

# ERT Legal Brief on the Ugandan Anti-homosexuality Bill 2009 (Excerpts)

On 9 December 2009, ERT has submitted a legal brief to Ugandan President Yoweri Museveni outlining how adoption of the Anti-homosexuality Bill currently being debated would breach both Uganda's Constitution and its international treaty obligations. ERT's submission calls on President Museveni and Ugandan parliamentarians to reject the Bill in its entirety, and to review the constitutionality of section 145 of the Ugandan Penal Code, which is currently used to prosecute homosexual conduct.

The 23-page submission by The Equal Rights Trust focuses solely on the rights to equality and non-discrimination, providing a detailed analysis of the way in which the proposed Bill would affect the enjoyment of these rights. ERT argues that protection from discrimination provided by the Constitution of Uganda includes protection on grounds of sexual orientation and gender identity. It further argues that the Bill does not comply with the Constitution's own provisions for restricting fundamental rights. In the second part of the submission, ERT turns to questions of compliance with international law from the point of view of equality and non-discrimination.

Excerpts of Part 1 of the legal brief are published below. Footnotes have been omitted.

To  
President Yoweri Kaguta Museveni  
State House Nakasero, P.O. Box 24594  
Kampala, Uganda

Dear Mr President,

I write on behalf of The Equal Rights Trust (ERT) to express our serious concern about the Anti-homosexuality Bill 2009 which was introduced before the Ugandan parliament on 14 October 2009. (...)

As you must be aware, many stakeholders both inside and outside Uganda have expressed concern with the Anti-homosexuality Bill. In view of this, in the present submission we will draw your attention to issues arising from this Bill only from the point of view of the rights to equality and non-discrimination, which are our focus of expertise, offering an objective independent opinion on whether the Bill is compatible with the Constitution of Uganda and

international law in respect to these rights. On the basis of our analysis, we conclude that if adopted, the Bill would contravene both. If passed, the provisions of the Anti-homosexuality Bill would legitimise, institutionalise, increase and perpetuate the profound discrimination and gross inequality reportedly suffered by lesbian, gay, bisexual and transgender (LGBT) people in Uganda today.

The Bill proposes to “fill the gaps in the provisions of other laws”, in particular section 145 of the Penal Code, which in effect makes same-sex conduct illegal through the criminalisation of “unnatural offences”. The Bill’s explicit purpose is to criminalise not only same-sex relationships but also the actions of those who promote the rights of LGBT people.

### **Summary of Findings**

In this brief, The Equal Rights Trust presents substantive legal arguments which establish the conclusion that the Anti-homosexuality Bill is contrary to:

- The Constitution of Uganda: In particular, the adoption of the Anti-Homosexuality Bill would violate, inter alia, Article 21 (equality and freedom from discrimination) of the Constitution.
- Uganda’s obligations under international human rights law: In particular, the adoption of the Anti-Homosexuality Bill would contravene Uganda’s obligations under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights.

On the basis of the legal analysis presented herein and in the anticipation of the egregious discrimination, stigmatisation and persecution that LGBT people and others will suffer if the Anti-homosexuality Bill is adopted, we urge you, in the strongest possible terms, to:

- (i) Reject, in its entirety, the Anti-homosexuality Bill; and
  - (ii) Take steps to review the constitutionality of section 145 of the Penal Code and remove this provision from Uganda’s legislation.
- (...)

### **1. The Constitution of Uganda**

Article 2 of the Constitution of Uganda states clearly that the Constitution is the supreme law of Uganda, that it is binding on all authorities and persons throughout the country and that any other law or any custom which is inconsistent with its provisions shall be void. A strong commitment to equality pervades the Constitution. The Preamble provides that the people of Uganda are committed to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. Furthermore, a commitment to an equal and inclusive society is expressed through Article III (ii) which states:

“Every effort shall be made to integrate all the peoples of Uganda while at the same time recognising the existence of their ethnic, religious, ideological, political and cultural diversity.”

Most notably the Constitution espouses a fundamental right to equality through Article 21.

## 1.1 The Right to Equality

Article 21 (1) states:

“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.” (...)

