

UGANDA'S ANTI-HOMOSEXUALITY ACT DEFIES GLOBAL COLONIALISM TRENDS

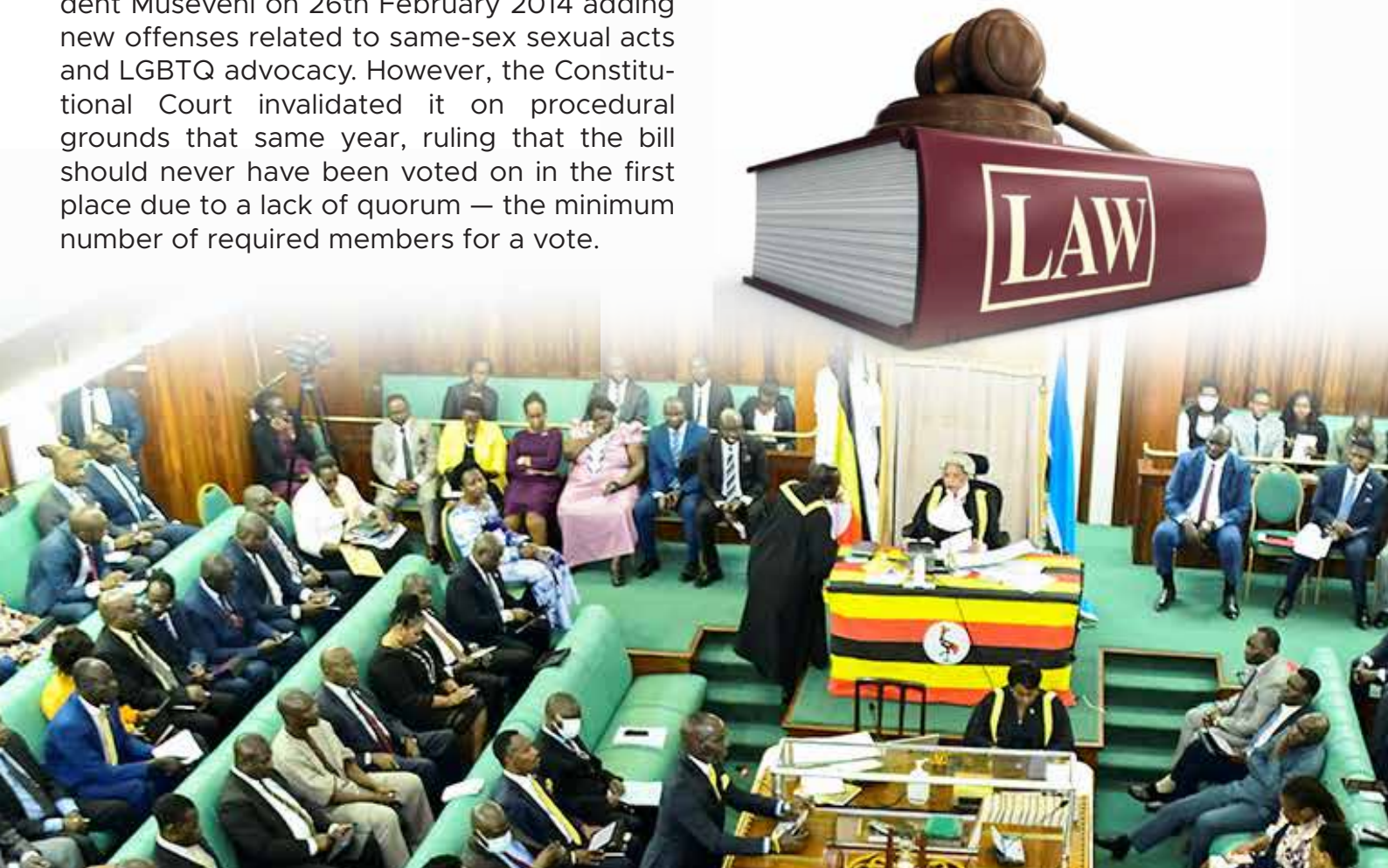


Introduction

Same-sex relations have been criminalized in Uganda since British colonial times and were further codified into Ugandan law at Independence under the Penal Code Act (Cap. 120) pursuant to sections 145 and 146 on “unnatural offenses” and 148 on “indecent practices”. Under the said legislation, “carnal knowledge against the order of nature” between men carries a maximum sentence of life in prison while indecent practices attract a seven-year imprisonment term.

