

The analysis was presented on 18 November 2009 at Makerere University:

My brief talk this afternoon is divided into four sections:

1. First, I will address issues of mutual concern that I share with Hon. Bahati;
2. Secondly, I will open the window of history and offer us a glimpse of the politics of hatred and discrimination that has affected the struggle for human rights over the years;
3. Third, I will highlight the social meaning of the bill; and
4. Finally, I shall put on my legal hat and outline the legal implications that this bill holds for our country if passed into law.

I. Common Issues of Concern

I have scrutinized the bill thoroughly and the Honourable Member of Parliament, David Bahati, will be surprised to learn that I share some of his convictions. For example, Hon. Bahati, I share your desires as expressed in the preamble to the bill:

1. To strengthen the nation's capacity to deal with emerging internal and external threats to the family unit. It is nevertheless important to point out that most of these can hardly be realized through the regulatory mechanism of the law.
2. To protect the cherished culture of the people of Uganda, particularly the positive aspects of it.
3. To protect Ugandan children and youth who are vulnerable to sexual abuse and exploitation—whether the abuse is hetero and homo sexual.

I do not have the time and space this afternoon to engage in a detailed sociological discussion of the concept that the bill refers to as the "Traditional African Family". However, it is my humble opinion that the concept needs to be unpacked and scrutinized. Mr. Chairperson, as you very well know, Africa is a vast continent with an extremely rich and diverse cultural history. Indeed it would be next to impossible to mark a particular institution as the one and only "Traditional African Family". I will cite just a few examples to demonstrate that matrimonial relations among various African communities have differed a great deal:

- a) While marriage between first cousins was traditionally taboo among the Baganda, marriages among blood-related kin were considered the best unions among the Bahima here in Uganda;
- b) There is the phenomenon of *chigadzamapfihwa* where the family of a barren wife among the Ndaus of Zimbabwe would 'donate' her brother's daughter to her husband to become a co-wife and bear children on behalf of the barren woman;
- c) Practices of non-sexual woman-to-woman marriages among various African customs e.g., the Nandi and Kisii of Kenya, the Igbo of Nigeria, the Nuer of Sudan, and the Kuria of Tanzania for purposes of coping with various reproductive, social, and economic problems; and
- d) Levirate marriages where a man inherits his dead brother's wife were a customary requirement in many African communities.

While these may have been cultural practices at some point in our history, it is also important to recognize that family institutions all over the world are undergoing rapid transformation. The changes that we see in this basic unit of society are the result of many factors including, economic crises, an increasing number of working mothers, technological advancements, armed conflicts, natural disasters, globalization, migration, the HIV/AIDS pandemic, etc. Many of these changes and indeed the evolution of culture cannot be halted, certainly not through law.

Perhaps the undisputed value that is a common denominator in all traditional institutions of the family in Africa is the group solidarity that we have embedded in our extended family networks. Unfortunately, the support, stability, love, and respect that were the hallmark of this family model are rapidly being eroded and will soon become history. Thus, while I agree with you, Hon. Bahati, that we must seek ways of dealing with issues that threaten our families, I do not agree that homosexuality is one of those issues.

Mr. Chairperson, ladies and gentlemen, what issues currently threaten our families here in Uganda? I will name a few:

- a) Blood thirsty Ugandans and traditional healers that believe that their good fortune will multiply through rituals of child sacrifice.
- b) Rapists and child molesters who pounce on unsuspecting family members. Research undertaken by the NGO, *Hope after Rape* (HAR) shows that over 50% of child sexual abuse reports involve children below 10 years of age, and the perpetrators are heterosexual men who are known to the victims.¹
- c) Sexual predators that breach the trust placed in them as fathers,

teachers, religious leaders, doctors, and uncles sexually exploit young girls and boys. A 2005 report by *Raising Voices and Save the Children* revealed that 90% of Ugandan children experienced domestic violence and defilement.²