The Anti-Homosexuality Bill creates several new offences within Ugandan criminal law. These include: (1) “The offence of homosexuality” which under Article 2 criminalises same-sex sexual conduct (including “touching with the intention to commit the act of homosexuality”) and carries a penalty of life imprisonment; (2) “Aggravated homosexuality” under Article 3 which imposes the death penalty on persons who are found guilty of committing “homosexuality” in a range of “aggravated” circumstances including “committing homosexuality” with persons under the age of 18, and “committing homosexuality” where the offender is living with HIV; and (3) “Same-sex marriage” which under Article 12 provides that people who contract a marriage with a person of the same sex are liable on conviction to life imprisonment.

These offences along with many other contained in this Bill overtly and systematically discriminate against people on grounds of their sexual orientation. The adoption of this Bill would create arbitrary legal provisions within the criminal justice system which are inherently discriminatory and clearly contravene Article 21 of the Constitution of Uganda.

The offences introduced by the Anti-Homosexuality Bill target a certain class of people - LGBT people and those who would defend their basic human rights – and seek to subject these people to arbitrary, unreasonable and unjustifiable discrimination within Ugandan criminal law. In doing so the Bill seeks to (i) systematically deny LGBT people their right to enjoy equal protection of the law; (ii) criminalise their ability to form private relationships; (iii) make it impossible for LGBT people to live their lives with dignity; and (iv) deny their inherent right to equality under Article 21. The Constitutional Court of Uganda has in previous decisions offered a clear interpretation of the purpose of Article 21 of the Constitution in relation to discrimination on grounds of sex:

“The concept of equality in the 1995 Constitution is founded on the idea that it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender (...) There is urgent need for Parliament to enact the operational laws and scrap all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real substantial equality based on the reality of a woman's life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises.”

Article 21(2) of the Constitution states:

“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.”

Sexual orientation is not explicitly listed as a prohibited ground of discrimination within Article 21(2). Nonetheless a solid legal basis exists for the conclusion that Article 21(2) prohibits discrimination on the grounds of sexual orientation. Two justifications support this conclusion:

- i. Read as a whole, Article 21 protects all persons from discrimination;
- ii. Sexual orientation is covered through a test for adding of new grounds to the enumerated grounds in Article 21(2)

**(i) Read as a whole Article 21 protects all persons from discrimination**

The interpretation of the Constitutional Court case in *Uganda Association of Women Lawyers and Others v Attorney General* makes it clear that the grounds listed in Article 21(2) are illustrative and not exhaustive. The opinion of A. E. N. Mpagi-Bahigeine Ja states that the concept of equality within Article 21 is founded on the idea that “it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender”. The prevailing implication of this reasoning is that it is also wrong and unacceptable to discriminate on grounds which are analogous to race or sex. This reasoning taken together with the text of Article 21(1) which sets out that the right to equality protection applies to all persons creates a strong presumption that under Article 21(2) discrimination on the grounds of sexual orientation is unconstitutional.

**(ii) Sexual orientation is covered through a test for adding new grounds to the enumerated grounds in Article 21(2)**

Most jurisdictions have adopted a variant of one of two broad approaches when setting the personal scope of the prohibition of discrimination. The first is termed a closed-list approach. It narrowly construes the right to equality to apply to a limited range of protected grounds, or classes, and respective personal characteristics, such as race, sex or disability on the basis that these characteristics have historically resulted in discrimination and victimisation against individuals who have them. Through specifying that the right to equality applies only to certain characteristics, a closed list approach guarantees that the scope of protection from discrimination is not overly broad. It also ensures that the right to equality is not misused by preventing legitimate distinctions from being made or by allowing spurious claims of discrimination.

While the closed list approach permits greater legal certainty, it is often too restrictive and non-flexible in its application. The impossibility to seek protection from discrimination based on a new or emerging ground undermines the object and purpose of the constitutional guarantees of equality and of national equality legislation. Consequently, many legitimate claims of discrimination would fall because they cannot be argued within an explicitly prohibited ground.

A second approach - the open list approach - also explicitly lists grounds of discrimination such as race, sex or political opinion which have historically resulted in discrimination against individuals with certain group characteristics. In addition to these, the open list approach

includes the expression “other status”, which enables new grounds of discrimination to be prohibited by law. This approach recognises that the grounds on which serious discrimination manifests itself often evolve or are born anew from social events and that individuals are often victims of discrimination on grounds which do not necessarily have a link to historical oppression, victimisation or marginalisation. It therefore allows courts and other judicial bodies to expand the list of prohibited grounds of discrimination to analogous cases in which individuals can experience similar unjust discrimination.