Although homosexual acts were already illegal, a draft Anti-Homosexuality Bill was first introduced by Hon. David Bahati on the floor of Uganda’s parliament on October 14, 2009 to specifically criminalize aggravated homosexuality and ban the promotion of homosexuality. This Bill was passed by Parliament in December 2013, and signed into law by President Museveni on 26th February 2014 adding new offenses related to same-sex sexual acts and LGBTQ advocacy. However, the Constitutional Court invalidated it on procedural grounds that same year, ruling that the bill should never have been voted on in the first place due to a lack of quorum – the minimum number of required members for a vote.

On 28th February 2023, parliament granted Hon. Asuman Basalirwa leave to introduce the Anti-Homosexuality Bill with an object of establishing a comprehensive and enhanced legislation to protect the traditional family by; prohibition of same-sex sexual relations and their 'promotion or recognition; strengthening measures to deal with emerging threats to the traditional, heterosexual family; protecting [Ugandan culture from] sexual rights activists seeking to impose their values of sexual promiscuity and protecting children and youth who are made vulnerable to sexual abuse through homosexuality and related acts. In May of 2023, President Yoweri Museveni signed into law this new version of the Anti-Homosexuality Bill which was immediately challenged by a petition filed in the Constitutional Court of Uganda which was heard on the 18th of December 2023 and judgment delivered on 02nd April 2024. We delve into the detail of this judgment here below.



The 2023 Anti-Homosexuality Act Constitutional Petition – Judgment of Constitutional Court



After the Ugandan Parliament enacted the Anti-Homosexuality Act of 2023 (AHA 2023), four constitutional petitions; 14, 15, 16 and 85 of 2023 were filed which were eventually consolidated into one petition. The petitions challenged both the procedure adopted in passing the law and substantial provisions of the law as unconstitutional. The petitioners argued that the law infringes upon the right to privacy, freedom of the press, freedom of expression and also contended that the law was rushed through parliament without adequate public consultation. On 2nd April 2024, the Constitutional Court judges led by Deputy Chief Justice Richard Buteera declined to nullify the Anti-Homosexuality Act 2023 in its entirety or to grant a permanent injunction against its enforcement. Despite striking down a few sections, the core of the law was upheld. This law now includes the death penalty for some consensual same-sex acts, prohibits expressions of support for LGBTQ people, and prohibits landlords from housing LGBTQ people.

The following were the issues addressed by the Constitutional Court;

1. Whether the Anti-Homosexuality Act alters the decisions or judgments of court in contravention of Article 92 of the Constitution
2. Whether the Private Members 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, and 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 in 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

6. Whether sections 6, 7, 9, 11(1) (2) (a)-(e), 14(1) & (2) and 15(1) and (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 and 16 of the AHA 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) and 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) and 16 of the AHA 2023 are inconsistent with the right to human dignity and protection from inhuman treatment guaranteed under Articles 24 and 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, 7, 11 (1) – (3) and 14 (1) – (3) & (5) of the AHA 2023 are inconsistent with the right to privacy of person, home, correspondence and other property guaranteed under Articles 26 (1), 27 (1) and 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 and 11 (1), (2) (e) & (3) of the AHA 2023 are inconsistent with the right to freedom of speech, expression, thought, conscience, belief and religion guaranteed under Articles 29 (1) (a), (b), & (c) and 43 (2) (c) of the Constitution