- d) Abusive partners who engage in domestic violence whether physical, sexual, or emotional. The 2006 national study on Domestic Violence by the Law Reform Commission confirmed the DV was pervasive in our communities. 66% of people in all regions of Uganda reported that DV occurred in their homes and the majority of the perpetrators were male heads of households.³ The Uganda Demographic Health Survey of 2006 put the figure slightly higher at 68%.⁴
- e) Parents who force their 14-year old daughters to get married in exchange for bride price and marriage gifts.
- f) A whole generation of children who were either born and bred in internally displaced persons (IDP) camps or abducted by the *Lord's Resistance Army* (LRA) in the northern sub-region of Kitgum, Gulu and Pader districts.
- g) The millions of children orphaned by HIV/AIDS. The Uganda AIDS Commission puts the cumulative number of orphans due to AIDS at 2 million.⁵
- h) The all powerful patriarchs that demand total submission and rule their households with an iron hand.
- i) Rising poverty levels and growing food insecurity which lead to hunger, disease, suffering and undignified living. Figures from the latest report from the Uganda Bureau of Statistics show that over 60% of Ugandans living in rural areas live below the poverty line.⁶

I do not see how two people who are in a loving relationship and harming no one pose a threat to the family simply because they happen to be of the same sex. The argument that homosexuality is a threat to the continuity of humankind and that it will lead to the extinction of human beings in the world simply does not hold water because there are too many heterosexuals in the world for that to become a reality. How many of you in this room would convert to homosexuality any time soon?... So, just as the priests, nuns and monks who are sworn to a life of celibacy will not cause the extinction of humanity, homosexuals will not either.

II. Lessons from History

Anyone who cares to read history books knows very well that in times of crisis, when people at the locus of power are feeling vulnerable and their power is being threatened, they will turn against the weaker groups in society. They will pick out a weak voiceless group on whom to heap blame for all society's troubles—refugees, displaced populations, stateless persons aka

illegal immigrants, minorities with no status, children, the poor, the homeless, commercial sex workers, etc. I will offer a few examples to illustrate this point:

- In Uganda, colonialists at various times blamed traditional chiefs and elders as well as Muslims as the main impediments to progress and civilization.
- Dictator Idi Amin blamed Asians for Uganda's dire economic problems and expelled all Indians in the early 1970s.
- When Milton Obote's political power was threatened during his second regime in the early 1980s, he embarked on a deliberate campaign of hostility towards refugees in Uganda, particularly those of Rwandese extract. Obote's persecution of the Banyarwanda in Uganda and the whipping up of anti-Rwandese sentiments included the constant reference to his political opponent, Yoweri Museveni, as a "foreigner from Rwanda."
- In the 20 years that northern Uganda faced armed conflict, the NRM administration pointed fingers at Kony and the LRA was blamed for all the atrocities and suffering of the people in the north.
- The transmission of HIV/AIDS at various points in our history has been blamed on different "weak" constituents including commercial sex workers, truck drivers, young women aged 15-23, and mothers to babies.
- When native South Africans faced dire economic crisis they turned against black "foreigners", blaming them for the high unemployment rates and sparking off brutal xenophobic attacks against helpless immigrants/migrants and refugees in May 2008.

The lesson drawn from these chapters in our recent history is that today it is homosexuals under attack; tomorrow it will be another exaggerated minority. Homosexuality has troubled people for a very long time. Some religions find it distressing and there are many debates around it. Mr. Chairperson and distinguished participants, where did the idea of destroying homosexuality come from? As his excellency President Museveni pointed out at the inaugural *Young Achievers Awards Ceremony* last weekend, homosexuals existed prior to the coming of Europeans to Uganda. According to the President: "They were not persecuted but were not encouraged either" (*Daily Monitor* Nov 16, 2009 at p.2). The idea of destroying homosexuality came from colonialists. In other words, homosexuality was not introduced to Africa from Europe as many would want us to believe. Rather, Europe imported legalized homophobia to Africa.

Homosexuality was introduced as an offence in Uganda directly through laws that were imported from Britain during colonialism. And what did these same colonialists think of the "African traditional family" in Uganda? They certainly did not introduce sodomy laws in order to protect the traditional African family. In fact they believed that the traditional African family was inferior to their nuclear monogamous one and considered the former barbarous and 'repugnant to good conscience and morality.' This colonial attitude was well exemplified in the infamous

1917 case of *R. v. Amkeyo*, in which Justice Hamilton dismissed customary marriages as mere 'wife purchase.'

Today, with all the economic, social and political crises facing Uganda, homosexuals present a convenient group to point fingers at as the "biggest threat" or the "real problem" to society. Mr. Chairperson, ladies and gentlemen, the re-criminalisation of homosexuality is meant to distract the attention of Ugandans from the real issues that harm us. It conveniently diverts the attention of the millions of Ugandans who have been walking the streets for years with their college certificates and no jobs on offer.