International human rights instruments elaborated in the framework of the United Nations in the wake of the 1948 Universal Declaration of Human rights follow the open list approach, established first by Article 2 of that Declaration. Making use of the open list – the “other status” provision, international human rights treaty bodies, including the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have determined that discrimination on grounds of sexual orientation is covered by the provisions of the respective Covenants under their oversight (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) because it is analogous to the explicitly proscribed grounds of discrimination. Yet many legal systems avoid the open list approach as it allows an overly broad and flexible interpretation of the right to equality in which potentially any distinction regardless of its triviality could invoke a claim of discrimination and a violation of the right to equality.

The Declaration of Principles on Equality (2008), which can be described as the current international understanding of the principles on equality as well as a moral and professional consensus on equality, was agreed upon by a group of experts from all regions of the world, whose work was facilitated by The Equal Rights Trust. In response to the sets of difficulties arising from both the open-list and closed-list approaches to grounds of discrimination, the Declaration of Principles on Equality has developed a compromise solution that retains the flexibility and inclusiveness of the open list approach but encases it within a strict legal test. This ensures that the protection against discrimination is not extended to spurious or illegitimate claims of discrimination. Principle 5 of the Declaration of Principles on Equality states:

“Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.

Discrimination based on any other ground must be prohibited where such discrimination

- (i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.”

Therefore, applying the test set out in this document of good practice, in order for sexual orientation to constitute a prohibited ground of discrimination, it must be shown that either:

- (a) Discrimination on the grounds of sexual orientation causes or perpetuates systematic disadvantage in Uganda; or
- (b) Discrimination on the grounds of sexual orientation undermines human dignity in Uganda; or
- (c) Discrimination on the grounds of sexual orientation adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds.

We now turn to examine whether the adoption the Anti-Homosexuality Bill, which would legitimise and perpetuate discrimination on grounds of sexual orientation, would be compatible with this modern understanding of the prohibited grounds of discrimination.

### **(a) Discrimination on the grounds of sexual orientation causes or perpetuates systematic disadvantage in Uganda**

The Anti-homosexuality Bill criminalises activities on the grounds of sexual orientation. It not only criminalises acts of people who engage in same-sex conduct but also criminalises acts of people who promote the rights of LGBT persons and those who fail to report "the offense of homosexuality". The effect of the Bill is that on the grounds that a gay, lesbian or bisexual person engages, attempts to engage, or "conspires to engage" in private same-sex conduct, they will be committing a crime. Furthermore, anyone who aids, abets, counsels, or promotes the freedom of people to engage private same-sex conduct also commits a crime.

The Bill therefore reaffirms the existing disadvantage and introduces new forms of disadvantage on the grounds of sexual orientation (for both LGBT people and human rights defenders). It perpetuates the existing discrimination, victimisation and disadvantage experienced by LGBT people as a result of the application of the criminal code by making a broad range of activities aimed at promoting tolerance toward and inclusion of LGBT people a criminal offence. The Bill also promotes the systematic disadvantage of LGBT people and those associated with the LGBT movement both inside and outside Uganda.

(...)

South Africa has acknowledged the disadvantaging and negative impact that sodomy laws have had on gay men. In the leading judgment of the Constitutional Court which declared these laws unconstitutional, Justice Ackerman stated:

"I turn now to consider the impact which the common law offence of sodomy has on gay men in the light of the approach developed by this Court (...) (a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate."

The Canadian Supreme Court also recalled in the case of *Vriend v Alberta* that its previous jurisprudence declared that sexual orientation was analogous to other grounds contained in section 15(1)18 of the Canadian Charter of Rights and Freedoms because of the disadvantage LGBT people suffered.

“In *Egan*, it was held, on the basis of ‘historical social, political and economic disadvantage suffered by homosexuals’ and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1).”

The South African and Canadian jurisprudence illustrates that constitutional guarantees to substantive equality require that laws which systematically criminalise the activities of LGBT people inherently disadvantage them and infringe their right to equality. The Anti-homosexuality Bill seeks to victimise, criminalise and stigmatise all those associated with the LGBT movement in Uganda. All offences within the Bill disadvantage LGBT people in a way which seeks to severely impair their ability to lead a normal life. The negative consequences of this Bill would leave LGBT people at such a disadvantage in comparison to everyone else that they would be unable to participate in any way in Ugandan economic, social, political, cultural or civil life.