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

12. Whether sections 2, 3, 9, 11 (1) – (3), 12, 13 and 14 (1) – (5) of the AHA 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) and 14 (1) (2) of the AHA 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 NODSPs XIV & XX and Articles 8A, 26, 45 and 287 of the Constitution

14. Whether there are any remedies available to the parties



In a unanimous decision of a quorum of five Justices of the Constitutional Court, it was held as follows;



Issue 1 – On alteration of earlier decisions of court

It was contended on behalf of the 1st to 8th Petitioners that the AHA 2023 had the effect of altering the decisions of the Constitutional Court in Prof. J. Oloka Onyango & Ors v A.G (2014) and the High Court in Kasha Jacqueline & Others v Rolling Stone and Victor Juliet Mukasa & Anor v A.G. The Oloka Onyango case struck down the AHA of 2014 while the other two cases respectively dealt with the right to privacy.

Article 92 of the Constitution stipulates that Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.

The A.G argued that the Oloka Onyango petition was decided on a procedural matter and did not delve into the merits of the then AHA 2014. It was also submitted that the cases of Kasha Jacqueline and Victor Mukasa dealt with personal freedoms such as right to privacy and property rather than the question of homosexuality.

The Court held that the Oloka Onyango petition of 2014 only declared the AHA 2014 unconstitutional on the basis of the fact that it was passed without the requisite quorum. It also agreed with the submissions on behalf of the A.G that the Kasha Jacqueline and Victor Mukasa case did not deal with the question of legality of homosexuality, but individual rights such as right to privacy and human dignity. Therefore, there was no violation of Article 92.

Issue 2 – Charge on the Consolidated Fund

It was argued for the Petitioners that sections 16 (2) and 17 imposed a charge on the consolidated fund and were unconstitutional. Secondly, it was submitted that the Certificate of Financial Implications that was issued ignored the impact of the AHA 2023 on the economy. They also argued that the Prisons service would have to be paid to incarcerate those convicted under the AHA 2023.

Court found that these arguments were speculative and not backed up by proof that the Prison Service would have to be paid on a man-hour basis rather than within the pre-existing, pre-budgeted and un-altered Prisons Service wage bill.

Further, Court was of the view that economic outlook, although important, did not go to the root of issuance of a Certificate of Financial Implication.

Issue 3 – Lack of meaningful, adequate public participation

The 1st – 8th Petitioners argued that the Bill was introduced to Parliament on the 9th of March, sent to the Legal and Parliamentary Affairs Committee on the same day and returned on the 22nd of March – 6 days later rather than the requisite 45 days as per the Parliamentary Rules of procedure. This robbed the Ugandan people of the extensive consultation that ought to have been done. It was also alleged by some of the Petitioners that they were denied audience by the Committee.

State Counsel for the A.G distinguished the case of Doctors for Life Intn'l v Speaker of the National Assembly that was cited by the petitioners by arguing that in that case, no consultations were carried out at all while in the case of the AHA 2023, consultations were done. He also argued that the Members of Parliament served as representatives of the Ugandan People.

Court relied on the case of Male H. Mabirizi & Ors v A.G where Supreme Court held that a reasonable opportunity for public participation depends on the circumstances of each case. Court found that NODSPs I (i) and II which require empowerment and encouragement of public participation did not translate into an obligation on the Ugandan polity to facilitate the nature of participation envisioned by the Petitioners. It also held that rule 129 (2) of the Parliamentary Rules of procedure required that Committee to exercise discretion on the expediency of consultations.

Issue 4 – Conduct of the Speaker of Parliament

The 9th to 16th Petitioners submitted that the Speaker is required to display impartiality during proceedings yet her statement that “Ugandans must see and hear those who are supporting homosexuality” were indicative of bias and contrary to Articles 2(1) & (2) and 89 (1) & (2) of the Constitution and rule 77 of the Parliamentary Rules of Procedure.

