudged to be unconstitutional. That, therefore, would be the fate of the provisions of the Anti-Homosexuality Act, 2023 that do not pass constitutional muster.

537. Finally, it is trite law that costs should follow the event unless a court for good reason decides otherwise. *See section 27(2) of the Civil Procedure Act, Cap. 71.* Case law abounds on the wisdom of not condemning losing parties to costs in exceptional circumstances such as public interest litigation. *See* ***Kiiza Besigye v Museveni Yoweri Kaguta & Electoral Commission (2001) UGSC 4***. It is abundantly clear that this petition has canvassed matters of grave national importance and immense public interest. Consequently, the circumstances of this case do warrant a departure from the general rule on costs.

E. **Disposition**

538. The upshot of our judgment is that this consolidated petition substantially fails with the following orders:

(a) Sections 3(2)(c), 9, 11(2)(d) and 14 of the Anti-Homosexuality Act, 2023 do not pass constitutional muster, and are hereby struck down.

(b) Each party shall bear its own costs.

It is so ordered.

Dated and delivered at Kampala this 3rd day of April, 2024.

Richard Buteera

Deputy Chief Justice

Geoffrey Kiryabwire

Justice of the Constitutional Court

03/04/2024

Muzamiru Mutangula Kibeedi

Justice of the Constitutional Court

***Monica Kalyegira Mugenyi**

Justice of the Constitutional Court

Christopher Gashirabake

Justice of the Constitutional Court

**This judgment was drafted and delivered before this judge ceased to hold that office.*