### **(b) Discrimination on the grounds of sexual orientation undermines human dignity**

The second test on which another ground of discrimination ought to be added to the list of protected grounds is whether it undermines human dignity. The jurisprudence of the Canadian Supreme Court, in the case of *Vriend v. Alberta*, has declared that recognising the human dignity of people with a different sexual orientation is critical to ensuring their right to equality under section 15 (1) of the Canadian Charter of Rights and Freedoms:

“It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened. That equality is guaranteed by our constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.” (...)

Upholding human dignity has also been put forward by the Constitutional Court of South Africa as a fundamental basis to strike down sodomy laws. In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CCT 11/98, 1998, the Court found that the sodomy laws violated the right to equality contained in section 9 of the Constitution of South Africa. Confirming that the discriminatory impact which the sodomy law had on gay men was unfair, Justice Ackerman considered three elements to be material. First, the discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in

the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate. Second, the nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform to the moral or religious views of a section of society. Third, the discrimination which the sodomy laws constituted has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.

The Indian judiciary recently moved to strike down section 377 of the Indian Penal Code, which criminalised homosexuality, and declared it unconstitutional. In the *Naz Foundation* decision, the Delhi High Court held that the discrimination perpetuated by section 377 severely affects the rights and interests of homosexuals and deeply impairs their dignity. It found that the inevitable conclusion was that the discrimination caused to the gay community was unfair, unreasonable and in breach of Article 14 (right to equality) of the Constitution of India. The High Court found that section 377 also violated Article 15 (right to non-discrimination) of the Constitution and concluded “that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15”.

The centrality of human dignity to the reasoning of the Canadian, South African and Indian courts in striking down laws and policies which discriminated against people on grounds of their sexual orientations has three important implications for the Anti-homosexuality Bill in Uganda. First, the Bill perpetuates an ideology that LGBT people are unnatural, immoral and a threat to Ugandan society. This fundamentally violates the dignity of all LGBT people in Uganda and encourages a system in which the stigmatisation and humiliation of LGBT people is acceptable, if not obligatory. Second, by imposing a life sentence penalty for engaging in private activities the Bill denigrates LGBT people as the lowest “class” of Ugandan society and sends a blanket message that these people should be treated with the lowest possible regard, worth, concern and respect. Third, treating a person as a criminal because of a characteristic which is innate to them not only violates the human dignity of the individual -- it violates the dignity of all Ugandans by betraying their wish to build their society upon the democratic principles of equality, unity, tolerance and understanding as expressed in Article III of the Constitution. At its most fundamental level the purpose of the Bill seeks to undermine the human dignity of LGBT people throughout Uganda. Therefore, Article 21(2) should, under the test set out in Principle 5 of the Declaration of Principles on Equality, provide protection from discrimination on the grounds of sexual orientation.

**(c) Discrimination on the grounds of sexual orientation adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds**

The third basis upon which other grounds of discrimination must be prohibited is when the discrimination on that ground seriously affects the equal enjoyment of a person’s right in a manner comparable to the discrimination on the explicitly prohibited grounds. The Anti-

homosexuality Bill seriously restricts several rights and freedoms including, inter alia, the rights to equality, privacy, freedom of expression, association and assembly.

In determining whether the discrimination on grounds of sexual orientation would be comparable to discrimination on the grounds enumerated in Article 21(2), several factors have been identified as material by courts in other jurisdictions. The South African Constitutional Court, in the landmark decision of *Harksen v. Lane*, opined that there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner. The Canadian Supreme Court has stated that what prohibited grounds of discrimination have in common “is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity”. Based on this jurisprudence, the Delhi High Court in the *Naz Foundation* case cited above held that sexual orientation was analogous to sex and was therefore covered under Article 15 of the Indian Constitution.

(...)

Similar to race and sex, sexual orientation is a fact of nature and a permanent or long-lasting characteristic of the human person. (...)

As noted above, the Ugandan Constitutional Court has strongly emphasised that the “concept of equality in the 1995 Constitution is founded on the idea that it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender.” It would be intolerant to this concept if a law sought to categorise a whole class of the people of Uganda as criminals because of their race or sex. The Constitutional Court of South Africa has considered this point:

“Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.”

It is clear therefore that under all three tests set out in the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000 and the Declaration of Principles on Equality 2008 discrimination on grounds of sexual orientation – which would inevitably be caused by the Anti-homosexuality Bill if adopted – runs counter to the Ugandan Constitution itself. It plainly causes and perpetuates systematic disadvantage, undermines human dignity and adversely affects the enjoyment of rights in a manner similar to that which would have been caused if the Bill was concerned with one of the characteristics protected by Article 21(2). While only one of these tests need to be satisfied to require a ground of discrimination to be prohibited, the fact that the discrimination caused by the Anti-homosexuality Bill satisfies all three tests is a clear indication that sexual orientation should be read into Article 21(2).