It was argued for the A.G that the Speaker of Parliament rather offered guidance to the House.

Court held the conduct of Parliamentary debates is not addressed under the Constitution, but under the Parliamentary rules of procedure. Violation of these rules does not amount to a Constitutional Violation let alone rendering a law emanating from this unconstitutional. Whereas the Speaker’s conduct may have indicated partiality, that was a matter for the house to deal with and not a constitutional violation to invoke the Constitutional Court’s jurisdiction.

Issue 5 – Procedure of Amending Constitution to Prohibit Same Sex Marriages

The 1st - 8th Petitioners to contended that Article 31 (2A) of the constitution did not originate from Constitution Amendment (No. 3) Bill of 2005. It was therefore not considered by the Legal and Parliamentary Affairs Committee neither was it in any of the recommendations.

It was submitted for the A.G that the amendment of Article 31 (2A) originated from Constitution Amendment No.3 and was presented by Hon. Abdu Katuntu as clause 11 (2) (a).

Court found that there was no evidence on record to show that the procedure laid down in Articles 259 and 262 was flouted. It also reiterated its earlier decision that failure to adhere to the Parliamentary Rules of Procedure did not amount to a Constitutional Violation.

Issue 6 – Principle of Legality

The Petitioners submitted that although Article 28 (12) of the Constitution offered protection against legal uncertainty, the AHA 2023 was practically and judicially unenforceable for being overly broad on the definition of what amounts to criminal conduct, and the conflict between criminalized conduct and the human rights of those that engage in such conduct.

Using the golden rule of interpretation, the Court found that there was no vagueness in the language used to draft sections 6 and 14(2) of the AHA 2023. The Court also found that not all terms used in a statute ought to be defined (basing on *A.G v. Salvatori Abuki*). It also held that there is no uncertainty under section 7 regarding tripartite broadcasting mediums. With regard to sections 14 and 15, the Court found that there was no evidence to support the petitioners' speculations that society could manipulate the sections to report individuals without reasonable suspicion, but based on ill-intentions. It also concluded that sections 14 and 15 were not vague or ambiguous.

Issue 7 – Right to Equality and Non – Discrimination

It was contended by the Petitioners that the AHA 2023 created new offences that violate the right of LGBTQI persons to equality by basing on homophobic myths, fear-mongering and purported threats to family values to fuel stigma, prejudice and violence against LGBTQI persons.

Court deferred to the constitutional interpretation rule of harmony/ the rule of completeness and exhaustiveness to hold that to try to include “sexual orientation” in the interpretation of the term “sex” under Article 21 of the Constitution would put it in a conflict with Article 31 (2A) which prohibits same sex relations. Court held that omission of the term ‘sexual orientation’ during the drafting of the Constitution was deliberate, moreover, the amendment in Article 31 (2A) received overwhelming support by two thirds of Parliament.

There is therefore no discrimination or violation of the right to equality under the impugned sections.

Issue 8 – Human Dignity

The 1st – 8th petitioners submitted that the enactment of the AHA 2023, its title, purpose and contested provisions targeted the LGBTQI community and violated their right to dignity and freedom from torture enshrined in Articles 24 and 44 (a) of the Constitution. A plethora of cases were cited the gist of which was that categorizing gay people as criminals amounted to stigmatization and rendered them vulnerable as it was an invasion on their dignity as human beings. The 9th – 16th Petitioners cited potential violation of Article 7 of the ICCPR and Article 5 of the ACHPR.

The Court held that internationally, the concept of dignity was broader than that which is provided for under Article 24 of the Constitution. The court took into consideration the fact that human dignity related to individual autonomy vis-à-vis the perceptions and interests of their societal culture. It considered the societal right to self-determination and self-conceptualization. The court reminded the parties that the backdrop of human dignity in the Ugandan Constitution could be seen through the NODSPs I (i) and XXIV and the preamble which revealed that the country's cultural objectives were of a central value to its constitutional embodiment of the principle of human dignity. Court therefore held that based on the community cultural aspect of human dignity in the Ugandan society, there was no violation of human dignity.