Ladies and gentlemen, homosexuals have nothing to do with the hundreds of thousands of families that sleep without a meal or the millions of children who die unnecessarily every day from preventable or treatable diseases such as malaria, diarrhea, measles, pneumonia, etc. Homosexuals are not the ones responsible for the lack of drugs and supplies at primary health care centres.

III. The Social Implications of the Bill to the Average Ugandan

You may think that this bill targets only homosexual individuals. However, homosexuality is defined in such a broad fashion as to include "touching another person with the intention of committing the act of homosexuality. This is a provision highly prone to abuse and puts all citizens (both hetero and homosexuals) at great risk. Such a provision would make it very easy for a person to witch-hunt or bring false accusations against their enemies simply to "destroy their reputations and cause scandal. We all have not forgotten what happened to Pastor Kayanja and other men of God in the recent past. 7

Moreover, the bill imposes a stiff fine and term of imprisonment for up to three years for any person in authority over a homosexual who fails to report the offender within 24 hours of acquiring such knowledge. Hence the bill requires family members to "spy" on one another. This provision obviously does not strengthen the family unit in the manner that Hon. Bahati claims his bill wants to do, but rather promotes the breaking up of the family. This provision further threatens relationships beyond family members.

What do I mean? If a gay person talks to his priest or his doctor in confidence, seeking advice, the bill requires that such person breaches their trust and confidentiality with the gay individual and immediately hands them over to the police within 24 hours. Failure to do so draws the risk

of arrest to themselves. Or a mother who is trying to come to terms with her child's sexual orientation may be dragged to police cells for not turning in her child to the authorities. The same fate would befall teachers, priests, local councilors, counselors, doctors, landlords, elders, employers, MPs, lawyers, etc.

Furthermore, if your job is in any way related to human rights activism, advocacy, education and training, research, capacity building, and related issues this bill should be a cause for serious alarm. In a very undemocratic and unconstitutional fashion, the bill seeks to silence human rights activists, academics, students, donors, and non-governmental organizations. If passed into law it will stifle the space of civil society. The bill also undermines the pivotal role of the media to report freely on any issue. The point I am trying to make is that we are all potential victims of this draconian bill.

Dr. Martin Luther King Jr. told us many years ago, "Power at its best is love implementing the demands of justice, and justice at its best is love correcting everything that stands against love." Article 1 of the Universal Declaration of Human Rights instructs us: "All Human Beings are Born Free and Equal in Dignity and Rights." Many great people that we respect and admire have spoken out for the rights of homosexuals. These include international award winners and champions of freedom and humanity—President Nelson Mandela, Archbishop Desmond Tutu, and President Barack Obama. Just yesterday, it was reported that former president of Botswana, Festus Mogae added his voice to those who have come out in opposition to the Bahati Bill (*Daily Monitor*, November 17, 2009 at p.10).

We must remember that the principal message at the heart of all religions is one of LOVE (*And now these three remain: faith, hope and love. But the greatest of these is love-* 1 Corinthians 13: 13). All religions teach the virtues of tolerance and urge their followers to desist from passing judgment. Ladies and gentlemen, this bill promotes hatred, intolerance, superiority, and violence. Even if you believe that homosexuality is a sin, this bill is not the best method to address the issue. It is valid to have religious and spiritual anxieties, but our jurisprudence has a long history of separating the institutions of religion from the law.

The law, Mr. Chairperson, does not seek to ally any legal principle with a particular religion. Mr. Stephen Langa is free to deliver his lectures on morality but it is unacceptable to reduce what he is preaching into law. In my final submission I want to turn to a legal analysis of this bill.

IV. The Legal Implications of the Bill

Mr. Chairperson, ladies and gentlemen, the *Anti-Homosexuality bill* has a total of 18 clauses. 12 of these 18 clauses (i.e., 67%) are not new at all as they simply replicate what we already have on our law books. So the first point I want to highlight is that Parliament has been given a bill two-thirds of whose content duplicates existing laws. So, let us examine the content of the remaining 6 clauses that introduce new legal provisions.