## 1.2 The Exceptions and Limitations Permissible by the Constitution of Uganda

It is necessary to further consider whether the *de jure* discrimination which the Anti-homosexuality Bill seeks to enact is compatible with any of the limitations of fundamental rights permitted by the Constitution of Uganda.

Derogating from the fundamental right to equality contained in Article 21 is only justifiable in two circumstances. First, Article 21(4) permits Parliament to enact laws that are aimed at:

- “(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.”

The purpose of Article 21(4)(a) seems to be to provide a mechanism to allow parliament to take positive measures to counter systematic disadvantage and discrimination without these measures violating Article 21 themselves. The Anti-homosexual Bill clearly does not fall within this category of legislative measures. Indeed, rather than seeking to redress the disadvantage and discrimination suffered by LGBT people, the Bill further perpetuates their status of outcasts. Moreover, it seeks to punish those who do attempt to combat the discrimination and oppression experienced by LGBT people in Uganda.

Nor does the Bill fall within the envisaged remit of Article 21(4)(b). Subsection (b) provides that Parliament may derogate from its obligations under Article 21(1) and (2) if it does so in making provisions which are “required or authorised” by the Constitution. Given the Constitution’s strong commitment to equality and integration of all people in Uganda, it is unclear how the introduction of this Bill could be either required or authorised by the Constitution.

It is easy to see that the Anti-homosexuality Bill does not meet the conditions for derogation provided under Article 21(4)(c). Imposing life imprisonment and the death penalty for private, non-violent sexual conduct between two consenting adults is not acceptable or justifiable in a free and democratic society. Indeed, in at least one respect, the Bill undermines one of the key components of a free and democratic society: Article 13 of the Bill (promotion of homosexuality) seeks to impose severe restrictions on freedom of speech, a right protected elsewhere in the Constitution.

The second provision permitting derogation from Article 21 is provided by Article 43 of the Constitution, which permits the restriction of any of the fundamental rights contained in the Constitution where it is necessary to preserve the public interest. With reference to Article 43, the Bill’s memorandum puts forward only one public interest argument to justify a violation of LGBT people’s fundamental right to equality: that homosexual behaviour constitutes

a “threat to the traditional family”. The memorandum to the Bill states that its objectives include:

- prohibiting and penalising homosexual behaviour and related practices in Uganda as they constitute a threat to the traditional family;
- prohibiting the ratification of any international treaties, conventions, protocols, agreements and declarations which are contrary or inconsistent with the provisions of this Act;
- prohibiting the licensing of organisations which promote homosexuality.

The public interest claim in this case is unjustifiable for three reasons. First, the charge that homosexual conduct constitutes a threat to the traditional family lacks any factual basis or evidence; it appears to be based on deeply rooted stereotypical and prejudicial attitudes about LGBT people. The experience in countries which permit same-sex relationships and conduct contradicts this assertion and no evidence exists to suggest that homosexual conduct is a threat to the traditional family. Second, the notion of the traditional family is itself subjective. As Sylvia Tamale points out, matrimonial relations among various African communities have differed a great deal. Third, “public interest” for the purposes of Article 43 does not permit any limitation of the enjoyment of the rights and freedoms prescribed that are beyond what is acceptable and demonstrably justifiable in a free and democratic society. Respect for the fundamental rights of each person is itself an essential aspect of the public interest in a democratic society. Therefore, the protection of the “traditional family” at the expense of such fundamental rights is itself an assault on the public interest. For this reason, the latter point would remain valid even if it were a proven empirical fact that not imprisoning homosexuals in a given society has the effect of undermining the “traditional family” – even though no such fact has been established by research in any society.

(...)

### **1.3. Discrimination in the Enjoyment of the Right to Privacy**

The offences created by Article 2 (offence of homosexuality), Article 13 (promotion of homosexuality) and Article 14 (failure to disclose the offence) of the Anti-Homosexuality Bill would, if adopted, violate the right to privacy contained in Article 27(2) of the Constitution of Uganda, which provides:

“No person shall be subjected to interference with the privacy of that person’s home, correspondence, communication or other property.”