With regard to the argument of consenting adults and individual autonomy, Court relied on the case of *Dobbs v. Jackson Women's Health Org.* in the USA where the Supreme Court also took into consideration the history and traditions and dictates of rule of law to override the broader right to autonomy.

Therefore, court found that there was no violation of the right to freedom from torture, cruel, inhuman and degrading treatment under the impugned sections.



Issue 9 – Right to Privacy

The Petitioners averred that LGBTQI persons have a right to occupy private spaces free from intrusion by the State. They also argued that one had a right to privacy regarding his/her intimacy decisions.

It was argued for the Respondents that the right to privacy was not absolute and could be limited. It was also submitted that the Act made no case for unlawful entry onto private property.

Court held that Article 1 of the ICCPR and Article 22 of the ACHPR were inapplicable to the right to privacy. Having held under section 8 that acts of homosexuality go against Uganda's culture and norms, court found that the right to privacy could be limited as per Article 29 (2) of the UDHR and thus, there was no violation of this right under sections 1, 2 and 3 of the AHA 2023.

However, with regard to professional confidentiality such as medical instances, Court held that section 14 of the AHA 2023 was inconsistent with the right to privacy under Article 12 of the UDHR and Article 17 of the ICCPR, the right to health enshrined in NODSP XIV (b) and Article 12 of the ICESCR.

Issue 9 partially succeeded.

Issue 10 & 11 – Right to Freedom of Expression, Thought and Association

The petitioners were of the view that there was a violation of Article 29 of the Constitution in as far as it refrained individuals from expressing their opinions on certain topics regarding homosexuality within the confines of the law. The Petitioners submitted that under Article 19 (2) of the ACHPR, the right to freedom of expression included the ‘freedom to seek information and impart information or ideas...’and that persons conducting research or publications on gender minorities would be placed at a disadvantage. It was also argued that prohibiting property owners from leasing out their premises for homosexual purposes amounted to a violation of the right to freedom of assembly.

Court firstly reiterated its holding in regard to section 14 being inconsistent with Article 29 (1) (c) of the Constitution. Since the petitioners did not advance any submissions in regard to sections 5, 6, 7 and 13, the Court presumed that these were abandoned. With regard to section 11, Court reminded the parties that the AHA 2023 was enacted against a backdrop of recruitment of children into homosexuality. It held that it was never the intention of the framers of the Constitution to have a lawless society therefore the limitations imposed through section 11 (2) (c) & (e) are demonstrably justifiable in a free and democratic society. The court also found that there would be no violation to the right to assembly under section 11 (2) (d) of the AHA 2023. Court found that section 11 (2) (b) of the Act resonated with Section 31 of the Uganda Communications Act and section 13 of the Anti-Pornography Act, seeking to preserve societal morals. Court found the limitations legally permissible within the confines of Article 19 (3) of the ICCPR. Court held that section 11 (2) (b) did not impede the right to academic freedom under Article 29, but instead amounted to a necessary limitation.

Issue 12 – Right to Profession, Occupation and Business

It was submitted by the Petitioners that the AHA 2023 which criminalized LGBTQI persons, called for their disqualification from employment upon conviction under section 12, the duty to disclose to employers under section 13 and the duty to report acts of homosexuality under section 14 violated the economic and development rights of Ugandans that are protected under Article 40 (2) of the Constitution. The Petitioners also challenged section 11 which called for the criminalization of activities of organizations which support or encourage homosexuality. The Petitioners also cited violation of Article 23 of the UDHR, Article 15 of the ACHPR, Article 13 of the Maputo Protocol and Article 6 (1) of the ICESCR.