1. Clause 6 provides for the recognition of the right to privacy and confidentiality for the victim of homosexual assaults. This is a procedural issue that no one can dispute and it can easily be inserted in the Penal Code provisions that criminalize rape and aggravated defilement. Nevertheless, the remaining 5 clauses are extremely problematic from a legal point of view. They violate Uganda's constitution and many other regional and international instruments that Uganda has ratified.

2. The interpretation section (Clause 1) replicates several definitions that are provided for elsewhere. Its novel provisions lie in the attempt to define homosexuality and its related activities. I have already alluded to the potential danger that Ugandans face in the threatening and broad fashion that the bill defines a homosexual act.

3. Clause 13 which attempts to outlaw the Promotion of Homosexuality is very problematic as it introduces widespread censorship and undermines fundamental freedoms such as the rights to free speech, expression, association and assembly. Under this provision an unscrupulous person aspiring to unseat a member of parliament can easily send the incumbent MP unsolicited material via e-mail or text messaging, implicating the latter as one promoting homosexuality. After being framed in that way, it will be very difficult for the victim to shake free of the stigma.

Secondly, by criminalizing the funding and sponsoring of homosexuality and related activities, the bill deals a major blow to Uganda's public health policies and efforts. Take for example, the Most At Risk Populations' Initiative (MARPI) introduced by the Ministry of Health in 2008, which targets specific populations in a comprehensive manner to curb the HIV/AIDS scourge. If this bill becomes law, health practitioners as well as those that have put money into this exemplary initiative will automatically be liable to imprisonment for seven years! The clause further undermines civil society activities by threatening the fundamental rights of NGOs and the use of intimidating tactics to shackle their directors and managers.

4. Clause 14 introduces the crime of Failure to Disclose the Offence of homosexuality. As I have noted above, under this provision any person in authority is obliged to report a homosexual to the relevant authorities within 24 hours of acquiring such knowledge. Not only does this infringe on the right to privacy but it is practically unenforceable. It dangerously opens up room for potential abuse, blackmail, witch-hunting, etc. Do we really want to move sexual acts between consenting adults into the public realm?

5. Clause 16 relates to extra-territorial jurisdiction, and basically confers authority on Ugandan law enforcers to arrest and charge a Ugandan citizen or permanent resident who engages in homosexual activities outside the borders of Uganda. This law enforcement model is normally used in international crimes such as money laundering, terrorism, etc. The

Ugandan Penal Code already provides for crimes that call for extra-territoriality. All these touch on the security of the state e.g., treason, terrorism and war mongering (see S.4 of the PCA).

When it comes to offences committed partly within and partly outside Uganda, the Penal Code provides:

When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction. [Section 5—Emphasis added]

Note that clause 16 of the Bill employs the disjunctive "or" which gives it wider reach than S.5 of the Penal Code that uses the conjunctive "and". Therefore, what the Bill proposes to do is to elevate homosexual acts to a position of such importance that they appear to be at an even higher plane than murder, rape or grievous bodily harm for which no such provision is made. It is difficult to see any rational basis for such inordinate attention to homosexuality.

And how exactly will they enforce this provision? Is the government going to storm the bedrooms of consenting adults, or deploy spies to follow them when they travel abroad in order to establish who they have slept with and how they did it? Does this include heterosexual couples that engage in anal sex? What about our constitutional right to privacy? In short, this provision of the Bill is a gross abuse of the principle of extra-territoriality. But more importantly, the bill carries hidden venom that is bound to spread beyond persons that engage in homosexuality.

6. Perhaps the most shocking aspect of this bill is Clause 18, which requires Uganda to opt out of any international treaty that we have previously ratified that goes against the spirit of the bill. Article 287 of the Constitution obliges Uganda to fully subscribe to all its international treaties obligations ratified prior to the passing of the 2005 constitution. We cannot legislate or simply wish these obligations away. Indeed, international law prohibits us from doing such a thing. Article 26 of the Vienna Convention on the Law of Treaties clearly sets out the pacta sunt servanda rule which requires that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

Article 123 (1), a provision deliberately placed in Chapter Seven of the Constitution (dealing with the powers of the Executive) says:

The President or a person authorised by the President may make treaties, conventions, agreements, or other arrangements between Uganda and any other country or between Uganda and any international organisation or body, in respect of any matter.