Criminalising private activities between consenting adults inherently infringes the human right to privacy set out in Article 27 of the Constitution. The criminalisation of such conduct has been criticised as a flagrant denial of the right to privacy by other African courts. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998), Case CCT 11/98 the South African Constitutional Court held that the sodomy laws in place in South Africa violated the constitutional right to privacy. Justice Ackerman stated:

“Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference

from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy (...) The offence [sodomy] which lies at the heart of the discrimination in this case constitutes at the same time and independently a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair.”

At paragraph 36 of the Court’s judgment Justice Ackerman emphasised the wider social harm caused by criminalising such private conduct:

“It is at the same time a severe limitation of the gay man’s rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.”

Furthermore, in 2008 the High Court of Uganda in the case of *Victor Juliet Mukasa and Yvonne Oyo v. Attorney General* accepted that a search conducted without a warrant at the house of Ms Mukasa, President of the Sexual Minorities in Uganda, violated her right to privacy. In so doing, the court declared that Ugandan constitutional rights apply to gay, lesbian, bisexual and transgender people. Consequently, if this Bill was adopted it would overturn the interpretation of the High Court. It would also afford arbitrary and draconian powers to police and law enforcement officials – the inevitable outcome of which would be the fundamental impairment of LGBT people to enjoy private lives. As such it would inherently deny a significant proportion of Ugandan citizens their constitutional right to privacy.

On the basis of the legal reasoning presented above ERT is of the opinion that the Anti-homosexuality Act 2009, if adopted, would violate Article 27 of the Constitution of Uganda, in respect to LGBT people, as well as all those who would promote LGBT rights, and by extension, all human rights defenders.

In addition to the substantive violation of Article 27, the Bill would also violate the accessory aspect of Article 21 of the Constitution. The constitutional right to non-discrimination and equality contained in Article 21 has two aspects: (i) a substantive and free-standing right to equality which is not necessarily associated with or dependent on the existence or exercise of any other right set forth by law: “all persons” are equal “in all spheres of political, economic, social and cultural life and in every other respect”; (ii) an accessory right not to be discriminated against in relation to the enjoyment of other rights set forth by law, and in particular other rights set forth in the Constitution itself. The Anti-homosexuality Bill will violate the right of LGBT people and of those who promote LGBT rights to non-discrimination in the enjoyment and exercise of the right to privacy. This means that they will not only have their right to privacy as such substantively infringed, but the infringement will be discriminatory, because the right to privacy enjoyed by persons with heterosexual orientations and/or persons who express opinions and acts in ways hostile or abusive to homosexuals will not be

similarly infringed. The latter categories of persons will enjoy their privacy and not pay impossible penalties for being who they are or for holding their opinions or expressing their beliefs.

In conclusion, the Anti-homosexuality Bill, if adopted, will also violate the Article 21 right to non-discrimination in relation to the right to privacy as provided in Article 27 of the Constitution of Uganda.

## **2. International Law**

If made law, the provisions within the proposed Anti-Homosexuality Bill would contravene Uganda's international human rights obligations. This section of the submission sets the legal foundations of this position.

(...)

### **Conclusion**

The Equal Rights Trust recommends that the Ugandan parliament reject the Anti-homosexuality Bill in order to ensure Uganda's adherence to its own Constitution and international and regional law. As the preceding analysis makes clear, passage of the Bill would be both unconstitutional and put Uganda in breach of its obligations under binding international and regional treaties. From the point of view of the right to non-discrimination and equality, the Bill is unconstitutional: it is in direct contravention of Articles 21 of the Ugandan Constitution and the discrimination which it espouses cannot be justified on the basis of the limitations of rights permitted by the Constitution. Furthermore, by passing the Bill, Uganda would violate its international legal obligations as a party to the ICCPR and CESCR. Uganda's Constitution contains strong guarantees of equality and non-discrimination, but these rights are ineffective if they are selectively denied. Any step which entrenches discrimination against one group undermines the strength of the right to equality itself. Furthermore, at a time where many countries are liberalising their laws with respect to the criminalisation of homosexuality, to move in the opposite direction would be a disgrace.

Dear Mr President, I extend the expertise of The Equal Rights Trust if you require any assistance in strengthening the rights to non-discrimination and equality in Uganda.

Yours sincerely,  
Dr Dimitrina Petrova  
Executive Director  
The Equal Rights Trust

The full text of the legal brief is available at: <http://www.equalrightstrust.org>