Court noted that economic rights under Article 40 of the Constitution can be limited. Court held that Article 40 did not give religious leaders or organizations to constitutional protection to house those engaged in unlawful activities. It therefore held that sections 11 (1) and (2) (d) & (e) of the AHA 2023 were not unconstitutional. Court found that there was no nexus between sections 2, 3 and 9 of the AHA 2023 and Article 40 of the Constitution as these only created the offences of homosexuality and aggravated homosexuality. Court also found the limitations in the impugned sections to be permissible thus there is no violation of the right to practice one’s profession, occupation or business.

Issue 13 – Right to Health and Property

It was the Petitioners’ case that the deterrent effect in section 14 to access to healthcare for fear of legal consequences and stigmatization was a violation to the right to health. It was also submitted that section 3 (2) (c) of the AHA 2023 which imposed a death penalty for transmission of terminal illness through homosexual activities was a violation of the right to life while the criminalization of transmission of HIV was a violation of the right to health. The Petitioners also averred that the criminalization of financial assistance for sexual minorities under section 11 (1) and (2) (c) of the Act impeded access to healthcare.

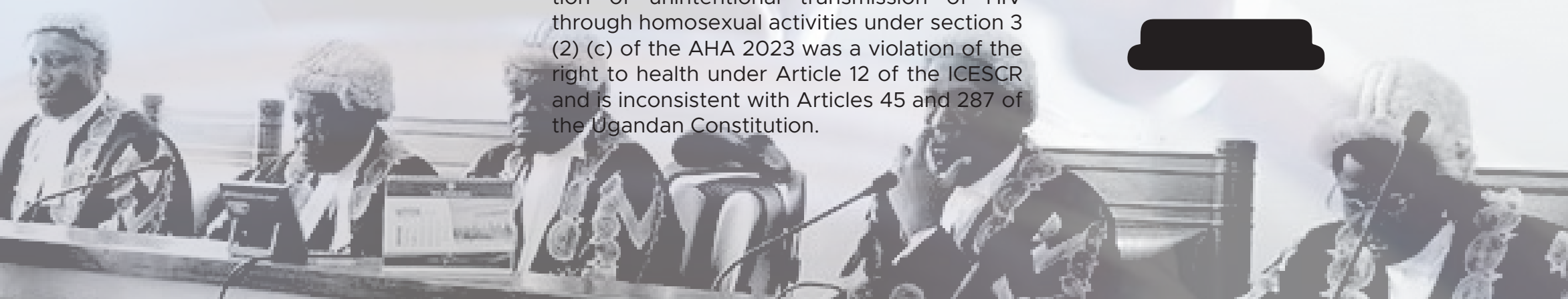
Court held that section 14 of the AHA 2023 was inconsistent with the right to health. Court found that sections 2 and 3 were not a violation of the right to self-determination and personal development and reiterated its findings under Issue 8 on the right to dignity and socio-cultural considerations. Sections 12 and 13 were found not to be unconstitutional. However, court found that sections 9 and 11 (2) (d) of the AHA 2023 infringed upon the right to an adequate standard of living under Article 25 of the UDHR and the right to mental health under Article 12 of the ICESCR and Article 16 of the ACHPR. Court also found that the criminalization of unintentional transmission of HIV through homosexual activities under section 3 (2) (c) of the AHA 2023 was a violation of the right to health under Article 12 of the ICESCR and is inconsistent with Articles 45 and 287 of the Ugandan Constitution.

Sections 1, 2, the rest of section 3, section 6, 11 (1) & (2) (c) & (e) of the AHA 2023 were found not to be inconsistent with or in contravention of NODSPs XIV (b) and XX or Articles 45 and 287 of the Constitution.

Issue 14 – Remedies Available

The Court declined to declare the AHA 2023 unconstitutional in its entirety or to grant a permanent injunction against its enforcement in Uganda.

It reiterated its earlier resolutions on the impugned sections – those struck out for their inconsistency and violation of constitutional rights and those deemed to be acceptable and demonstrably justifiable in a free and democratic society.