This is a wide power that can only be limited by express language under the Constitution itself. A major procedural limitation is found in the next clause of the same article, which provides:

Parliament shall make laws to govern ratification of treaties, conventions, agreements or other arrangements made under clause (1) of this article. (Art. 123.2)

Another substantive limitation is to be found in the Bill of Rights found in Chapter 4. In effect, the President cannot by the mechanism of Article 123(1) sign treaties whose effect would be to amend the Constitution. Indeed, any such treaty would be, as a matter of municipal law, null and void to the extent of such inconsistency, in terms of Article 2 (2) of the Constitution.

Parliament therefore has only a procedural role to incorporate treaties into Ugandan law – and that is the full extent of its powers. It cannot purport to proscribe *ex ante* (before the fact) the limit of the President's treaty making powers. Nor indeed, can parliament bind its own future action by purporting to exercise in advance its power to scrutinize treaties signed by the President and determine which of them to ratify. All that Parliament can do is to either ratify or refuse to ratify a treaty after it is signed, and in the latter case such treaty does not become part of Ugandan law. This is the balance of executive power and democratic input achieved by Article 123, and one that clause 18 of the Bill is incompetent to amend.

Mr. Chairperson, distinguished participants, I wish to end by appealing to members of parliament and all Ugandans that believe in human rights and the dignity of all human beings to reject the Anti-homosexuality bill. I am imploring Hon. Bahati to withdraw his private members bill. Do we really in our hearts of hearts want our country to be the first on the continent to demand that mothers spy on their children, that teachers refuse to talk about what is, after all, out there and that our gay and lesbian citizens are systematically and legally terrorized into suicide?

Ladies and gentlemen, you may strongly disagree with the phenomenon of same-sex erotics; you may be repulsed by what you imagine homosexuals do behind their bedroom doors; you may think that all homosexuals deserve to burn in hell. However, it is quite clear that this Bill will cause more problems around the issue of homosexuality than it will solve. I suggest that Hon. Bahati's bill be quietly forgotten. It is no more or less than an embarrassment to our intelligence, our sense of justice and our hearts.

Thank you for your attention.

Notes

1. Study cited in *Uganda Youth Development Link, Report on Sectoral Study on Commercial Sexual Exploitation of Children in Uganda*, Commissioned by the International Labour Organisation (ILO) and the Ministry of Gender, Labour and Social Development (January 2004).

2. See *Raising Voices and Save the Children (edited by Dipak Naker), Violence Against Children: The Voices of Ugandan Children and Adults*. (2005). Available at <http://www.raisingvoices.org/files/VACuganda.RV.pdf>

3. See *Law Reform Commission, A Study Report on Domestic Violence*, April 2006 at p.112

4. See <http://www.measuredhs.com/pubs/pdf/FR194/FR194.pdf>

5. See *Report by the Office of the Auditor General, Value for Money Audit Report on Uganda AIDS Control Project*, October 2007. Available at <http://www.oag.go.ug/docs/UACauditreport.pdf>

6. See UBOS, *Spatial Trends of Poverty and Inequality in Uganda: 2002-2005*, February 2009.

Response after the Q & A Session

Mr. Chairperson, in the interest of time I will respond to only three issues:

1. Mad people – like bats seeing the world upside down – animals – wicked... These are some of the words used to describe homosexuals by the audience. All the heckling and vicious jeering... Mr. Bahati you commenced your talk this afternoon by saying, "We are not in the hate campaign. Well, if you were in any doubt about the fact that your bill is whipping up hatred and violence against homosexuals, just reflect back on the discourse that transpired in the room this afternoon.

2. Secondly, Mr. Chairperson I think it is the height of paternalism and arrogance for Hon. Bahati and Mr. Langa to stand here and say they are legislating against homosexuals because they love them, they feel sorry for them, they face the risk of cancer, their lives are reduced by 20 years, etc. Homosexuals are not asking for your pity, love, approval, or

redemption. They only want you to affirm their humanness and their right to exist and be different.

3. Finally, Mr. Chairperson, Hon. Bahati asked the question, "Tamale, do you support homosexuality?" I would like to tell Hon. Bahati that I am a simple woman that recognizes all human beings as worthy of dignity and rights and I am not obsessed with how people have sex in the privacy of their bedrooms. I support the rights of all human beings regardless of how and with whom they have sex as long as they are adults and are not harming anyone. So, the question should not be whether I support homosexuality, or heterosexuality for that matter.

Thank you very much Mr. Chairperson.