Spiritual dynamics of the anti-homosexuality legislation



Ugandan religious leaders from the varied religious factions, have over the years, endorsed the anti-same-sex law pledging all their support to ensure that the said law comes into effect. Central to shaping the trajectory of the enactment of this law is a prophecy that was given by Prophet Elvis Mbonye of Zoe Fellowship ministries. On 8th January 2013, Prophet Elvis Mbonye prophesied about the emergence of a new form of strange colonialism tactfully being handed down to nations under the guise of the LGBTQ movement. He explained that while it would be disseminated through numerous avenues, the end of it all is globalization. At the time of the prophecy, Prophet Elvis acknowledged that one of the primary elements of this 'globalization' that was being fronted, to which Uganda was a hinderance, was the growing anti-gay sentiments which would then culminate in a more heated debate rising again. Sure enough, in December 2013, the anti-homosexuality bill, which had gone silent since 2009 picked momentum once again and was first passed into law in 2014.

The passing of the Act sparked global debates surrounding LGBTQ rights with Uganda facing significant international criticism from reknown global leaders like former president of the USA-Barrack Obama and his former Secretary of State-Hillary Clinton. Nevertheless, Uganda's democratic process and President Museveni stood firm in supporting this legislation and preserving its cultural values in the face of global influences. To this day, Uganda still serves as a barrier to the rise of new form of colonialism and has presented herself as a worldwide yardstick regarding resolutely defending and upholding our ancient spiritual and cultural values.

The recent legal battle that unfolded in the Constitutional Court over the Anti-Homosexuality Act demonstrated this stance, as Uganda has firmly asserted its sovereignty against international scrutiny. The Court's decision to uphold the constitutionality of the Act showed Uganda as a stumbling block demonstrated through its defiance of external pressures and its commitment to preserving its cultural integrity as Uganda's democratic processes upheld the Act despite facing international criticism.

In reaching its decision, the Constitutional Court of Uganda weighed both global norms alongside Uganda's unique socio-cultural context and as a result balanced between international human rights standards and national sovereignty which challenged the prevailing narrative that African nations passively accept the forces of globalization. As a result, this positioned Uganda as an active participant in shaping its own future, asserting its independence and autonomy on the global stage.

It is therefore worth acknowledging that, knowingly or unknowingly, Prophet Elvis Mbonye's prophetic guidance given in 2013 has significantly influenced the Uganda's trajectory on this matter leading to a landmark decision amidst the complex influences of a cunning subliminal globalization. As a matter of fact, Uganda's law has been dubbed the most stringent world over.



Other jurisdictions that criminalise homosexual relations

Homosexuality is criminalized in 65 countries worldwide, with 11 imposing the death penalty for private, consensual same-sex sexual activity. In Africa, 32 countries criminalize homosexuality, including Algeria, Burundi, Cameroon, Chad, Comoros, Egypt, Eritrea, Eswatini, Ethiopia, Zimbabwe, Ghana, Nigeria, Mauritania, South Sudan and Guinea. In the Middle East and North Africa, countries such as Iran, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Syria, Tunisia, Somalia and the United Arab Emirates criminalize homosexuality. In Asia, Bangladesh, Brunei, Indonesia, Kiribati, Malaysia, Maldives, Nauru, North Korea, Pakistan, Palau, Papua New Guinea, Philippines, Singapore, Solomon Islands, Sri Lanka, Tonga, Turkmenistan, Tuvalu, and Uzbekistan have laws criminalizing homosexuality. In the Caribbean and the Americas, countries like Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago also criminalize homosexuality.

Conclusion

Uganda's response to the challenges of globalization, as demonstrated by the legal battle over the Anti-Homosexuality Act, have affirmed the nation's sovereignty, resilience and commitment to upholding its cultural values. To this end, Uganda stands tall and proud both as a stumbling block, and as a symbol of independence from external influences in an ever-pressurizing world.

FOR GOD AND MY COUNTRY!